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# CALIFORNIA REPORTER

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SECOND SERIES




169 P.2d – 170 P.2d

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# CALIFORNIA REPORTER

## 169 PACIFIC REPORTER

SECOND SERIES

28 Cal.2d 121

**PEOPLE v. VALENTINE.**

Cr. 4601.

Supreme Court of California, In Bank.

April 30, 1946.

As Supplemented May 16, 1946.

**1. Criminal law ⇐1189**

Where evidence was sufficient to sustain a verdict of either murder of the second degree or voluntary manslaughter, Supreme Court, upon reversing a conviction of murder of the first degree because instructions relating to differences between degrees of murder and definition and effect of provocation and sudden passion upon degree or class of homicide were prejudicially erroneous, could not exercise its power to modify the judgment but was required to remand case for new trial. Pen. Code, § 1181, subd. 6.

**2. Homicide ⇐308(2)**

An instruction that, if killing was done without provocation and passion which reduced the offense to manslaughter, it was second-degree murder unless evidence proved specific intent to take life, in which event the offense would be first-degree murder, was erroneous as requiring jury, if they found homicide to be murder at all, to find it to be murder of the first degree. Pen.Code, § 189.

**3. Homicide ⇐307(1)**

An instruction that, where provocation adequate to reduce an intentional killing to manslaughter is shown although the intent to kill exists, it is not that deliberate and malicious intent which is essential element in the crime of murder, was erroneous in differentiating manslaughter from murder on basis of deliberate intent and in declaring that deliberate intent is an essential element of murder, as such. Pen. Code, §§ 187, 189.

**4. Homicide ⇐9**

Deliberate intent is not an essential element of murder, as such, but is an essential element of one class only of first-degree murder and is not at all an element of second degree murder. Pen.Code, §§ 187, 189.

**5. Homicide ⇐308(1), 341**

Where jury were instructed that existence of "adequate provocation" reduces an intentional killing from murder to manslaughter, failure to further advise that existence of provocation, which is not "adequate" to reduce the class of the offense, may nevertheless raise a reasonable doubt that defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation, constituted prejudicial error. Pen.Code, § 188.

**6. Criminal law ⇐561(2)**

The statute providing that upon trial for murder, the commission of the homicide by defendant being proved, burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon defendant, unless proof on part of prosecution tends to show that crime committed only amounts to manslaughter or that defendant was justifiable or excusable merely declares a rule of procedure, and does not relieve state of burden of proving every essential element of guilt beyond a reasonable doubt. Pen.Code, §§ 187–189, 1105.

**7. Criminal law ⇐808½, 1172(2)**

An instruction in statutory language on defendant's burden of proving mitigating circumstances, if defendant's commission of homicide is proved, constituted prejudicial error, where jury were not advised that the statute was not applicable in determining degree of murder, if homi-

cide was found to constitute murder, but was pertinent only in relation to determining whether homicide constituted murder or manslaughter or was justifiable or excusable. Pen.Code, §§ 187–189, 1105.

**8. Homicide ⇐286(3), 340(1)**

An instruction that there need be no appreciable space of time between intention to kill and the act of killing, that a man may do a thing deliberately from a moment's reflection as well as after pondering over the subject for a month or a year, and that a man can premeditate, that is, think before doing the act, the moment he conceives the purpose, as well as if the act were the result of long preconcert or preparation, when considered with other instructions, constituted prejudicial error as substantially deleting the only difference between first and second degree murder.

**9. Homicide ⇐307(1)**

An instruction that if defendant, in a sudden, violent quarrel growing out of protests of deceased against commission by defendant of an unlawful act, killed deceased with deadly weapon, the fact that defendant was impassioned would not mitigate or excuse such homicide, and that crime committed would be murder in first degree, was erroneous as transgressing the rules both as to voluntary manslaughter and as to difference between first and second degree murder.

**10. Homicide ⇐308(2)**

An instruction that it was not less murder because act is done suddenly after intent to commit the homicide is formed, and that it is sufficient if malicious intention precedes and accompanies the act of homicide, was erroneous as destroying statutory difference in degrees of murder and authorizing conviction of first-degree murder upon proof of facts amounting only to second-degree murder.

**11. Homicide ⇐289**

An instruction attempting to define the statute making killing by means of poison, etc., or killing in perpetration or attempt to perpetrate any of certain enumerated felonies, murder in the first degree in the terms of a nonexistent "conclusive presumption" of premeditation, instead of simply stating that under such circumstances the offender would be guilty of murder in the first degree by force of statute, was erroneous. Pen.Code, § 189.

**12. Homicide ⇐18(1)**

Even where killing in perpetration or attempted perpetration of one of felonies enumerated in statute is unintended and accidental, the offender is guilty of murder of the first degree by force of the statute. Pen.Code, § 189.

**13. Homicide ⇐235**

Even if evidence does not conclusively establish that homicide was committed in perpetration or attempt to perpetrate one of enumerated felonies so as to constitute murder in first degree, nevertheless, if record affords substantial support for conclusion that one of enumerated felonies was perpetrated or attempted, killing was committed in such perpetration or attempt, a first-degree murder conviction must be affirmed. Pen.Code, § 189.

**14. Homicide ⇐22(1)**

Where jury has found that killing was by poison, lying in wait, or torture, defendant is guilty of murder of the first degree by force of statute, and it is not function of jury to draw inferences as to manner of formation and carrying out of an intention to kill. Pen.Code, § 189.

**15. Homicide ⇐308(5)**

An instruction that killing by poison, lying in wait, or torture was murder of first degree by force of statute could properly be given as illustrating the heinous character and typical cruelty of forms of murder which legislature has provided are of the first degree, as opposed to those of second degree, notwithstanding that defendant was not charged with committing a murder of such type. Pen.Code § 189.

**16. Homicide ⇐307(1)**

Where jury were instructed that manslaughter was the unlawful killing of a human being, without malice, and voluntary manslaughter was defined as a killing upon a sudden quarrel or heat of passion, and thereafter jury were further instructed that if intent to kill existed and killing was unlawful, it would be murder, even though

done upon a sudden quarrel or heat of passion, unless there was adequate provocation, the instructions, though they could be reconciled against a background of legal knowledge, were erroneous as confusing jury. Pen.Code, § 192.

**17. Homicide ⇐309(1)**

An instruction defining "heat of passion" as such a passion as would naturally be aroused in mind of an ordinarily reasonable person under given facts, and that consequently no defendant may set up his own standard of conduct and justify or excuse himself because of fact his passions were aroused, unless jury believed that facts were sufficient to arouse passion of an ordinarily reasonable man, was proper. Pen.Code, § 192.

See Words and Phrases, Permanent Edition, for all other definitions of "Heat of Passion".

**18. Statutes ⇐147**

A Penal Code section is presumed to be a continuation of the common law only when it and the common law are substantially the same. Pen.Code, §§ 4, 6.

**19. Statutes ⇐224**

Where a statute with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.

**20. Statutes ⇐147**

Ordinarily, it is to be presumed that Legislature by deleting an express provision of a statute intended a substantial change in the law.

**21. Statutes ⇐147**

Where changes in a statute have been introduced by amendment, it is not to be assumed that they were without design.

**22. Statutes ⇐147**

The Legislature, by substantially amending a statute, demonstrates an intent to change the pre-existing law.

**23. Statutes ⇐167(1)**

Fact that common-law limitation on types of circumstances, which could be regarded as furnishing adequate provocation to reduce a homicide to manslaughter, was originally a part of statutory law, was not a proper basis for holding that it still was the law, but rather such fact, in light of repeal of statute which incorporated it, together with enactment of a new law on same subject with the important limitation deleted, would suggest that Legislature intended a more liberal rule. Pen.Code, § 192.

**24. Statutes ⇐241(1)**

Where language which is reasonably susceptible of two constructions is used in a penal law, ordinarily that construction which is more favorable to offender will be adopted.

**25. Criminal law ⇐561(1)**
**Statutes ⇐241(1)**

A defendant is entitled to benefit of every reasonable doubt, whether it arises out of a question of fact, or as to true interpretation of words, or construction of language used in a statute.

**26. Homicide ⇐33, 42, 45**
**Statutes ⇐231**

The statute defining voluntary manslaughter as the unlawful killing of a human being, without malice, upon a sudden quarrel or heat of passion, would not be construed as limited by stringent language of Code Commissioners' note that "no words of reproach, however grievous, are sufficient provocation to reduce the offense of intentional homicide from murder to manslaughter", in view of fact that such strict limitation had previously been part of the statute, but had been deleted upon repeal of former statute together with enactment of new law on same subject. Pen.Code, § 192.

**27. Constitutional law ⇐70(1)**
**Homicide ⇐307(1)**

An instruction that neither provocation by words only, however opprobrious, nor contemptuous or insulting action or gestures without an assault upon the person nor any trespass against lands or goods, constituted adequate provocation sufficient to reduce offense of intentional homicide with a deadly weapon from murder to manslaughter was erroneous as amounting to judicial legislation engrafted upon statute

defining voluntary manslaughter. Pen.Code, § 192.

SHENK and EDMONDS, JJ., dissenting.

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Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

John Valentine was convicted of murder in the first degree, and, from the judgment of conviction and order denying his motion for a new trial, he appeals.

Reversed and remanded.

Prior opinion 152 P.2d 334.

Marshall Denton, Jr., and Clyde C. Shoemaker, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

[1] Defendant has been tried on a charge of murdering Raymon Boyd. A jury found him guilty of murder of the first degree and fixed the penalty at life imprisonment. He appeals from the judgment of conviction and from an order denying his motion for new trial. Defendant contends, and we agree with his contentions, that the instructions relating to the differences between the degrees of murder and the definition and effect of provocation and sudden passion upon the degree or class of the homicide were prejudicially erroneous. Defendant further urges that the evidence is insufficient to support the finding that the homicide was murder of the first dgree and that, since the errors in the instructions relate only to the degree and class of the offense, we should exercise our power (Pen.Code, § 1181, par. 6) to modify the judgment. Although it is doubtful whether the evidence (hereinafter summarized) could sustain a verdict of murder of the first degree, it is unnecessary for us to determine that point. The evidence is amply sufficient to sustain a verdict of either murder of the second degree or voluntary manslaughter. In that condition of the record we cannot say that as a matter of law it establishes either murder of the second degree or manslaughter to the exclusion of the other. Therefore, a new trial is necessary.

Defendant John Valentine and his wife, at the time of and for about two years prior to the killing, lived in a house at the rear of No. 3715 Wall Street, Los Angeles. Three other adults, members of the family, resided with them. The defendant was steadily employed at Goodyear Tire & Rubber Company and went to his work early in the morning. At the front of the lot was a two-family house, one side of which was occupied by deceased and his wife at the time of and for about five months prior to the killing. The Boyd and Valentine families were not acquainted with each other. Defendant and deceased spoke to one another for the first time approximately one-half hour before defendant shot deceased.

Before daylight, at about 6:15 o'clock (daylight saving time) on the morning of November 18, 1943, defendant left his home to go to work. In order to get to the street from defendant's house it was necessary to use a cement walk which led up to and around the house at the front of the lot. The walk turned under the bathroom window of the Boyd residence. The lower sill of this window was six feet four inches above the walk. Defendant is six feet five inches tall; his eyes are six feet one inch above the ground. After defendant left his house and before he reached the turn of the walk Boyd spoke to him from the bathroom window. Boyd accused defendant, in effect, of being a trespasser and of being there for the purpose of peering into the window. Defendant denied that he was a trespasser, denied that he had looked into the window and explained that he lived in the rear house and was on his way to work. An argument and quarrel developed which quickly culminated in the tragic homicide.

According to the testimony of Mrs. Boyd, widow of decedent, the circumstances of the killing were as follows: Her husband, who had not yet dressed, awakened her and told her that he had spoken to someone through the bathroom window. Boyd then went to the front of the house and looked out the living room windows.

After about five minutes Boyd returned to the bedroom, spent about fifteen minutes dressing, then went out the front door. She heard him talking with someone. Boyd called to her and she went onto the front porch. Boyd and a man whom she later learned was Valentine were standing in the front yard; "both were talking at the same time" and she could understand only part of what was said. "My husband asked him what he was doing around the back of the house"; she did not understand Valentine's reply. Boyd and Valentine continued to talk and "I understood Mr. Valentine to say that he lived in the back and if he would go around the back he would show him where he lived." Mrs. Boyd went into her house, put on her shoes, and returned to the front porch. Boyd and Valentine were not there, so she went through her house and onto the back porch. About six or eight people were in the back yard and Boyd "was demonstrating to the people, to Mrs. Valentine, what Mr. Valentine did when he spoke to him * * * my husband walks back or ran back there, rather [to the rear house], and spread his hands out against the wall like this (illustrating), and leaned up against the wall like that. * * * He said he was showing the way the position that Mr. Valentine was in after he had spoke to him and he ran. * * * Then some woman came out on the back porch of that little house * * * and she told my husband that he must be mistaken, that that man was her husband and he lived there, and that he must have the wrong man, so my husband said—turned to Mrs. Valentine and said, 'Well, it was you [sic], wasn't it?' and Mrs. Valentine said, 'Yes.' Then my husband proceeded to walk away from him and passed him and said, 'O. K., forget it,' and then Mr. Valentine came behind him and said, 'I didn't like the way you talked to me this morning and I could have shot you.' So my husband turned and—slightly turned to him and said, 'Well, why don't you shoot me?' * * * He had both of his hands in his pockets, Mr. Valentine did, * * * continually from the time I first saw him until he pulled this gun out of his pocket." Defendant took a revolver "out of his right pocket, and took his left hand and fooled with—was fooling with the gun, was doing something to it, I don't know what, for a minute, and they were both talking at the same time, and I couldn't understand what either one was saying." She further testified that defendant and Boyd were then standing about "6 or 8 feet" apart; that Boyd's hands were "down by his side"; that no profanity was used by Boyd in addressing the defendant and that "I said, 'Oh, Mister, please don't shoot him,' and I said it again, and he shot him * * * [T]he shot spun him around, and he fell on his back." Mrs. Boyd "ran in the house immediately and called the ambulance and police, and when I came back everybody had gone."

Officer Hoffman testified that at about 7:05 a. m. on November 18, 1943, he received a call over his police car radio to go to 3715 Wall Street. Two or three minutes later he and a fellow officer arrived at the Wall Street address. They went to the rear of the property and the defendant advanced to meet them. "I asked the defendant what happened; well, he said that he had trouble and shot a man. * * * I asked the defendant where the gun was that he had used, and he pulled back his coat, the left side of his coat, and, as I recall, the gun was sticking in his belt * * *. The gun had six loaded bullets in it * * * I said, 'Where is the shell that you fired?' He said, 'I reloaded the gun and the shell is in the house.' And we went in the house and got the shell out of the wastepaper basket." Defendant was taken to the University Police Station where he gave the following statement:

"This morning I started out to work; it was dark, and I heard somebody say, 'Hey, where you going?' I looked around and I could see a lighted cigarette through the window. Then he asked me who I was and I told him my name is John Valentine, and I was on my way to work. Then I asked him what his name was, but he didn't tell me. Then he said to me, 'Do you live back here?' and I said yes, I'd been living back here for * * * almost two years. Defendant returned

to his house "For my cigarettes * * * and got the gun after Boyd had spoken to me out of the window and I didn't know who he was." "When I got around to the front man I know now as Boyd came out the front door and stopped me again. He asked me again what I was doing here and I said I live back here. Then he went to the door and called his wife out and she came out. When she came out she told Boyd that that wasn't the fellow. Then I walked around to the back with Boyd to show him where I lived. Then he called his wife again and when she came out she said again, 'Honey, that's not the fellow, that's the wrong fellow.' Then he said, 'I saw you around here this morning and you ran up and ducked behind the bushes.' I told him no, I only * * * live here, I wasn't ducking behind the bushes. I told him again that I lived here and Boyd said, 'I'll see about that.' He had both his hands in his pockets, and he started to come towards me and I shot him." Defendant further stated that before he shot, Boyd attempted to strike or detain him and "I ducked back out of his way"; that Boyd was "six or eight feet away" when defendant fired. Defendant was then asked, "At the time you shot Boyd you didn't think that your life was in danger, did you?" and replied, "No, the only thing, when he talked to me, he acted like he was riding over me and it made me hot." To the question, "You could have gone on to work and not stopped if you hadn't wanted to?" defendant answered, "Well, it was more on account of him making me hot than because of what he said that I stopped."

The testimony of defendant is as follows: When he left his house to go to work on the morning of November 18, "I only had got about four steps out of the house" when a loud voice said something which the defendant did not understand. "I stood and looked but couldn't see anyone, * * * then * * * I seen a reflection of a cigarette * * * and I couldn't tell whether it was on the outside or inside, and this voice said, 'Who is you? What are you doing back there? * * * What is your name? Where are you going?' * * * I said, 'My name is John Valentine, fellow; I live here; I am on my way to work.' He said * * *. 'You are a God damned liar.' * * * At that time I still didn't see him * * * I said, 'I live here, I told you.' * * * He said, 'You are a God damned liar, you do not live here. * * * I will find out in a little while. You wait there.' He said, 'What were you doing, looking up here in my window?' I said, 'Fellow, I wasn't looking in your window. * * * How could I look in your window from where I am standing over here?' * * * He said, 'You wait there, I will find out whether you live here or not.' * * * I stood there a little while and felt in my pocket for my cigarettes and they wasn't in my pocket, so I went on back in the house, and when I picked up my cigarettes something said to me, 'Why don't you get your gun? You don't know who is out there.' So I just picked the gun up and stuck it in my belt and walked on out. I come out there and I didn't see anyone. * * * I walks on around the house and * * * out to the sidewalk of the public, * * * and when I got there * * * there was some 'scrub,' * * * and this man appeared from behind this 'scrubs' and stepped right in front of me * * * and I said, 'Fellow, * * * you the fellow that stopped me this morning, wasn't you?' He said, 'Yes. * * * What about it?' and he started at me. I said, 'Nothing. I just want to tell you I live here,' and I backed on up, showing him where I lived. * * * I just continued backing and talking to him. * * * He said, 'I knowed God damned well I was going to get even with you, and I knowed I was going to catch up with you.'" The two went around the Boyd house, as Boyd continued his accusations and defendant continued his denials and explanations and urged that they "try to get along with each other * * * I don't like trouble." After they reached the yard between Boyd's and Valentine's houses Boyd "yelled for his wife and she ran out * * * and that is the first time I ever seen the lady, and she said, 'No, honey, that is the wrong man.' * * * And he still pushed on toward me and at that time, a little after, I heard another voice holler, 'What is the matter?' I said, 'This man * * * don't want to let me

get out of here to go to work.' * * * He continued cursing me and shoving me around and shoving me around, and I said, 'Fellow, * * * listen, stop shoving me like that. * * * Man, I am late for work. I don't like trouble.'" By this time the members of defendant's household had come out. Mrs. Higgins, defendant's sister-in-law, and Boyd's wife told Boyd that he "had the wrong man." Mrs. Boyd said, "'Honey, * * * leave the man alone.' He didn't leave me alone, and I thought while he was speaking to them I could get by, and I went to pass him again and he shoved me like he was going to strike me. * * * I ducked back from him. * * * I said, 'Listen, I have been ducking and I don't want to shoot you. * * * Please leave me alone.' He says, 'Shoot,' and * * * he had his hands in his pockets and he swung the right out, and when the hand came out with whatever he had, I had been backing up, * * * but when he swung as if he had something in his hand which he had in his pocket, * * * I just pulled the gun out of my pocket and shot him."

On cross-examination defendant testified that he had never before fired a gun. He further testified that when Boyd first spoke to him "I was afraid of the voice at that particular time of the morning" and that thereafter, when they met in the yard, he was afraid of Boyd and "the way he approached me, I just figured he was doing something he didn't have no right to; and after me explaining to him * * * I was explaining to him all of the time."

Mrs. Valentine, Mrs. Higgins, and Mr. Edmond, also a member of defendant's household, came out of their house when they heard the altercation. They testified that Boyd repeatedly accused defendant of peeking in his window, cursed him and stated that "That is not the first time that has happened. I knew I was going to catch him and break his God damned neck." When defendant attempted to pass Boyd, saying, "Mister, get out of the way and let me go to work," Boyd said, "Don't be in such a God damned hurry" shoved defendant, and put his right hand in his pocket. Boyd thereafter started toward defendant as if he were going to shove him again and defendant said, "Don't come another step, else I will shoot." Boyd replied, "You can't scare me with your God damned gun," came on, and defendant fired.

In three essential and fatal respects the instructions given in this case resemble the instructions condemned in People v. Thomas (1945), 25 Cal.2d 880, 156 P.2d 7: (1) The jury were told that the existence of a specific intent to kill (which, of course, exists in voluntary manslaughter and in second degree murder as well as in some types of first degree murder) constitutes a homicide murder of the first degree; (2) the effect of provocation and passion as reducing the class of a homicide from murder to manslaughter was emphasized and the effect of provocation and passion as possibly precluding or making doubtful the formation of a deliberate and premeditated intent to kill was ignored; and (3) the jury were told, in effect, that the burden of proving circumstances which would mitigate the offense from murder of the first to murder of the second degree was upon the defendant.

[2-4] The jury were erroneously instructed that "If the unlawful killing is done *without the provocation and sudden passion which reduces the offense to manslaughter,* or is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, or is committed in the attempt to perpetrate a felony other than those mentioned in the description of murder in the first degree, or the circumstances of the killing show an abandoned heart, this is *murder of the second degree, unless* the evidence proves the existence in the mind of the slayer of *the specific intent to take life. If such specific intent exists at the time of such unlawful killing the offense committed would of course be murder of the first degree.*" (Italics added.) Such instruction, under the facts of this case, completely eliminated the statutory difference between murder of the first degree and murder of the second degree and required the jury, if they found the homicide to be murder at all, to find it to be murder of the first degree. (See Pen.Code, § 189; People v.

Sanchez (1864), 24 Cal. 17, 28; People v. Holt (1944), 25 Cal.2d 59, 90, 91, 153 P.2d 21; People v. Thomas (1945), supra, 25 Cal.2d 880, 902, 156 P.2d 7; People v. Bender (1945), 27 Cal.2d 164, 178, 163 P.2d 8.) Some further confusion as to the degrees of murder may well also have been contributed by the instruction that, where provocation adequate to reduce an intentional killing to *manslaughter* is shown, "although the intent to kill exists, it is not that *deliberate* and malicious *intent* which is an *essential element* in the crime of *murder.*" (Italics added.) The language of the last quoted instruction is that of People v. Freel (1874), 48 Cal. 436, 437, quoted in People v. Elmore (1914), 167 Cal. 205, 210, 138 P. 989, but it is incorrect in differentiating manslaughter from murder on the basis of *deliberate* intent and in declaring that *deliberate* intent is an essential element of murder. Deliberate intent, under the statute (Pen.Code, §§ 187, 189) is not an essential element of murder, as such. It is an essential element of one class only of first degree murder and is not at all an element of second degree murder.

[5] The jury were also instructed (and the idea was emphasized by repetition) that the existence of "adequate provocation" reduces an intentional killing from murder to manslaughter. But they were not advised that the existence of provocation which is not "adequate" to reduce the class of the offense may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation. If they were not impliedly precluded from considering at all the matter of provocation in determining the degree of murder they were at best left to infer its materiality from instructions that to constitute murder of the first degree the intent to kill "must be formed upon a pre-existing reflection and not upon a sudden heat of passion sufficient to preclude the idea of deliberation" and that malice "is implied, when no considerable provocation appears" (Pen.Code, § 188). This omission was particularly serious when considered with the instruction above discussed that the specific intent to kill constitutes an unlawful homicide murder of the first degree, and the instruction hereinafter discussed that "the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation * * * devolves upon the defendant." Under such instructions the jury may have believed defendant's and his family's testimony as to Boyd's conduct, determined that defendant was not justified in killing Boyd in self-defense and that there was not such provocation as would reduce the offense to manslaughter (both matters covered by several explicit instructions), and thereupon given no further consideration to such testimony.

[6, 7] The jury were instructed, substantially in the words of section 1105 of the Penal Code, that "Upon the trial for Murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter or that the defendant was justifiable or excusable." To this instruction was added the incomplete and confusing explanation that "While the burden of showing the circumstances under which the act is *justified* or *excused* devolves upon the defendant, he is only bound under this rule to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt *of the offense charged.*" (Italics added.)

The giving of instructions in the language of section 1105 has been countenanced in a number of decisions by the courts of this state. But the confusion in the minds of the jury as to "burden of proof" which is likely to attend the giving of such an instruction has been pointed out (concurring opinion of Mr. Justice Traynor in People v. Albertson (1944), 23 Cal. 2d 550, 587–589, 145 P.2d 7) and it has been said, "logic suggests that since such section in reality merely declares a rule of procedure and does not relieve the state of the burden of proving each and every essential element of guilt beyond a reasonable doubt the propriety of reading it to the jury, even with a proper explanation,

is doubtful." (People v. Thomas (1945), supra, 25 Cal.2d 880, 896, 156 P.2d 7, 16.

The explanation above quoted which was given to the jury in this case is inadequate. In the first place the jury were not advised that section 1105 "has no application whatsoever in determining the degree of murder, if the homicide is found to constitute murder, but is pertinent * * * only in relation to determining whether the homicide constitutes murder or manslaughter or is justifiable or excusable." (People v. Thomas (1945), supra, pages 895, 896 of 25 Cal.2d, page 15 of 156 P.2d; see, also, People v. Howard (1930), 211 Cal. 322, 329, 295 P. 333, 71 A.L.R. 1385; People v. Bender (1945), supra, 27 Cal.2d 164, 179, 163 P.2d 8; Fricke, California Criminal Law, pp. 104, 105.) The offense charged must have been understood by the jury to be murder of the first degree. The instruction therefore placed on defendant the burden of raising a reasonable doubt as to the degree of murder (if the homicide was murder). But, as shown, the law does not place that burden on a defendant.

In the second place the explanatory paragraph, by purporting to remove the effect of the instruction in the words of section 1105 so far as "circumstances under which the act is justified or excused" are concerned, only emphasizes the unexplained instruction that "the burden of proving circumstances of mitigation * * * devolves upon the defendant." Once the jury found that the killing was not justifiable or excusable the explanatory paragraph as phrased had no further application to their deliberations. Thus a conscientious jury, following the instructions, might believe that defendant's evidence tending to show mitigating circumstances must do more than raise a reasonable doubt not only as to the degree (People v. Thomas (1945), supra, 25 Cal.2d at pages 896, 897, 156 P.2d at page 16,) but also as to the class of the homicide. Other instructions do nothing to correct this. Particularly is this so because the explanatory instruction refers to "a reasonable doubt of his guilt of the offense *charged*" (italics added) and the jury knew that the offense charged was murder and was claimed by the prosecution to be murder of the first degree. The evidence of the prosecution does not tend "to show that the crime committed only amounts to manslaughter." The statutory instruction as to presumption of innocence and the definition of reasonable doubt (Pen.Code, § 1096) which was given does not clear up the confusion, for it states only that "in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an *acquittal*." (Italics added.)

[8] The above mentioned errors in instructions relative to the degree of the offense are made even more serious by the instructions that "There need be * * * no appreciable space of time between the intention to kill and the act of killing. * * * A man may do a thing * * * deliberately * * * from a moment's reflection as well as after pondering over the subject for a month or a year" and a man "can premeditate, that is, think before doing the act, the moment he conceives the purpose, as well as if the act were the result of long preconcert or preparation." As held in People v. Bender (1945), supra, 27 Cal.2d 164, 182-185, 163 P.2d 8, this combination of instructions, taken as a whole, substantially deletes the only difference, in this type of case, between first and second degree murder.

[9] Defendant next complains of the giving of a stock instruction that "If the accused was engaged in the performance of an unlawful act, and if the deceased attempted in a lawful manner to prevent the performance of such unlawful act, and if, while so endeavoring to prevent the same, the defendant in anger and solely for the purpose of revenge, or to enable him to carry out his unlawful design, so interfered with by said deceased, attacked the latter with a deadly weapon, intending to kill said deceased, and did, under such circumstances, carry such intention into execution, the fact that defendant was in a passion would not mitigate or excuse such homicide, but the crime committed would in such case be murder in the first degree. It is not less murder because the act is done suddenly after the intent to commit the homicide is formed. It is sufficient that the

*malicious intention* precedes and accompanies the act of homicide." (Italics added.) This instruction is manifestly erroneous. According to its first sentence, if the accused in a sudden, violent quarrel growing out of the protests of deceased against the commission by defendant of any unlawful act, however trivial, killed deceased with a deadly weapon, the homicide would be murder in the first degree. That is not the law. The statement as made transgresses the rules both as to voluntary manslaughter and as to the difference between first and second degree murder.

[10] The second and third sentences of this instruction are likewise manifestly erroneous if, as they apparently do, they too refer to first degree murder. They destroy the statutory difference in the degrees of murder and authorize conviction of first degree murder upon proof of facts amounting only to second degree murder. (People v. Thomas (1945), supra, 25 Cal.2d 880, 898, 156 P.2d 7; People v. Bender (1945), supra, 27 Cal.2d 164, 181, 182, 163 P.2d 8.)

[11-14] Defendant complains in another respect of the stock instructions concerning the degrees of murder. Such instructions contain the following (italicized) erroneous statements of law: "There are *certain kinds of murder* which *carry with them conclusive evidence of premeditation.* * * * These cases are of two classes: First. *Where the killing is perpetrated by means of poison, etc. Here the means used is held to be conclusive evidence of premeditation.* Second. *Where the killing is done in the perpetration, or attempt to perpetrate, some one of the felonies enumerated in the statute* [Pen.Code, § 189], *here the occasion is made conclusive evidence of premeditation. Where the case comes within either of these classes the test question: Is the killing willful, deliberate and premeditated? is answered by the statute itself.* * * * But there is another and much larger class of cases included in the definition of murder in the first degree, which are of equal cruelty [etc.]. * * * In this class the legislature leaves the jury to determine, from all the evidence before them, the degree of the crime, but prescribes for the government of their deliberations *the same test* which has been *used* by itself *in determining the degree of the other two classes,* to-wit: *The deliberate and preconceived intent to kill.*" (Italics added.) Of course the fact that a killing is committed in the perpetration of, or attempt to perpetrate, one of the five felonies enumerated in section 189 of the Penal Code is not conclusive, or necessarily any, evidence that such killing was deliberate and premeditated. Even where the killing in perpetration or attempted perpetration of one of the named felonies is unintended and accidental, nevertheless, as held in People v. Lindley (1945), 26 Cal.2d 780, 791, 161 P.2d 227, 233, "the offender 'is guilty of murder of the first degree by force of the statute.' [Citations.] If the evidence establishes conclusively that the murder was so committed, then only a verdict of murder of the first degree may properly be rendered. And even where the showing is not conclusive, if the record affords substantial support for the conclusion that one of the enumerated felonies was perpetrated or attempted, and the killing was committed in such perpetration or attempt, the judgment must be affirmed. [Citations.]" (See, also, Fricke, California Criminal Law, page 100, and cases there cited.) Similarly the murderer who kills by torture or poison may intend only to inflict suffering, not death. Evidence of the means used might support an inference that the killing was willful, deliberate, and premeditated, but where the jury has found that the killing was by poison, lying in wait, or torture it is not their function to go farther and draw inferences as to the manner of the formation and carrying out of an intention to kill. In such a case the question which the statute (Pen.Code, § 189) answers affirmatively is not, "Is the killing willful, deliberate and premeditated?"; it is, "Is the killing murder of the first degree?" Killings by the means or on the occasions under discussion are murders of the first degree because of the substantive statutory definition of the crime. Attempts to explain the statute to the jury in terms of nonexistent "conclusive presumptions"

tend more to confuse than to enlighten a jury unfamiliar with the inaccurate practice of stating rules of substantive law in terms of rules of evidence.

[15] We cannot agree with defendant's further contention that in a case of a killing such as the present one it is erroneous to instruct the jury at all as to a homicide being murder of the first degree because of the means or occasion of its perpetration. Such an instruction, correctly worded, can properly be given as illustrating the more heinous character and typical cruelty of the forms of murder which the Legislature has provided are of the first degree, as opposed to those of the second degree.

[16, 17] The jury were told, in the words of section 192 of the Penal Code, that "Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: 1. Voluntary—upon a sudden quarrel or heat of passion. 2. Involuntary—[defined]." They were further told that "if the intent [to kill] exists and the killing is unlawful, it will be murder, even though done upon a sudden quarrel or heat of passion, unless there was adequate provocation. [There follows a statement of what is not adequate provocation, hereinafter quoted.]" Although the two instructions can perhaps be reconciled by lawyers and judges, who read them with a background of knowledge that neither means exactly what it says, a jury might well be confused by being told that voluntary manslaughter is an unlawful killing upon a sudden quarrel or heat of passion, but that an unlawful killing upon a sudden quarrel or heat of passion is murder except in certain circumstances, which excepted circumstances do not affirmatively define adequate provocation but merely assert that certain conduct and acts, no matter how provoking in fact, are to be considered in law as not provoking in effect.

The above mentioned instruction as to what is not adequate provocation reads as follows: "It is a settled rule in law that neither provocation by words only, however opprobrious, nor contemptuous or insulting actions, or gestures without an assault upon the person, nor any trespass against lands or goods, are of themselves sufficient to reduce the offense of an intentional homicide with a deadly weapon from murder to manslaughter." They were further told (and this instruction is correct) that "To reduce a felonious homicide from the grade of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of such character as would be naturally calculated to excite and arouse the passion. * * * Heat of passion is defined as such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances, and consequently no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man."

Defendant urges that the instruction as to what is not "adequate provocation" which is first above quoted "amounts to judicial legislation engrafted upon the provisions of section 192 of the Penal Code," and is inconsistent with the last quoted (and correct) instruction defining "heat of passion." He points out that the Penal Code does not require that the "sudden quarrel" be more than verbal or that the "heat of passion" be aroused by a particular type of conduct, to constitute a killing manslaughter rather than murder.

Through the industry of counsel for the defendant as reflected in his outstandingly excellent briefs the historical basis for the challenged portion of the provocation instruction is made clear. The Crimes and Punishments Act of 1850 (§ 23), following a common law principle, provided: "In cases of voluntary manslaughter there must be a serious and highly-provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing." (See People v. Butler (1857), 8 Cal. 435, 441.) No such limitation is expressed in the Penal Code enacted in 1872, but the Code Commissioners' notes to section 192 (which defines manslaughter) state that "No words of re-

proach, however grievous, are sufficient provocation to reduce the offense of an intentional homicide from murder to manslaughter.—People v. Butler [supra], 8 Cal. 435." In People v. Turley (1875), 50 Cal. 469, 471, this court, without mentioning the fact that the Crimes and Punishments Act of 1850 had been repealed and superseded by the less stringent provisions of the Penal Code, said that the principle of the Butler case is "so long and firmly established in this State that its discussion would be out of place." But, directly contrary to the Turley case, and in accord with the new (1872) statute, the court in People v. Hurtado (1883), 63 Cal. 288, 292, said that an intentional killing is manslaughter "when it is committed under the influence of passion caused by an *insult or provocation* sufficient to excite an *irresistible passion* in a reasonable person." (Italics added.) In 1892 this court (in People v. Bruggy, 93 Cal. 476, 481, 29 P. 26, 28) failed to follow or cite the Hurtado case and said that before the adoption of the Penal Code the law was as above quoted (Crimes and Punishments Act, § 23) and that "While no similar provision is found in the Penal Code, yet it has never been even suggested that the law pertaining to the subject of manslaughter underwent any change upon the adoption of the Code. Such provision was probably omitted from the Code upon the ground that it was entirely unnecessary, and surplusage, being simply a reiteration of a principle of law settled and established by all text-writers upon the subject." But in People v. Logan (1917), 175 Cal. 45, 164 P. 1121, this court reverted to accord with the Hurtado case and reversed a judgment of conviction of murder of the second degree because the jury were instructed in the language of the repealed section 23 of the Crimes and Punishments Act. It was said (pages 48, 49 of 175 Cal., page 1122 of 164 P.), "that section ceased to be the law by failure to reenact it in the Penal Code [citation]. In the present condition of our law *it is left to the jurors* to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether or not he did, commit his offense under a heat of passion. The jury is further to be admonished and advised by the court that this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances, and that, consequently, no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man. Thus no man of extremely violent passion could so justify or excuse himself if the exciting cause be not adequate, nor could an excessively cowardly man justify himself unless the circumstances were such as to arouse the fears of the ordinarily courageous man. Still further, while the conduct of the defendant is to be measured by that of the ordinarily reasonable man placed in identical circumstances, the jury is properly to be told that the exciting cause must be such as would naturally tend to arouse the passion of the ordinarily reasonable man. *But as to the nature of the passion itself, our law leaves that to the jury, under these proper admonitions from the court.* For the fundamental of the inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion—not necessarily fear and never of course the passion for revenge—to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." (Italics added.) The foregoing quotation is a clear and correct statement of the law. Nevertheless, it is pointed out to us, since 1917 this court has on at least two occasions ignored the Logan (1917) case and followed the Bruggy (1892) case. (See People v. Manzo (1937), 9 Cal.2d 594, 599, 72 P.2d 119; People v. French (1939), 12 Cal.2d 720, 744, 87 P.2d 1014.)

As could naturally be expected (and emphasizing the necessity for purging our case law of the confusion) the two extant lines of directly conflicting authorities in this court on this important question of

law have produced their replicas in decisions of the District Courts of Appeal. See People v. Chutuk (1912), 18 Cal.App. 768, 771, 124 P. 566; and People v. Jackson (1926), 78 Cal.App. 442, 448, 248 P. 1061; on one side of the question, opposed by People v. Golsh (1923), 63 Cal.App. 609, 614, 219 P. 456, and People v. Davis (1928), 94 Cal.App. 192, 198, 270 P. 715, on the other side. The Chutuk (1912) case, in accord with the Bruggy case but without citation of authority, ignored the Hurtado (1883) case and "[saw] no error" in a charge "that adequate provocation is not produced by opprobrious, contemptuous actions or gestures, without an assault upon the person, or trespass against lands or goods." [18 Cal.App. 768, 124 P. 567.] The Jackson (1926) case, likewise in accord with the Bruggy case and likewise without citation of authority, ignored the Logan (1917) case as well as the Hurtado case and declared (at page 448 of 78 Cal. App., at page 1063 of 248 P.) that "it is a settled rule in law that neither provocation by words only, however opprobrious, nor contemptuous, or insulting actions, or gestures without an assault upon the person, nor any trespass against lands or goods, are of themselves sufficient to reduce the offense of an intentional homicide with a deadly weapon from murder to manslaughter." But the Golsh (1923) case cited both the Hurtado and Logan cases and held (at page 614 of 63 Cal.App., at page 458 of 219 P.), in accord with their more liberal rule, that "The provocation which will stir in the heart of the slayer that heat of passion which reduces the homicide from murder to manslaughter must be such as would have a like effect upon the mind and emotions of the average man —the man of ordinary self-control." And in the Davis (1928) case the court completely ignored the conflicting authorities, cited the Hurtado case, the Logan case, and the Golsh case, and broadly declared (at page 198 of 94 Cal.App., at page 718 of 270 P.), "In this state *it has always been held* that to reduce a killing from murder of the second degree to manslaughter on the ground of sudden quarrel or heat of passion 'this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances, and that, consequently, no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions are aroused, unless further *the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.*'" (Italics added.) The statements of the rule in the last two cases, like those in the Hurtado and Logan cases, in specifying as the test the effect of the surrounding circumstances (in language broad enough to include the words, conduct, acts, etc., of the deceased) upon an "ordinarily reasonable man" or an "average man," without the limitation asserted in the Code Commissioners' notes, are manifestly inconsistent with the cases above mentioned which have adhered to the principle stated in the long since repealed Crimes and Punishments Act of 1850 and the Butler (1857) case.

It is to be noted, of our own decisions, that neither the Hurtado (1883) case nor the Logan (1917) case was expressly overruled in the Bruggy (1892) case or in the Manzo (1937) case or in the French (1939) case. Likewise, of the District Court of Appeal decisions, neither the Golsh (1923) nor the Davis (1928) case has been overruled or disapproved. Yet obviously the French, Manzo, Turley, Bruggy, Chutuk, and Jackson cases do not correctly state the law if the Logan, Hurtado, Golsh, and Davis cases state it correctly. Fairness to the profession in general, and in particular to the courts of lower jurisdiction, demands that one group or the other of these cases be squarely overruled. It cannot be gainsaid that section 192 of the Penal Code in defining voluntary manslaughter did omit the more stringent language of the Crimes and Punishments Act of 1850. We are satisfied that the Code Commissioners could not, merely by including in their notes a statement from and citation of the Butler (1857) case, write into the seemingly more liberal new statute the stringent limitation of the older repealed act. If the cases since the adoption of the newer statute had uniformly followed the Code Commissioners' note, or if the Hurtado case, the Logan case, the Golsh case, and the Davis case had

been squarely overruled in later cases, we should have a much stronger basis than is actually present for holding that a court-made limitation has become engrafted on the statute. But the Hurtado case, the Logan case, the Golsh case, and the Davis case opinions are thoroughly sound in their factual and logical bases; they stand without express challenge as stating the law of this state; they are consistent with the statute and with rules of statutory construction; no reason for overruling them has been pointed out in any of the inconsistent opinions. In view of the uncertain state of the law, with two directly conflicting rules to be found in the reports and none of the cases undertaking to discuss both rules and overrule inconsistent decisions, we find that we must now make a choice.

[18, 19] We are not bound to consider the principle written into the repealed Crimes and Punishments Act of 1850 (§ 23) as being still the law of this state merely because such principle was recognized in the common law. "No act or omission, commenced after twelve o'clock noon of the day on which this code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this code, or by some of the statutes, which it specifies as continuing in force * * *, or by some ordinance. * * *" (Pen.Code, § 6.) "The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." (Pen. Code, § 4.) A code section is presumed to be a continuation of the common law only when it and the common law are substantially the same. (Scott v. McPheeters (1939), 33 Cal.App.2d 629, 633, 92 P.2d 678, 93 P.2d 562.) Section 23 of the Crimes and Punishments Act of 1850 was substantially the same as the common law on the subject but section 192 of the Penal Code, which superseded it, is not substantially the same. It is obviously substantially different. "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject [in this case, the same subject] is significant to show that a different intention existed." (23 Cal.Jur. 778, § 154; In re Estate of Garthwaite (1933), 131 Cal.App. 321, 326, 21 P.2d 465.)

[20-23] It is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law. (Southern Pacific Co. v. McColgan (1945), 68 Cal.App.2d 48, 54, 55, 156 P.2d 81.) It has been repeatedly declared that where changes have been introduced by amendment it is not to be assumed that they were without design and, further, that by substantially amending a statute the Legislature demonstrates an intent to change the preexisting law. (See Loew's, Inc., v. Byram (1938), 11 Cal.2d 746, 750, 82 P.2d 1, and cases therein cited.) "The taking effect of the Penal Code on the first day of January, 1873, operated a repeal at that time of the old Crimes and Punishments Act of April 16, 1850." (People v. Salvador (1886), 71 Cal. 15, 16, 11 P. 801, 802.) From the foregoing discussion it appears that the fact that the common law limitation on the types of circumstances which could be regarded as furnishing adequate provocation to reduce a homicide to manslaughter was originally a part of the statutory law of this state is not a proper basis for holding that it still is the law. On the contrary such fact, in the light of the repeal of the statute which incorporated it, together with enactment of a new law on the same subject with the important limitation deleted, strongly suggests that the Legislature intended a more liberal rule.

[24-27] This court has been unanimous in holding that "When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted. In other words, criminal statutes will not be built up 'by judicial grafting upon legislation. * * * [I]t is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arises out of a question of fact, or as to the true interpretation of words, or the construction of language used in a statute.' [Citations.]" (People v. Ralph (1944), 24 Cal.2d 575, 581, 150 P.2d 401, 404.) Here we do not have even ambiguous

language in the statute to support the restrictive limitation which was placed in the instruction. If the "sudden quarrel or heat of passion" specified in section 192 of the Penal Code is to be limited by the stringent language of the Code Commissioners' note that "No words of reproach, however grievous, are sufficient provocation to reduce the offense of an intentional homicide from murder to manslaughter," that limitation must be grafted upon the statute entirely by judicial construction. Some of the incongruence of imposing such a limitation upon the code definition is depicted in the very language of the Bruggy case which espouses it. The court there said (at page 482 of 93 Cal., at page 28 of 29 P.), "Nothing is more surely calculated to arouse the blood of some men to a heat of passion than grievous words of reproach, yet no words are sufficient provocation to reduce an offense from murder to manslaughter; and this principle is so well established in this state that discussion would be out of place." The principle had, of course, been established by the Crimes and Punishments Act of 1850, but that act had been repealed and the statement of such principle deleted from the superseding statute. We choose not to engage in a construction of this law which would rewrite into it the limitation which the Legislature has written out. If the simple language of the statute is to be altered by so rigorous a limitation we think the action should come from the Legislature. We prefer to apply the statute as written, giving to its provisions "the fair import of their terms," and in so doing we follow People v. Hurtado (1883), supra, 63 Cal. 288, 292; People v. Logan (1917), supra, 175 Cal. 45, 48, 164 P. 1121; People v. Golsh (1923), supra, 63 Cal.App. 609, 614, 219 P. 456; and People v. Davis (1928), supra, 94 Cal.App. 192, 198, 270 P. 715. The case of People v. Butler (1857), supra, 8 Cal. 435, decided under the Crimes and Punishments Act of 1850 (§ 23), cannot be regarded as authority for proper construction of the quite different code section enacted in 1872; the cases of People v. Turley (1875), supra, 50 Cal. 469, 471; People v. Bruggy (1892), supra, 93 Cal. 476, 481, 29 P. 26; People v. Manzo (1937), supra, 9 Cal.2d 594, 599, 72 P.2d 119; and People v. French (1939), supra, 12 Cal.2d 720, 744, 87 P.2d 1014, insofar as they are contrary to the pertinent holdings in People v. Hurtado, supra, People v. Logan, supra, People v. Golsh, supra, and People v. Davis, supra, are overruled. Likewise, the pronouncements in People v. Chutuk (1912), supra, 18 Cal.App. 768, 771, 124 P. 566, and in People v. Jackson (1926), supra, 78 Cal.App. 442, 448, 248 P. 1061, to the extent that they are inconsistent with the views herein expressed, are disapproved.

We express no opinion as to whether the evidence in this case shows such conduct on the part of Boyd as would arouse in a reasonable man the "heat of passion" referred to in section 192 of the Penal Code. Clearly the evidence, even if viewed most favorably to defendant, would not as he urges establish as a matter of law no higher offense than voluntary manslaughter. It would justify a verdict of voluntary manslaughter but it is not insufficient to sustain a verdict of second degree murder. The question is one of fact for the jury under proper instructions.

For the reasons above stated, and in order that the class and degree of the homicide can be found by a jury properly instructed, the judgment and the order denying defendant's motion for a new trial are reversed and the cause is remanded for a new trial.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., concurred.

SPENCE, Justice (concurring).

I concur. It is apparent from reading the foregoing opinion, together with the recent cases which are cited therein, that a painstaking attempt has been made to clarify the law with respect to the distinctions between first degree murder, second degree murder and voluntary manslaughter, and to indicate the nature of the instructions which should be given to juries concerning such distinctions and also concerning other matters. It would appear, however, that something more than judicial clarification is required in order that clear, concise, and understandable instructions may be given in this important class of cases where the accused is charged with

the unlawful killing of a fellow human being. I believe that the real difficulty is inherent in our statutory provisions and that the time has come for a legislative reexamination of all code sections relating to homicides in the light of the decisions construing those sections.

The substantive law relating to homicides is found mainly in sections 187 to 199 inclusive of the Penal Code. A mere reading of those sections demonstrates the difficulty which the ordinary layman, sitting as a juror, must encounter in grasping their significance when the substance of those sections is given in the form of instructions. Perhaps instructions covering the distinction between murder, defined as "the unlawful killing of a human being, with malice aforethought" (Pen.Code, § 187), and voluntary manslaughter, defined as "the unlawful killing of a human being, without malice * * * upon a sudden quarrel or heat of passion" (Pen.Code, § 192), should be easily understood. But when a further attempt is made to instruct upon the distinction between the two degrees of murder (Pen.Code, § 189) and upon the effect of provocation either in reducing the grade or degree of the offense or in rendering the homicide wholly excusable or justifiable (Pen.Code, §§ 195, 197 and 199), it is practically impossible to give adequate instructions in clear, concise, and understandable form because of the unavoidable complexity of the instructions dealing with those subjects. Nevertheless, it is the duty of a trial judge, under our existing statutory law, to instruct upon all these subjects, as well as many others, in practically every case involving a charge of murder.

When an accused is placed on trial for his own life following the taking of the life of another, it is important from the standpoint of the accused, as well as that of the state, that the jury, which is entrusted with the often perplexing problem of determining the facts, should not be embarrassed by complicated and confusing instructions concerning the law to be applied to the facts as found. In my opinion, the present inevitable complications and confusion could be eliminated, at least in part, if the degrees of murder were abolished, leaving only the distinction between murder and voluntary manslaughter and permitting the jury to fix the punishment in the event that the accused is found guilty of murder, in the same manner that the jury is now permitted to fix the punishment in the event the accused is found guilty of first degree murder. Pen.Code, § 190. There appears to be little, if any, reason for dividing into degrees the offense defined as "the unlawful killing of a human being, with malice aforethought" (Pen.Code, § 187), so long as the jury is permitted to fix the punishment to be imposed upon one found guilty of such offense. On the other hand, the simplification of the law and the resulting simplification of the instructions dealing with the subject of homicides would appear to be of paramount importance. The question of whether the degrees of murder should be abolished is but one of several questions which might be considered by the Legislature in the event that it attempts to accomplish such simplification.

SHENK, Justice (dissenting).

I dissent. The administration of justice should not be defeated by a too rigid adherence to a close and technical analysis of the instructions to the jury. This practice was overly indulged prior to 1911 when the people of this state took the reviewing courts in hand and prescribed the mandate that no misdirection of the jury should cause a reversal unless the error complained of resulted in a miscarriage of justice. Const., art. VI, § 4½, adopted October 10, 1911. This case is one, in my opinion, where the Constitution should be observed and the judgment be affirmed. Whether the attempted remaking of the law of the state from its early beginnings on the question of premeditation and deliberation has resulted in clarification is doubtful. I hesitate to conclude that this court in its long history of dealing with felonious homicides has been so oblivious of the defendant's rights as to have sent men to their doom under what is now said to be a prejudicial misapplication of the law. The long line of jurists preceding us are now said to have been unable to

state the correct rule of law. Instructions, approved by this court for generations, have become the fixed law of the state. Any change in the line of clarification, if any be necessary, should be left to the Legislature.

EDMONDS, J., concurred.




74 Cal.App.2d 464

**DE PRIEST v. CITY OF GLENDALE et al.**

Civ. 14996.

District Court of Appeal, Second District, Division 1, California.

May 13, 1946.

**1. Automobiles ⇐245(14)**

Ordinarily, the question of whether vehicle constitutes an immediate hazard within meaning of statute respecting right of way at through highway intersection, is one for trier of fact. Vehicle Code, § 552.

**2. Automobiles ⇐245(14)**

Evidence presented question for jury as to whether defendant bus driver was guilty of negligence in attempting to cross through street in front of plaintiff's automobile approaching intersection on through street after having made required stop, where bus driver's testimony showed that plaintiff's automobile was approximately 200 feet away and moving at not less than 35 miles per hour when defendant started to cross intersection. Vehicle Code, § 552.

**3. Automobiles ⇐171(5)**

Where it would appear to reasonable person that vehicle approaching intersection on arterial highway is near enough to constitute immediate danger, and under those conditions driver of other vehicle attempts to enter or cross arterial highway, he is negligent in so doing though he was first to arrive at or enter intersection. Vehicle Code, § 552.

**4. Automobiles ⇐245(80)**

Evidence presented question for jury as to whether plaintiff motorist who was traveling on through street was guilty of contributory negligence in assuming that bus approaching on intersecting street would yield right of way or in not maintaining a constant lookout as he approached intersection, so as to be precluded from recovering for injuries sustained in intersectional collision. Vehicle Code, § 552.

**5. Negligence ⇐136(9, 26)**

The question of contributory negligence is primarily one of fact for jury and becomes a question of law only when it will support but one legitimate inference.

**6. Trial ⇐244(4)**

Defendant's proffered instruction on duty to look carefully for approaching traffic was objectionable and properly refused where it singled out plaintiff alone for application of the rule.

**7. Automobiles ⇐246(60)**

Defendant's proffered instruction that one was presumed to see that which was in plain sight was properly refused, as having no application, where each driver admitted seeing other vehicle.

**8. Appeal and error ⇐1170(9)**

Refusal of defendant's proffered instructions did not result in prejudicial error, where instructions given, when considered in their entirety, adequately covered issues presented, and it could not be said that a different verdict might have ensued had proffered instructions been given. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Burl D. De Priest against City of Glendale, Glendale City Lines, Inc., and R. A. Murphy to recover for personal injuries sustained by plaintiff as result of collision of his automobile with a bus owned by defendant Glendale City Lines, Inc., and operated by defendant R. A. Murphy. From a judgment for plaintiff,

the defendant Glendale City Lines, Inc., alone appeals.

Affirmed.

George H. Moore and Hugh B. Rotchford, both of Los Angeles, for appellant.

S. L. Kurland, of Los Angeles, for respondent.

WHITE, Justice.

This action was commenced to recover damages for personal injuries sustained by plaintiff as a result of the collision of his automobile with a bus owned by defendant Glendale City Lines, Inc., and operated by defendant R. A. Murphy. From a judgment in favor of plaintiff entered upon the verdict of a jury defendant Glendale City Lines, Inc., prosecutes this appeal.

The accident occurred at about 11:20 p.m. on the evening of January 2, 1944, at the intersection of Glen Oaks Boulevard and Concord Street in the City of Glendale. Glen Oaks Boulevard, a through arterial highway running in an easterly and westerly direction, consists of two paved 60-foot roadways separated by curbs from an elevated 40-foot private right-of-way of the Pacific Electric Railroad. Concord Street runs north and south and is approximately 40 feet wide. Traffic entering Glen Oaks Boulevard from intersecting streets, including Concord Street, was required to stop before proceeding into Glen Oaks Boulevard. The railroad tracks between the roadways of Glen Oaks Boulevard were approximately five feet higher than the roadways themselves, the rise from the north edge of the right-of-way to the north track covering a distance of 20 to 25 feet and the drop from the south track to the south edge of the right-of-way occurring within a distance of nine or ten feet.

Appellant urges first, that the evidence was insufficient as a matter of law to support the finding that the bus driver was guilty of negligence; second, that plaintiff was guilty of contributory negligence as a matter of law; and third, that the court committed prejudicial error in refusing certain instructions proffered by defendant.

Plaintiffs testified that on the evening in question he was driving his 1942 Plymouth coupe east on Glen Oaks Street; that when he was about 200 feet from the west curb line of Concord Street he noticed headlights approximately 40 feet from the street car tracks on the north side of Glen Oaks. It was raining and plaintiff's windshield wiper was operating. The bus was moving at approximately five miles per hour or less. Plaintiff was driving between 25 and 30 miles per hour and did not change speed at any time before the accident. When he next saw the bus plaintiff was from 28 to 30 feet west of the curb line of Concord Street, at which time it seemed to speed up and "dart kind of right in front of me," coming down the incline from the tracks. He estimated the speed of the bus at that moment at 15 to 20 miles per hour. He estimated the interval between the time he first saw the bus at 200 feet and when he noticed it for the second time at three seconds. He further testified that during the estimated three second interval "I was watching right ahead. It was raining and bad driving conditions, and I noticed to the right, to the east, that there was a traffic." He further testified as follows:

"Q. What occurred when you saw this bus coming down this incline from the car tracks at an accelerated speed just prior to the accident? A. I really can't say. It was just all of sudden, almost instantly.

"Q. About how long a time elapsed from that time until the impact? A. About a split second, very short.

"Q. You were going about 25 to 30 miles per hour? A. Yes, sir.

"Q. Did you apply your brakes? A. I have no recollection."

Plaintiff did not recall whether the inside lights of the bus were on; he was unable to determine from the bus lights whether it was a bus or a passenger car. He estimated that the right side of the bus was about 15 feet from the right edge of Concord Street and that the bus traveled about 20 feet from its position where he saw it for the second time and the point of impact.

On cross-examination plaintiff placed his position when he saw the bus the second time at 57 feet from the point of impact. The following testimony of plaintiff on cross-examination is quoted by appellant in support of its contention that plaintiff was guilty of contributory negligence as a matter of law:

"Q. You were going along here at this rate of speed, 25 or 30 miles an hour, whatever your speed was, you just kept going right along at that rate of speed until you ran right into the side of the bus, didn't you? A. That's what happened.

* * * * *

"Q. You didn't have any trouble in seeing that bus, did you? A. Seeing it throw the headlights, I had no trouble seeing it when it was right in front of me.

"Q. You didn't? A. No.

"Q. When you were a couple of hundred feet away you could see it was a bus, couldn't you? A. No.

"Q. How is that? A. No.

"Q. When did you first know it was a bus? A. When it was directly in front of me, when I saw it the second time.

"Q. Did you talk to any police officers that night? A. Yes, sir, I did.

"Q. Do you remember what you told them? A. Yes, about what I have told you here.

"Q. Is it not a fact that you told the police officers that the first time you saw the bus the bus was crossing the railroad tracks, and at that time you were about 200 feet back, and you just didn't pay any attention to it? A. I have no recollection of it.

"Q. You don't say that you didn't say it, you just don't recollect it? A. I haven't any recollection of saying anything like that."

Further in support of his contention with respect to contributory negligence, appellant quotes the testimony of a police officer as to plaintiff's testimony with reference to the accident at a hearing in the municipal court, as follows: "He was asked when and where he observed the bus and how far away he was, to which he said he was about 200 feet back from the intersection and the bus was on the railroad track and he did not notice the bus again until he struck it."

At the time of the trial the driver of the bus was in military service. His testimony was introduced by deposition. He testified that the headlights, the inside lights, clearance lights and taillights of the bus were on; that the bus was colored yellow and white; that at the time of the collision the bus was traveling three or four miles per hour in low gear; that he made a complete boulevard stop before entering Glen Oaks Boulevard and another stop before crossing the tracks. He stated that he noticed plaintiff's headlights when he made the boulevard stop and that the plaintiff was then approaching or at a boulevard stop on Glen Oaks a quarter of a mile west of the scene of the accident. He further testified as follows:

"Q. As you were proceeding across the tracks state what, if anything, you observed in regard to traffic. A. I noticed the headlights of one car about 200 feet west of me, to my right.

"Q. Where was your bus with relation to the tracks at that time? A. It was right on top of the tracks when I noticed it.

* * * * *

"Q. Did you notice anything in regard to the speed of that automobile at that time? A. As close as I could say it was coming about 35 miles an hour.

"Q. Then what did you do? A. He was a good 200 feet away, so I proceeded in low gear right on down across the intersection.

"Q. Then what happened? A. I noticed he didn't slow down any, so there was nothing I could do but keep right on going, and about ten feet from the opposite curb he ran into the side of the bus."

On cross-examination the driver testified in part:

"A. * * * Before I crossed the tracks he was about 300 feet, a good 300 feet away; he was quite a ways away.

"Q. Did you stand there for some little time before you crossed the railroad tracks? A. I stopped and then I continued on in low gear.

"Q. So he was 300 feet away, you would say, as you started to cross the tracks? A. Yes.

"Q. Could you estimate his speed at that time? A. It was not less than 35 miles per hour, if not more."

Plaintiffs also testified that he made a series of tests at the intersection of Concord Street and Glen Oaks Boulevard and that it was not possible to see the intersection to the west from the point where the bus driver claimed to have seen it, due to the curve of the roadway of Glen Oaks, palm trees and other obstructions.

In contending that the driver of the bus was not guilty of negligence, appellant states: "The only question remaining is: Where there is no evidence that the Plymouth was less than a quarter of a mile away when the bus came to a full boulevard stop before entering the highway, and where the evidence shows that the bus already proceeded some distance into the intersection when the Plymouth was still more than two hundred (200) feet away on an arterial highway, is there sufficient evidence that the Plymouth constituted an 'immediate hazard' as that term is used in the Vehicle Code?"

Section 552 of the Vehicle Code reads as follows: "The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway."

[1] Appellant's argument, in short, is that although the highway was divided, nevertheless the entire crossing constituted but one intersection; that the driver of the bus made the required stop at a time when the plaintiff (according to the driver) was a quarter of a mile away; that therefore plaintiff's vehicle did not constitute an "immediate hazard", and the bus driver was not guilty of negligence in proceeding across the intersection. Further, argues appellant, negligence cannot be predicated upon the bus driver's act in going ahead after seeing plaintiff's car 200 feet away at a time when the bus was either at or on the tracks. The same facts are urged as showing that plaintiff was guilty of contributory negligence as a matter of law in failing to observe what was in plain view and in failing to yield the right of way when at a distance of 200 feet he saw the bus upon the tracks. Appellant concedes that, in ordinary circumstances, the question of whether a vehicle constitutes an "immediate hazard" is one for the trier of fact (Zwerin v. Riverside Cement Co., 52 Cal.App.2d 715, 718, 126 P.2d 920 and cases therein cited), but cites Fisher v. Wichita Transp. Corporation, 156 Kan. 500, 134 P.2d 393, in support of the argument that in a situation such as is here presented the question becomes one of law. In the cited case, a jury found that an oncoming automobile 150 feet away constituted an "immediate hazard" to a bus about to make a left turn. The Kansas court held that it was not and directed that judgment be entered for defendant.

[2, 3] The situation here presented, however, does not warrant the substitution of this court's views for those of the jury. In the Kansas case the jury made a special finding that the distance was 150 feet and a further finding that at such distance plaintiff's vehicle constituted an immediate hazard. In the present case the elements of speed, distance and position of the respective vehicles at given times were to some extent in dispute. The testimony of plaintiff and defendant bus driver as to the movements of the bus were in conflict. If the jury, as it had a right to do, chose to place credence in plaintiff's version of the accident, it might well have concluded that the bus was stopped, or moving very slowly at the tracks when plaintiff first saw it at a distance of 200 feet. To make a left turn at an ordinary intersection in front of a vehicle 150 feet away is one thing; it is quite another situation when the driver of a 30-foot bus, starting from a standstill in low gear, attempts to cross a railroad track, go down an incline and clear a 60-

foot roadway, in front of a vehicle 200 feet away and moving, according to the driver's own estimate, at not less than 35 miles per hour. It must be assumed that the jury believed the testimony of the plaintiff that the bus suddenly increased its speed, thrusting it in front of him so quickly that he was unable to stop before striking it. In these circumstances, the fact that the bus driver made the boulevard stop and also a stop at the railroad tracks did not absolve him from his continuing duty to use due care. "* * * the law is also well settled that if it should appear to the mind of any reasonable person that the vehicle approaching the intersection on the arterial highway is near enough to constitute an immediate danger, and under those conditions the driver of the other vehicle attempts to enter or cross the arterial, he is negligent in so doing even though he was the first to arrive at or enter the intersection." Pattisson v. Cavanagh, 18 Cal.App.2d 123, 127, 63 P.2d 868, 870, 64 P.2d 945.

[4, 5] Likewise, bearing in mind that the jury was entitled to accept plaintiff's version as to how the accident occurred, its conclusion that he was not guilty of contributory negligence must be upheld. It is well established that the question of contributory negligence is primarily one of fact for the jury and becomes a question of law only in rare instances. The language in Granath v. Andrus, 70 Cal.App.2d 99, 102, 160 P.2d 129, 131, is particularly applicable to the situation here presented. The court there said: "It is apparent that plaintiff misjudged the speed of the truck and was mistaken as to his ability to cross Anaheim Street in front of it with safety. However, every mistake of judgment is not negligence, for mistakes are made even in the exercise of ordinary care. In a situation like the present, the language of the court in Couchman v. Snelling, 1931, 111 Cal.App. 192, at page 195, 295 P. 845, at page 847, is apropos: 'The circumstances under which a court can declare that certain acts constitute contributory negligence as a matter of law are rare. Swartz v. Acme Express & Drayage Co., 102 Cal. App. 615, 283 P. 358. It can seldom happen that the question is so clear from doubt that the court can undertake to say as a matter of law that the jury could not fairly and honestly find for the plaintiff. Schierhold v. North Beach & M. R. Co., 40 Cal. 447, 453. The question is usually one of fact and becomes a question of law only when the evidence is of such a character that it will support no other legitimate inference. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513.'"

Likewise illustrative of the rule that the question of plaintiff's negligence in assuming that the bus would yield the right of way or in not maintaining a constant lookout as he approached the intersection was one for the jury is the case of Breland v. Traylor Eng. etc. Co., 52 Cal.App.2d 415, 422, 423, 126 P.2d 455, 459. It was there said: "The contention that the evidence shows that R. H. Breland was guilty of contributory negligence as a matter of law is equally untenable. This contention is based upon Breland's testimony that he observed the Chapman car coming from his right when he was within 60 to 65 feet from the intersection, and that he did not look again to his right until he entered the intersection. It seems to be the thought of appellant that Breland, as a matter of law, was required to keep a constant lookout to his right. The only case cited by appellant on this point is Jensen v. Hansen, 12 Cal.App.2d 678, 55 P.2d 1201. In that case, in affirming a judgment in favor of the plaintiff, and in holding that an implied finding of negligence on part of defendant was supported, the court pointed out that the evidence showed plaintiff's car entered the intersection first from the right, and in commenting on the failure of defendant to keep a proper lookout, stated (12 Cal.App.2d at page 683, 55 P.2d [1201]): 'It was his duty to keep a reasonably vigilant lookout for vehicles approaching the intersection from both directions.' That sentence cannot be distorted into a holding that, as a matter of law, under all circumstances, one approaching an intersection must keep a constant lookout both ways. Where a driver sees an approaching car, whether he acted as a reasonable man in not keeping his eye on that car, is generally a question of fact for the trier of the fact. R. H. Breland testified that when

he saw the Chapman car it was 'over twice the distance' from the intersection that he was. Mrs. Breland testified the Chapman car was so far from the intersection that when she saw it she 'just dismissed it from my mind.' Whether Breland exercised reasonable care in keeping a proper outlook, and, whether he acted as a reasonable man in not again looking at the Chapman car until he entered the intersection, were questions of fact. The finding of the trial court on this question cannot now be disturbed. Lundgren v. Converse, 34 Cal. App.2d 445, 93 P.2d 819; Lee v. Stephens, 8 Cal.App.2d 650, 47 P.2d 1105."

Finally, appellant predicates error upon the refusal of the court to give certain proffered instructions. The refused instructions were as follows: "You are instructed that the plaintiff, Burl D. De Priest, was not entitled to assume or presume that the road ahead of him would be free and clear of traffic. To the contrary, in order to avoid a charge of negligence, it was the duty of Burl D. De Priest to look carefully for approaching traffic and to see that which would have been seen by a person of ordinary care and prudence. Where there is no obstruction a person is presumed to see that which is readily within the range of his vision. You are instructed that it is just as much negligence to look in a careless or negligent manner as it is not to look at all."

"General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened but did not hear that which he could have heard in the exercise of ordinary care, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive."

"In determining whether there was an automobile so close as to constitute an immediate hazard at the time the bus entered the intersection insofar as this pertains to the charge of negligence against the defendant, you are instructed that the burden of proof is upon the plaintiff; and, unless this charge has been established to your satisfaction by a preponderance of the evidence, you will find that the driver of the bus was not negligent in that regard."

"A witness false in one part of his or her testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence, you shall believe that the probability of truth favors his or her testimony in other particulars."

It is also asserted that, because the jury had the task of drawing inferences from established facts, it was error to refuse defendant's proffered instruction on the distinction between direct and indirect evidence.

[6-8] Appellant's showing of prejudicial error with respect to the refused instructions must be held insufficient, under article VI, section 4½ of the California Constitution, to warrant a reversal. The first proffered instruction, on the duty to look carefully for approaching traffic, was objectionable, in that it singled out the plaintiff alone for application of the rule. The instruction that one is presumed to see that which is in plain sight had no particular application to the present case, as each driver admitted seeing the other vehicle. The instructions given by the trial court, when considered in their entirety, adequately covered the issues presented, including the questions of right-of-way, "immediate hazard", preponderance of evidence, burden of proof, negligence and contributory negligence. It cannot be said, in view of the entire charge to the jury, that a different verdict might have ensued had the proffered instructions been given or that the error, if any, resulted in a miscarriage of justice.

The attempted appeal from the order denying motion for new trial is dismissed.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

## WELLS v. WELLS.

Civ. 13035.

District Court of Appeal, First District, Division 1, California.

May 13, 1946.

Hearing Denied July 11, 1946.

1. Contracts ⇐147(1)

The function of all interpretation of contracts is to ascertain the true intent of the parties.

2. Evidence ⇐397(1), 455

Parol evidence should not be admitted to vary, to add to, or to subtract from the terms of a written agreement, but it is admissible to explain what the parties meant by what they said. Code Civ.Proc. §§ 1856, 1860.

3. Evidence ⇐450(5)

In action to recover money under written contract which appeared in first paragraph to be assignment of one-half salary earned by one contracting party from his present employment in consideration of $10 and "other valuable consideration," but which in second paragraph referred not only to present employment but also to future employment, parol evidence was admissible to show that contract was in fact a separation agreement and not an allegedly void wage assignment in violation of the labor code, since contract was ambiguous. Labor Code, § 300; Civ.Code, § 1405; Code Civ.Proc. §§ 1856, 1860.

4. Evidence ⇐419(11)

The true consideration for a contract may always be shown by parol evidence. Code Civ.Proc. §§ 1856, 1860.

5. Contracts ⇐169

Trial court, as an aid in discovering the intention of the parties to a contract, may look to the circumstances surrounding the making of the contract, including the object, nature and subject matter of the writing, and the preliminary negotiations between the parties, and thus place itself in the same situation in which the parties found themselves at time of contracting.

6. Contracts ⇐170(1)

Where a contract is ambiguous, a construction given to it by the acts and the conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court.

7. Contracts ⇐147(2)

In construing a contract court must give effect to the intention of the parties, where such intention is not wholly at variance with the correct legal interpretation of the terms of the contract.

8. Husband and wife ⇐281

In action by former wife against former husband to recover money allegedly due under terms of ambiguous written contract which wife contended was a separation agreement and which husband contended was a wage assignment void under the labor code, parol evidence was sufficient to sustain finding that the contract was a separation agreement whereby husband promised to pay wife, for her support and the support of their child, a sum of money to be measured by half of husband's earnings, not to exceed $150 a month. Labor Code § 300; Civ.Code, § 1045; Code Civ. Proc. §§ 1856, 1860.

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Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Marion R. Wells against Paul David Wells, also known as Paul D. Wells, to recover certain sums of money allegedly due plaintiff under the terms of a written contract entered into as part of what plaintiff claimed was a separation agreement. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

See also, Cal.App., 168 P.2d 73.

Dudley H. Nebeker and Girard N. Richardson, both of Oakland, for appellant.

Phil F. Garvey, of San Francisco, and Owen M. Gentry, of Oakland (Julia M. Easley, of San Jose, of counsel), for respondent.

PETERS, Presiding Justice.

Plaintiff, the former wife of defendant, brought this action to recover certain sums

of money allegedly due her under the terms of a written contract entered into as part of what the wife claims, and the trial court found, was a separation agreement. The trial court found that $1,194.35, plus interest, was due under the contract and entered its judgment in favor of plaintiff in that amount, plus costs. From this judgment defendant appeals, contending that while he executed the contract, the agreement is void in that it constitutes an agreement to assign to plaintiff his earnings from future employment, and therefore violates § 300 of the Labor Code. He urges that the agreement is clear and unambiguous and that the trial court erroneously admitted parol evidence to show that the agreement was actually intended to be, as found by the trial court, a separation agreement to provide for the support of the wife and the minor child of the parties. The parol evidence, if admissible, amply supports the findings.

The agreement in question was entered into in North Carolina and reads as follows:

"This Indenture, entered into this the 23rd day of October, 1937, by and between Paul David Wells, party of the first part, and Marion R. Wells, party of the second part; witnesseth:

"That for and in consideration of Ten ($10.00) Dollars and for other valuable considerations, the receipt of which is hereby acknowledged, the party of the first part does hereby assign to the party of the second part one-half of the monthly salary which he now earns as an employee or agent of the Charles R. Hadley Company, a corporation with its principal office and place of business at 330 North Los Angeles Street, Los Angeles, California. And the party of the first part does hereby promise and agree that on the 15th of each month hereafter, the party of the second part shall be paid the aforesaid one-half of his month salary, which one-half amounts at the present time to Ninety-Nine ($99.00) Dollars; and the party of the first part does hereby agree that on the 15th of each month hereafter or whenever the one-half of his monthly salary shall be paid during each month hereafter, that said one-half of his monthly salary shall not be paid to him by the aforesaid Charles R. Hadley Company, but shall be paid by the said Company direct to the party of the second part and that a check or other instrument of payment for the said one-half of the monthly salary of the party of the first part shall be mailed and sent by the aforesaid Company direct to the party of the second part or to any bank or trust company designated by her and that said check or other instrument of payment for one-half of the monthly salary of the party of the first part shall not in any event be mailed, delivered or sent to the party of the first part.

"It is the purpose and intent of this instrument to effect a complete assignment and transfer unto the party of the second part of one-half of any salary or wage which the party of the first part may earn during any month hereafter, and to this end, the party of the first part does hereby covenant and agree that not only shall one-half of the amount which he earns each month so long as employed by or representing the above named Company be paid to the party of the second part, but likewise and in the same manner one-half of such amount as the party of the first part may earn when employed by or representing any person, firm or corporation hereafter and one-half of such amount as the party of the first part may earn hereafter in any capacity shall be paid to the party of the second part.

"It is stipulated and agreed, however, that the amount to be paid hereafter to the party of the second part out of the salary, wages or earnings of the party of the first part, shall not in any event exceed the sum of One Hundred and Fifty ($150.00) Dollars per month.

"It is likewise stipulated and agreed that the amount to be paid to the party of the second part out of the salary, wages or earnings of the party of the first part, shall not at any time or in any month exceed one-half of the total salary, wages or earnings of the party of the first part during such period and in the event the salary, wages or earnings of the party of the first part shall hereafter be or become reduced, then and in that event, the amount

paid to and received by the party of the second part shall be proportionately reduced so that the amount received by and paid to the party of the second part shall at no time be more than one-half of the total salary, wage or earnings of the party of the first part.

"In witness whereof, the party of the first part and the party of the second part have hereunto set their hands and seals this the day and year first above written.

"(Signed) Paul David Wells (Seal)
"Marion R. Wells (Seal)

"Witness:
"(Signed) Alice C. Moore."

Although the agreement was executed in North Carolina neither of the litigants discusses, although the point was suggested at oral argument, the conflict of laws question as to whether North Carolina or California law should govern the interpretation and legal effect of the document. Both litigants assume and are apparently agreed that these matters should be governed by California law. In the balance of this opinion, based on this assumption and implied agreement, we will assume that these matters are governed by California law.

The defendant contends that the above quoted agreement is clear and unambiguous on its face; that it is a mere agreement to assign to plaintiff one-half of his wages from his present and any future employment; that at least as to the portion purporting to assign one-half of his future wages the agreement is void and unenforceable; that it was error of a most serious and prejudicial nature, and violative of the parol evidence rule, to have admitted the evidence upon which the trial court found that the agreement was in fact a separation agreement.

It may be assumed, without deciding, that if the agreement is a mere assignment of a portion of wages earned and to be earned from present and any future employment, it would be void and unenforceable, at least as to the purported assignment of wages from future employment. Labor Code, § 300; Civil Code, § 1045; Cox v. Hughes, 10 Cal.App. 553, 102 P. 956; Orkow v. Orkow, 133 Cal.App. 50, 23 P.2d 781.

The challenged evidence was admitted, over vigorous objections. It will be noted that the agreement does not even disclose that the contracting parties are husband and wife. It does not disclose that the parties were on the verge of a divorce, that they have a minor child, or that the purpose of the agreement was to provide for the support and maintenance of the wife and child. Nor does it disclose that the agreement was the result of a prior written offer submitted by defendant to plaintiff and accepted by her. It fails to disclose the true consideration, or the circumstances of the parties. These, and other facts, were shown by parol evidence. That evidence was to the effect that on October 23, 1937, the parties were husband and wife and that they had one minor child. The defendant was desirous of securing a divorce. In a letter addressed to his wife he admitted that he was the party at fault and that his wife was in no way at fault, and requested his wife to secure a divorce. In this letter he stated:

"I shall give you enough money each month to support yourself and Betty. I wish you would advise me how much you think would meet your needs * * *

"Whatever you wish to do with things in Calif. is all right with me. If you wish to sell the house O.K., if not, I'll take it over or you may have it * * *. Let me know * * * how much money you will need to live on, and I shall make arrangements for you." Subsequently, the parties met and talked over their proposed financial arrangements. Shortly before the contract above quoted was entered into the defendant, in writing, submitted the following offer to plaintiff:

"Will give—

"$100.00 per month alimony based on present income. If income decreases, alimony will be proportionately decreased. Will assign all rights, title and interest in real and personal property located in Calif., except coin collection and tools. Will assign $10,000 life insurance policy to my daughter, Betty Jane and pay the premiums on same provided I have an income sufficient to pay said alimony and insurance premium."

Plaintiff accepted this offer, and the agreement of October 23, 1937, was executed for the purpose of carrying part of this agreement into effect. Subsequently, the wife secured a divorce. At that time, in reliance on the agreement, she did not ask for alimony or maintenance or support for herself or for their child. As part of the transaction partially disclosed by the agreement of October 23, 1937, the husband assigned to his wife their equity in a house in the city of Alameda, California, and transferred to her personal property consisting of the furnishings in the house and an old automobile. He likewise named his daughter beneficiary of the insurance policy.

At the time the agreement was entered into the husband was employed by the Charles R. Hadley Company of California. He terminated his employment with that company in March of 1938. Immediately after the contract was signed, and starting November 15, 1937, and continuing to April 15, 1942, the husband made arrangements to have half of his salary deposited in the San Francisco Bank to the credit of his wife, and such sums were paid to her. Starting in May, 1942, appellant sent respondent monthly checks for $30 on which he indorsed the following: "This is written solely for the support of my daughter, Betty Jane Wells."

It is an admitted fact that respondent at no time treated the agreement of October 23, 1937, as an assignment, and that she at no time ever presented the document to any employer of appellant, or in any other way attempted to enforce it as an assignment. It is admitted that during the months appellant failed to make the payments provided for in the contract he was gainfully employed, and at the time of trial was still gainfully employed, by the United States Maritime Commission at salaries testified to by appellant. The amount found by the trial court to be due is correctly computed if the contract is enforceable.

There was some correspondence between the parties after the execution of the October 23, 1937, agreement. In a letter dated April 7, 1938, prior to the date the divorce was secured, and in which appellant urges respondent to secure the divorce as quickly as possible, appellant refers to the agreement of October 23, 1937, as "the separation agreement," refers to the supplementary arrangement relating to the Alameda property, and refers to sending respondent certain checks for an attorney's fee as being "in addition to the $99.00 each month as per the terms of the agreement." He then discusses the possibility of respondent securing a separate maintenance decree in place of a divorce, and states: "You say that each of these attorneys have advised you to sue for separate maintenance. That is absurd that they should so advise you because in the first place it would only be thrown out of the courts on the basis that you had a separate agreement that had not been breached by anyone except yourself, and which was far more liberal than a separate maintenance judgment which any court would have allowed you." He then states that even if respondent secured a separate maintenance decree she could not collect under it. He concludes that he has no intention to refuse "to support you and Betty," but that she should get a divorce at once, in which event "I shall do everything in my power to see that you and Betty get the support I have agreed to give you * * *. If you have ever been sincere in your promises, or have accepted the separation agreement in good faith, here is your chance to show it." On other occasions, and in other correspondence appellant referred to the transaction as a separation agreement.

Based on this evidence the trial court found that the agreement of October 23, 1937, was made, executed and delivered for the purpose of providing for the support and maintenance of respondent and the minor child of the parties; that such agreement was made, executed and delivered for the purpose of settling the property rights of the parties; that such contract was not an assignment of wages, salary or earnings and was not intended by the parties to be such; that there was $1,194.35 due under the contract.

The appellant assumes that the above quoted agreement is clearly an agreement

for the assignment of wages, and argues that where a contract is clear on its face it is error to admit parol evidence for the purpose of ascertaining the intent of the parties. There has been much written on this subject and it is quite apparent that there is some difference of opinion among the members of the Supreme Court of this state on this issue. See Universal Sales Corp. v. Cal. etc. Mfg. Co., 20 Cal.2d 751, concurring opinion p. 776, 128 P.2d 665, 679; In re Estate of Rule, 25 Cal.2d 1, dissenting opinion p. 17, 152 P.2d 1003, 1011, 155 A.L.R. 1319, see, also, Ermolieff v. R. K. O. Radio Pictures, 19 Cal.2d 543, 122 P.2d 3; see, also, an article by James P. McBaine entitled "The Rule against Disturbing Plain Meaning of Writings," 31 Cal.Law Rev. 145; an article by Oliver Wendell Holmes entitled: "The Theory of Legal Interpretation," in 12 Harvard Law Rev. 417; 9 Wigmore on Evidence, 3rd Ed., §§ 2458–2478. Much can be said in support of the rule that parol evidence is not only admissible to explain an ambiguity appearing on the face of the document but is also admissible to show that what appears to be a perfectly clear agreement, in fact meant something entirely different to the parties. This seems to be the theory of our statutory law. Section 1856 of the Code of Civil Procedure provides that except in the cases of mistake or imperfection of the agreement, or where the validity of the agreement is in fact in dispute "no evidence of the terms of the agreement other than the contents of the writing" is admissible, but that "this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty." Section 1860, without limitation, provides: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

[1, 2] The function of all interpretation is, of course, to try to ascertain the true intent of the parties. Parol evidence should not be admitted to vary, to add to, or to subtract from the terms of a written agreement, but it should be, and is admissible, to explain what the parties meant by what they said.

[3-7] We do not find it necessary to determine whether the limited or the more liberal rule is in force in this state. This is so, because, in the instant case, even under the most limited rule, parol evidence was admissible to interpret the contract. The first sentence of the agreement refers to "other" valuable considerations." It is elementary, of course, that the true consideration may always be shown by parol. The parol evidence shows that the true consideration was that these parties were husband and wife and that this agreement was in fact part of a separation agreement. When the true consideration is once shown the ambiguous nature of the document at once appears. The first paragraph appears to be an assignment of one-half the salary earned by one contracting party from his present employment. The second paragraph refers not only to present employment but also to future employment and also to "one-half of such amount as the party of the first part may earn hereafter in any capacity." This apparently applies to earnings other than from present and future employment, and itself creates an ambiguity. The third paragraph fixes the maximum payment at $150 a month, while the fourth paragraph fixes the rights of the parties in the case of a reduction in the earnings of Paul Wells. When it is once disclosed that this contract was in fact drafted as part of a separation agreement it is quite apparent that the agreement is ambiguous in that it is not clear whether it only provided for an assignment, which it may be assumed was in part unlawful, but also contained the agreement of appellant to pay respondent one-half of his wages or earnings for her support. Parol evidence, even under the most limited rule, was admissible to explain this ambiguity. The rules applicable to such a situation were clearly stated in Universal Sales Corp. v. Cal., etc., Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665, 671, as follows: "As an aid in

discovering the all-important element of intent of the parties to the contract, the trial court may look to the circumstances surrounding the making of the agreement [citing many authorities], including the object, nature and subject matter of the writing [citing three authorities], and the preliminary negotiations between the parties [citing two authorities], and thus place itself in the same situation in which the parties found themselves at the time of contracting. [Citing four authorities.] Also applicable here is the familiar rule that when a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court. [Citing two authorities.] The reason underlying the rule is that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties upon the instrument is the best evidence of their intention. [Citing two authorities and quoting from another.]"

[8] Measured in the light of these fundamental rules of construction it is at once apparent that the fundamental finding of the trial court that the agreement was a separation agreement by which appellant intended to and did promise to pay to respondent for her support and the support of their child a sum of money to be measured by one-half the husband's earnings, but not to exceed $150 per month, is amply supported by the evidence. It is also quite apparent that what the parties did was to use the form of an assignment simply to fix the extent of the parties' rights, but such form in no way detracts from the fundamental purpose of the agreement which was to give the wife a promise of a certain sum each month as support money. The evidence establishes without conflict that there were prior negotiations between these parties. By letter the appellant promised respondent to give her "enough money each month to support yourself and Betty." Not a word about an assignment is to be found in that letter. Then appellant, in writing, submitted an offer to respondent which she accepted. That offer was to pay respondent $100 per month "alimony based on present income," and to give the real and personal property of the parties to respondent, and to "assign" a life insurance policy to the daughter. No mention of an assignment of wages is to be found in that offer. The agreement of October 23, 1937, was executed to carry a portion of this agreement into effect. The evidence then shows that neither party treated the agreement as an assignment of wages. It was never delivered by respondent to any employer of appellant. Respondent made no claim under it as an assignment. Appellant, months after the execution of the agreement, and while he was paying to respondent the amounts called for by the agreement, by letter, referred to the agreement not as an assignment but as a separation agreement and states that he would see to it that respondent and his daughter "get the support I have agreed to give you." In the light of this evidence is there any doubt at all that the agreement of October 23, 1937, constituted a binding contract by which appellant agreed to pay respondent one-half his salary earnings, not to exceed $150 per month, for her support and the support of the child of the marriage? It is perfectly clear that the agreement was not solely an assignment and never intended as such, but that such form was used simply to designate in a somewhat awkward fashion the extent of appellant's liability. The findings of the trial court are amply supported.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

74 Cal.App.2d 487

## PEOPLE v. CHENAULT.

Cr. 573.

District Court of Appeal, Fourth District, California.

May 15, 1946.

**1. Witnesses ⇐359**

To impeach witness by showing his previous conviction of felony, denied by him, proper practice is to produce copy of judgment of conviction. Code Civ.Proc. §§ 2051, 2065.

**2. Criminal law ⇐656(2), 730(3)**

A prosecuting attorney's question to defendant, who testified that he had not been convicted of felony, as to whether he escaped from jail while serving term therein during portion of probation granted him, and continual reiteration of questions to defendant by attorney and trial judge as to conviction and overruling of objections thereto, were improper, though trial court sustained objection to, and instructed jury to disregard, question as to such escape.

**3. Witnesses ⇐246(2, 4)**

A trial judge may seek to clarify fact or elicit truth from witness fairly and by proper questions on cross-examination, but unusually long cross-examination on matter not competent or material to issues and tending to prejudice defendant, in jury's eyes is improper.

**4. Criminal law ⇐363**

A person's declarations, made at time of transaction concerning his connection with which witness is questioned and expressing its character, motive, or object, are regarded as verbal acts, indicating present purpose and intention, and hence are admissible in evidence like other material facts under exception to hearsay rule.

**5. Criminal law ⇐412(1)**

Testimony as to defendant's statements two days before alleged crime that he was going to another city than that in which crime was committed was admissible in support of defendant's alibi under exception to hearsay rule.

**6. Criminal law ⇐784(7)**

An instruction that circumstantial evidence was competent and entitled to same weight as direct testimony, if it excluded every other reasonable hypothesis than defendant's guilt of crime charged, and that fact that evidence or portion thereof was circumstantial was immaterial, if jury believed from evidence that circumstances pointing to defendant's guilt were proved beyond reasonable doubt and excluded every reasonable hypothesis except guilt, was erroneous as not fully embodying rule that, to justify conviction on circumstantial evidence, circumstances must not only be consistent with guilt, but inconsistent with any other rational conclusion.

**7. Criminal law ⇐552(3), 784(1)**

To justify a conviction on circumstantial evidence alone, circumstances must be not only consistent with theory of defendant's guilt, but inconsistent with any other rational conclusion, and defendant is entitled to adequate instruction embodying such rule.

**8. Criminal law ⇐775(2)**

Where only defense was that defendant was in another city than that in which crime charged was committed at time thereof, he had right to have jury instructed on such issue.

**9. Criminal law ⇐814(8)**

The trial court should refuse instruction to jury on any theory unsupported by evidence, but defendant is entitled to instruction based on theory of his defense, if instruction correctly states law and defense is supported by evidence.

**10. Criminal law ⇐775(2)**

Refusal of defendant's requested instruction to acquit him, if jury had reasonable doubt as to his presence near scene of alleged crime after considering all evidence, was erroneous, though such instruction did not contain element respecting accomplices, where jury was instructed to convict defendant, if they believed from evidence beyond reasonable doubt that crime charged was committed by defendant, either personally or by standing by, aiding and abetting, or assisting or encouraging commission thereof.

**11. Criminal law ⇐761(6)**

In prosecution for entering store with intent to commit theft therein, instruction to jury that such intent at time defendant entered building, though essential element of burglary, may be inferred from circumstances or conduct of person making entry, was erroneous as assuming vital fact, denied by defendant, that he entered building.

**12. Criminal law ⇐761(15)**

An instruction to jury that inconsistent, false, or fabricated statements, made by defendant to peace officers for purpose of misleading, were admissible in evidence to show defendant's consciousness of guilt, was erroneous as assuming fact, as to which evidence was conflicting, that defendant made such statements.

**13. Criminal law ⇐1186(4)**

In prosecution for entering building with intent to commit theft, where evidence that defendant entered building or aided or abetted others in so doing was purely circumstantial, evidence of his guilt was not so strong and convincing as to require affirmance of conviction on ground that no miscarriage of justice resulted from improper instructions to jury or other errors complained of, though evidence of defendant's possession of stolen goods was substantial. Const. art. 6, § 4½.

**14. Criminal law ⇐1186(4)**

The phrase "miscarriage of justice", in constitutional provision barring reversal of conviction for errors not resulting in such miscarriage, does not mean simply that guilty man has escaped or that innocent man has been convicted, but is equally applicable where acquittal or conviction resulted from some form of trial wherein essential rights of people or defendant were disregarded or denied. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

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Appeal from Superior Court, Fresno County; Arthur Shepard, Judge.

Samuel Chenault, Jr., was convicted of entering a store with intent to commit theft, and he appeals.

Reversed and remanded.

John Said, of Fresno, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Robert M. Wash, Deputy Dist. Atty., of Fresno, for respondent.

GRIFFIN, Justice.

Defendant Samuel Chenault, Jr. (colored, aged 26), was charged with and convicted by a jury of entering the Singer Grocery Store in Fresno with intent to commit theft therein. A motion for new trial was denied. At the trial it was stipulated and established that the grocery store in question was burglarized sometime between 7 p. m. of November 21, and 10 a. m. of November 22, 1945, by a breaking of the rear door and that rolls of pennies, nickels and dimes, together with certain groceries, cigarettes, a radio, and ladies' wearing apparel were taken. The store proprietor identified articles of groceries received in evidence by the retail prices which he had written thereon.

Defendant came to Fresno from Los Angeles on Sunday evening, November 18, and claims that he was en route to San Francisco to see a sick cousin or uncle, but stopped over to see two lady friends. Sunday evening he saw a "Room for Rent" sign in a window, rented the room, and paid $7.50 for the first week.

According to the testimony of the proprietor (a Mr. Phillips, also colored and about 64 years of age), defendant brought with him a woman who was supposed to be his wife, and a man whom defendant said was his brother. He testified that the claimed wife stayed there with him Sunday and Monday nights and the brother stayed with him on Tuesday night; that on Wednesday night, Nov. 21, the day before Thanksgiving, at about 11 o'clock, defendant and the brother came to the house together and made two or three trips into the kitchen with packages and bundles under their arms; that the brother left and defendant retired; that defendant occupied a rear

bedroom and had kitchen privileges; that in order to get to the kitchen defendant had to go through the proprietor's room where he slept; that after defendant went to bed he, the proprietor, got up and went to the kitchen and saw a lot of groceries in a big box; that the next morning defendant took the groceries out of the box and stacked them on three separate shelves in the kitchen; that the ice box was also filled with food; that on Thursday morning, Thanksgiving day, while Phillips was preparing for church, defendant attempted to hook up a black radio to Mr. Phillips aerial; that he told defendant there was no need of two radios; that defendant said he would sell his radio then; that on that same morning defendant told Phillips "that he was a good man," and that he would pay him some more money on his room rent; that defendant then gave him $7.50 for another week's rent; that the money consisted of a roll of 50 dimes and some 50¢ pieces; that he became suspicious of defendant because he had missed a vibrator out of the top drawer of his dresser; that he called the police department at about 6 p. m. on Thanksgiving day; that an officer arrived and that he told him about missing the vibrator and showed him the groceries and $5 in dimes; that the officer got defendant out of bed and sent him to headquarters.

The officer testified that he questioned the defendant about the burglary of the Singer store and that at first defendant denied ever seeing the groceries but immediately thereafter stated that he had bought them from a man in Chinatown two or three days previously. Later, another officer interviewed defendant and defendant told him that when he was about 35 miles from Fresno, a white man, whom he did not know, sold him the groceries for $5 and took him and the groceries to the Phillips home. Defendant denied any knowledge of the burglary, about the radio, the ladies' clothing or the fresh meat found in the ice box. A search of defendant's room revealed a radio hidden under the bed, which radio was taken from the Singer store, and a box of ladies' clothing which was also taken from the same store. Finger prints found on a partly empty beer bottle in the same store were examined but there were found to be no clear prints, only "smudge spots."

Defendant took the stand and testified that when he arrived in Fresno on the morning of November 18, he went to the house of "Iola" and "Jennie"; that he did not know their last names; that he wanted to get a room; that he was going to San Francisco to see a sick cousin; that he would be back in about a week or ten days; that that afternoon he went to San Francisco in a car driven by a colored boy named "George"; that he did not know his last name; that when he arrived in San Francisco his cousin was dead; that he attended the funeral on Tuesday, November 20, but did not know just exactly where it was held; that he stayed one night in a hotel in San Francisco but did not remember the name of it; that he then went to Oakland and left for Fresno on Thanksgiving day, November 22nd, about 1:30 or 2 o'clock in the morning with "George"; that he arrived in Fresno about 10 a. m., saw Iola and Jennie on the street and then went to his room and saw Phillips and other people there having a "jamboree"; that Phillips made improper advances to him and threatened to get even with him; that about 30 minutes later the police came and accused him of burglary which he denied; that he had never seen the groceries until he arrived home and that the radio was being played by guests in the house; that he never talked to the police officers although they tried to get him to talk and admit the burglary; that he never slept in the room except the hour or two just before he was arrested on November 22nd. Defendant first denied that he had ever been convicted of a felony but later, after considerable cross-examination, admitted a prior conviction of robbery in the second degree and that he was granted five years probation. In rebuttal, the police officer testified that defendant never told him anything about being in San Francisco at the time of the alleged burglary. Mr. Phillips denied that any party was going on at his home on Thanksgiving day and said that defendant's story was "the biggest story ever told"; that when officer Baker came to the home defendant was in bed

with one Mary Allen and that when the officer questioned the defendant about the vibrator defendant said "he did not give a ——— if they put him in the penitentiary."

It is first claimed that prejudicial error was committed in the cross-examination of the defendant in respect to the prior conviction of a felony. A portion of the cross-examination on this subject is as follows:

"Q. (By Mr. Wash): By the way, have you ever been convicted of a felony? A. No.

"Q. Isn't it a fact, Mr. Chenault, that on May 28, 1942, you were found guilty of second degree robbery in the Superior Court of the County of Los Angeles? A. Beg pardon?

"Mr. Said: Just one moment, please. We object to that question, Your Honor, as already been asked and answered. The only question that he can ask this witness is whether or not he has been convicted of a felony and the answer has already been given. Counsel knows he cannot go any farther than that. He wishes to leave an impression with this jury that this man has been convicted of something that he was not convicted of, and I assign that as prejudicial misconduct."

The objection was overruled.

"* * * A. Well, I have never been convicted nowhere of a felony.

"Mr. Wash: Q. Isn't it a fact that on May 28, 1942, you were found guilty of robbery in the second degree? A. No. * * *

"Mr. Wash: Q. Isn't it a fact that you were granted probation for five years in that case? A. No."

Objection to the question was overruled and it was assigned as prejudicial misconduct.

"* * * Mr. Said: May we take a recess to look up the law? * * *

"Mr. Wash: Q. Isn't it a fact, as a result of the second degree conviction of robbery, you were granted five years probation with the first year in the county jail? A. No. * * *

"Mr. Wash: You still say no, it is not a fact while serving the jail term, a portion of that probation, you escaped from jail? A. No."

Objection thereto was made.

"The Court: That objection, on the basis of information furnished the court by the district attorney, must be sustained, the question relative to escape. * * *

"Mr. Wash: I am not alleging escape. Even if so, it would not be a felony, Your Honor. It is simply to prove he was incarcerated as part of it. * * *

"The Court: The jury will understand that the last question should not be given any consideration by the jury whatever. Wipe that from your minds entirely, the question of escape.

"Mr. Said: And let the record also show, Your Honor, that counsel has been purporting to read from some notes that he has on his desk. I assign that as prejudicial misconduct, and within a distance of four or five feet of the nearest juror.

"The Court: Mr. Said, in your presence I saw that telegram, and I can see nothing that the District Attorney should be accused of prejudicial misconduct. You and the District Attorney and the court all read that telegram together, and that is what he is reading. If there has been a mistake here, then there is a mistrial."

A motion for mistrial on that basis was denied.

Several pages of transcript were consumed in this line of examination and over objections. Later, the defendant was recalled by the court as a witness. The trial judge further questioned the defendant, over his counsel's objections. It was in part as follows:

"(By the Court). You understand what the word 'probation' means? A. No.

"Q. Have you ever been on probation? A. Yes, I have been on probation.

"Q. Then you understand what would be meant by it, don't you? A. Well, it is not a felony, is it?

"Q. Well, you answer it. I am not asking you about anything except the charge of robbery the District Attorney asked you about yesterday. A. Yes, sir, I understand.

"Q. Not referring to anything else at all. He asked you whether or not you had been convicted of a felony, and you answered that you had not; then he asked you whether or not you had not, on a certain date, been convicted of second degree robbery in the County of Los Angeles, and you answered that you had not. However, the court wanted there to be no misunderstanding about your answers, because of course if you answered a question like that untruthfully with full knowledge of what your answer meant and what the question was, then naturally you would be guilty of perjury, because you are under oath. Now, I want to be sure that you understood clearly what the question meant. Now, the word 'conviction' includes a plea of guilty. In other words, if you had pleaded guilty or were tried before a jury, it is the same thing; and if you pleaded guilty to second-degree robbery and were granted probation, the situation is still such that you have been convicted of a felony. A. Oh, I see.

"Q. You understand? A. Yes, sir. * * *

"Q. Now, with that explanation in mind —does that change your answer in any way? A. Well, I have been convicted of second degree robbery, yes, sir.

"Q. I see. A. But I did not plead guilty. I was found * * * guilty * * * by the court (and) * * * granted probation * * * for five years. * * *

"The Court: All right, I think that clears the whole matter up."

Thereafter, a motion for mistrial was denied. The defendant again argues that the court prejudiced the defendant in the eyes of the jury, gave him a veiled warning about committing perjury, and contends that the prosecutor had no right to cross-examine the defendant on the details of the claimed prior conviction after he had denied it; that the only proper procedure was to produce a certified copy of the alleged conviction, citing 70 C.J. 894, sec. 1097; 27 Cal.Jur. p. 142, sec. 118; People v. Chin Hane, 108 Cal. 597, 606, 41 P. 697; People v. David, 12 Cal.2d 639, 646, 86 P. 2d 811; People v. Pagni, 69 Cal.App. 94, 230 P. 1001; People v. Boggess, 194 Cal. 212, 228 P. 448.

[1] Section 2051 of the Code of Civil Procedure provides that a witness may be impeached by showing that he has been convicted of a felony either by an examination of the witness or production of the record of the judgment. A witness must answer as to his previous conviction of a felony. Sec. 2065, C.C.P. Where a witness denies the previous conviction, it is the usual and proper practice to produce a copy of the judgment of conviction. 27 Cal.Jur. p. 143, sec. 118. Where the defendant admits the prior felony conviction it has been held that the witness might be asked the name or nature of the particular felony and might be questioned with respect to the judgment. People v. Rodrigo, 69 Cal. 601, 11 P. 481.

In People v. Chin Hane, supra, and People v. David, supra, it is said: "Beyond this the examination should not go" [108 Cal. 597, 41 P. 700], and "details and circumstances comprising the prior offenses are not admissible" [12 Cal.2d 639, 86 P.2d 814].

In Johns v. State, 88 Neb. 145, 129 N.W. 247, where the statute involved was similar to ours, it was held that if the defendant testifies in his own behalf the county attorney may, on cross-examination, ask him whether he has been convicted of a felony, and, if the witness equivocates in his answer, the prosecutor, in good faith, may ask such additional questions as may be reasonably necessary to bring out the fact of that conviction.

The same question was presented in Denker v. State, 106 Neb. 779, 184 N.W. 945. There the defendant appeared as a witness for himself. It was held that he subjected himself to the same rules of cross-examination as any other witness to test or attack his credibility. The defendant denied prior conviction of a felony. The county attorney further cross-examined him and brought out the admission of a prior conviction and that he was sentenced to the penitentiary. This was held not to be prejudicial error.

On the other hand, it has been held that an attempt on the part of the prosecution

unduly to influence the jury by repeated and persistent questions to the accused as to his having been previously convicted of crime, where he denies such convictions and no competent evidence of any former conviction is introduced, is such a departure from legal methods and so prejudicial to the rights of accused as to call for a reversal of a judgment of conviction. People v. Elliott, 104 Cal.App. 107, 285 P. 401; 70 C.J. 888, sec. 1097.

[2, 3] The attorney general, in his brief, rightfully concedes that the prosecutor "probably did overstep the bounds of legal propriety" in asking the defendant: "You still say no, it is not a fact while serving a jail term, a portion of that probation, you escaped from jail?" Even though the trial court did sustain the objection thereto and instructed the jury to disregard the question of escape, the suggestion of such fact, under the circumstances here described, should not be condoned, and the continual reiteration of such questions and the overruling of objections bearing on such questions, it seems to us, went beyond the rule which allows a witness to be cross-examined on the question as to whether or not he has been convicted of a felony. The trial judge and prosecutor, no doubt, were acting in good faith in endeavoring to elicit the truth from the defendant in respect to the prior conviction and to clarify the misapprehension on the defendant's part as to the law in respect thereto. A trial judge may fairly and by proper questions seek to clarify a fact or to elicit the truth from a witness even in a criminal case, but where such cross-examination is of unusual length on a matter not competent or material to the issues, which has a tendency to prejudice the defendant in the eyes of the jury, courts condemn such procedure. Hughes v. Quackenbush, 1 Cal.App.2d 349, 359, 37 P.2d 99.

As the judgment in this case must be reversed on other grounds, on a retrial of the action the complaint here made that the bounds of cross-examination were overstepped will, no doubt, be avoided.

[4, 5] Defendant produced Iola Clayton as a witness in his behalf, who testified that she had known the defendant for more than three months; that she saw him on Sunday morning, November 18th, in Fresno, and had a conversation with him; that he said to her that "he was just coming from Los Angeles and he was on his way to San Francisco." The prosecution moved to strike the answer as to what the defendant said to this witness. The motion was granted. Thereafter, counsel for the defendant asked the witness whether or not defendant said anything to her about going to San Francisco. The witness replied: "Yes, sir, he did." She was then asked the substance of the conversation. Objection was made and sustained. A similar question was propounded to her as to whether or not she saw the defendant on Thanksgiving day in Fresno and whether Mr. Chenault told her where he had been during the past three or four days. Objection to this question was sustained. An offer of proof was made that Chenault told her he was going to San Francisco to see his sick cousin and the offer was rejected. The witness was further asked whether or not she saw defendant at any time between Sunday afternoon and Thanksgiving day. Objection was made to this question and was sustained.

It is now urged that the trial court committed prejudicial error in sustaining the objections to the questions propounded, citing People v. Fong Sing, 38 Cal.App. 253, 175 P. 911; People v. Silver, 16 Cal.2d 714, 108 P.2d 4; People v. Alcalde, 24 Cal. 2d 177, 148 P.2d 627; People v. Weatherford, Cal.Sup., 164 P.2d 753.

People v. Fong Sing, supra, was a murder case in which the defense was an alibi. Defendant claimed that he was not present at the scene of the homicide. He claimed that he was, at that time, on the premises of a Stockton Lumber Company. In support of his alibi he offered to prove by a third person that he had stated to him immediately preceding his departure that he was going to a certain lumber yard several blocks from where the deceased was slain. The trial court rejected this line of evidence on the ground that it was hearsay. The Supreme Court held such ruling to be erroneous and cited Mr. Greenleaf on "Law of Evidence" where it is said that

"When a person * * * leaves his house, * * * his declarations, made at the time of the transaction, and expressive of its character, motive, or object, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted in proof like other material facts." [38 Cal. App. 253, 175 P. 913.] This is an exception to the hearsay rule. This case was cited in People v. Silver, 16 Cal.2d 714, 108 P.2d 4; and People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627. (See, also, People v. Weatherford, supra.) Under the authorities cited, the court erred in its rulings. The proffered testimony was an exception to the hearsay rule.

[6, 7] The evidence against defendant was entirely circumstantial.

It is now claimed that it was prejudicial error to refuse to instruct, in substance, that when circumstantial evidence is relied upon it must be irreconcilable with the theory of innocence. In this connection the defendant offered, but the court refused, to give the following instruction:

"Where a conviction for a criminal offense is sought upon circumstantial evidence alone, the people must not only show, by a preponderance of the evidence and beyond a reasonable doubt, that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible upon any reasonable hypothesis other than that of the guilt of the accused."

And "If the facts, no matter how strong, can be reconciled with the theory that another may have committed the crime, the defendant should be acquitted."

The court did give the following instruction offered on behalf of the People:

"You are further instructed that circumstantial evidence is legal and competent in criminal cases; and if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is entitled to the same weight as direct testimony.

"And if you believe from the evidence beyond a reasonable doubt, that the defendant committed the crime as charged in the information, it matters not that such evidence, or a portion of it, is circumstantial, provided you believe from the evidence that such facts and circumstances pointing to the guilt of the defendant have been proved beyond a reasonable doubt, and are of such a character as to exclude every reasonable hypothesis except that the defendant is guilty."

The instruction, as given, bore upon the question, but did not fully and entirely embody the rule that, to justify a conviction, the circumstances must not only be consistent with the theory of guilt, but must be inconsistent with any other rational conclusion. Where the evidence is purely circumstantial, the defendant is entitled to an adequate instruction embodying such rule. People v. Hatchett, 63 Cal.App.2d 144, 146 P.2d 469. And it has been said that the defendant, upon request, is entitled to a special instruction thereon. People v. McClain, 115 Cal.App. 505, 1 P.2d 1085.

In People v. Bender, Cal.Sup., 163 P.2d 8, the Supreme Court held that in every criminal case wherein circumstantial evidence is received, the trial court should, on its own motion, give an instruction that, to justify a conviction, the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion. In that case it was held that the instruction given on the subject was proper as far as it went but that there should have been added a direct statement of the precise principle under discussion, and held that the failure to give a complete instruction on the subject, although error, was not ground for a reversal. It therefore must be held here that the failure of the trial court to give an adequate instruction on that subject was error.

[8, 9] It is next argued that the court committed reversible error in refusing to give the following instruction:

"I instruct you that if, after considering all the evidence in this case, you have a reasonable doubt as to the presence of the defendant near the scene of the alleged crime, then you should acquit the defendant."

The main and only defense of the defendant in the instant case was that he was in San Francisco at the time of the alleged

offense. He had the right to have the jury instructed on the issue. The court, in refusing this instruction, made a notation: "Not good law * * * could have aided and abetted without being present." The trial court should refuse to give an instruction as to any theory which is not supported by the evidence, but a defendant is entitled to an instruction based upon the theory of his defense, provided such instruction correctly states the law and the defense is supported by evidence. People v. Gallagher, 107 Cal.App. 425, 290 P. 504. It has been held to be reversible error for the court to refuse to give the jury an instruction on alibi. People v. Garrett, 93 Cal. App. 77, 268 P. 1071.

[10] While it is true that this instruction did not contain the element respecting accomplices, an instruction on that subject was given informing the jury that if they believed from the evidence beyond a reasonable doubt that a burglary was committed as charged and that the defendant committed the same by entering the building mentioned or by standing by, aiding and abetting, assisting or encouraging the commission of the crime, then it was the duty of the jury to find the defendant guilty as charged. The court should have given an instruction dealing with that issue. People v. Wong Loung, 159 Cal. 520, 114 P. 829; People v. Garrett, supra; People v. Wilson, 100 Cal.App. 428, 280 P. 169; People v. Spraic 87 Cal.App. 724, 262 P. 795.

[11] It is next argued that the trial court committed prejudicial error in giving two instructions offered by the People which in effect charged the jury on questions of fact and invaded their province. The People offered this instruction:

"The court further instructs you that though the intent to commit theft within the said building *at the time the defendant entered therein* (Italics ours) is an essential element of the offense of burglary, the existence of such intention may be and usually must be inferred from the circumstances and conduct of the person making the entry.

"The commission of an offense is strong, but not conclusive evidence that the entry was for that reason; * * *."

This instruction was marked "Not applicable under testimony here," but was inadvertently placed in the file and was read to the jury as above quoted. The portion of the foregoing instruction which we have italicized does assume a vital issue of fact. Defendant's whole defense was that he never entered the store. The instruction, as given by the court, assumes that the defendant entered therein, and in fact told the jury so. The error is manifest. People v. Messersmith, 61 Cal. 246; People v. Matthai, 135 Cal. 442, 67 P. 694; People v. Kinowaki, 39 Cal.App.2d 376, 381, 103 P. 2d 203.

[12] The second instruction complained of recites:

"You are instructed that inconsistent, false or fabricated statements *made by the defendant to peace officers* (italics ours) for the purpose of misleading * * * are therefore admissible in evidence for the purpose of showing a consciousness of guilt by the defendant."

This instruction has the same vice noted in the preceding instruction. The instruction assumes that inconsistent, false, or fabricated statements were made by the defendant to peace officers. The peace officers claimed certain statements were made to them by the defendant. The defendant denied making them. There was therefore a conflict in the evidence on this subject, and the question whether they were false or fabricated was for the jury to determine.

[13, 14] It is finally argued by the People that the evidence of defendant's guilt in the case was so strong and convincing that no miscarriage of justice resulted from the giving of the instructions or from the errors complained of. While the evidence that defendant was found in the possession of the stolen goods is substantial, the fact that he entered the building or aided and abetted others in so entering, is purely circumstantial, and we are convinced that Article VI, section 4½ of the Constitution has no application. See People v. Weatherford, supra, where it is said [164 P.2d 763]:

"The phrase 'miscarriage of justice'", within the meaning of the Constitution, (Article VI, section 4½) "'does not simply

mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied.'"

The defendant should have a new trial.

Judgment and order reversed and cause remanded for a new trial.

BARNARD, P. J., and MARKS, J., concur.




74 Cal.App.2d 623

**ZIMMERMAN et al. v. YOUNG.**

Civ. 3380.

District Court of Appeal, Fourth District, California.

May 24, 1946.

**1. Easements ⇐22**

The recordation of map showing contract right of easement was evidence of notice to purchasers of servient estate of the claimed easement and was circumstance tending to put them on inquiry as to the state of the title at the time of their purchase of servient estate.

**2. Easements ⇐22**

The express right to have conveyed, to the vendee named in a contract of purchase, an easement for road purposes, was as potent against a purchaser of the servient estate with notice of the grant of the right of way, or of the use of the way, and with knowledge of facts sufficient to put him on inquiry concerning it, as would be a conveyance of the right of way, so long as the right was in existence.

**3. Easements ⇐36(3)**

In action to quiet title to land over which defendant claimed an easement for road purposes, evidence sustained finding that easement was not abandoned by use of other means of access across neighbor's property for a number of years.

**4. Easements ⇐53**

The right to use property for road purposes carries with it a right to make necessary and reasonable improvements for the purpose for which it was intended.

**5. Easements ⇐36(3)**

In action to quiet title to land over which defendant claimed an easement for road purposes, evidence that defendant graded road, and caused a cut of a few feet to be made and a fill of like depth, did not show that burden on servient estate had been unreasonably increased, resulting in irreparable injury thereto, which would forfeit the easement on ground that use was greater than purpose for which it was created.

**6. Easements ⇐36(3)**

In action to quiet title to land over which defendant claimed an easement for road purposes, evidence that contract of sale under which defendant claimed created a right to an easement for road purposes, that contract, as between the parties, was still in force, that subsequent purchaser of servient estate had actual, as well as constructive, knowledge of the contract right of easement, as shown by recorded map, sustained determination in favor of defendant on his cross-complaint.

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Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action to quiet title by Wayne A. Zimmerman and another against Clyde Young, wherein defendant filed a cross-complaint. Judgment upon the cross-complaint in favor of defendant, and the plaintiffs appeal.

Affirmed.

Ernest W. Pitney, of Los Angeles, for appellants.

J. Dean La Motte, of Oceanside, for respondent.

GRIFFIN, Justice.

This is an action to quiet title to a triangular strip of property consisting of ½ of an acre over which defendant claims a 20-foot easement for road purposes. Plaintiffs and cross-defendants appealed from a judgment upon the cross-complaint

in favor of defendant and cross-complainant. One Houston, prior to 1935, owned a tract of land near Vista. It was surveyed, subdivided and sold and was mapped by a licensed surveyor. The map, No. 486, was recorded in the Recorder's office on January 11, 1935, and recites: "I hereby certify that this map is a true and correct representation of an actual survey made by myself at the request of Dr. C. R. Geith, Wm. M. Houston and Wayne A. and Marion A. Zimmerman, the legal owners of this property, that it truly represents conditions found upon the ground and that I have found or set all points as hereon shown." This map clearly shows the 20-foot road easement here in dispute. Defendant Young, and Houston executed a written contract of sale, as of January 3, 1935, for the purchase, by Young, of a 13.28 acre parcel of this subdivided tract of land. The written contract provided for a deferred payment plan for the purchase price of $1542.80, payable $750 on or before September 1, 1935, and $792.80 on or before September 1, 1936, with interest at 7 per cent, payable quarterly. It further provided that: "Time is declared to be the essence of this contract and should the buyer fail or neglect to make said deferred payments, or any of them, or to pay any of said indebtedness at the times and in the manner herein provided, then, and in that event, this receipt and contract shall be and become at once null and void * * * Seller shall be at once released from any and all obligations at law or in equity to make any conveyance hereunder or to convey the property described to said buyer * * * buyer herein does hereby expressly waive any right to demand or receive from the seller, notice to pay * * * or notice of declaration of forfeiture * * * seller, on receiving such payments, * * * agree to furnish to the buyer a policy of title insurance * * * as of such date, showing title to said premises to be vested in William R. Houston, * * * and the seller further agrees at such time to execute and deliver to the buyer * * * a good and sufficient deed."

The contract was never acknowledged or recorded but it was found by the trial court that it was at all times in force and effect and payments were being made upon it. The contract, as pleaded, shows that on September 9, 1935, there was paid $18 on account of interest; on November 29, 1935, $300 on principal; on December 3, 1935, $27 on interest in addition to $98 on the principal; and on December 4, 1935, $202 on the principal. Although there were several payments on interest every few months thereafter, there was no further payment on principal until August 31, 1943. On September 1, 1944, $1301.24 had been paid on the principal in addition to the payments of interest. This action was filed on September 14, 1944.

The easement in question runs along the north boundary of plaintiffs' premises, i. e. the 4.10 acres, which they purchased from Houston, the common grantor, prior to 1935. On July 27, 1936, Zimmermans secured title from Houston, by recorded deed, to the triangular strip of property (½ acre) bordering their 4.10 acre tract. (The easement runs over the ½ acre strip.) No mention is made in the deed of the right of way set out in the previous contract between Young and Houston. It does, however, contain a clause: "Subject to taxes * * * and rights of way of record."

The record is clear that plaintiffs had knowledge of the existence of the claimed easement, not only from the recorded map but from conversations had with defendant and with Houston prior to the time they purchased or negotiated for the purchase of the narrow strip from Houston in July, 1936.

Mr. Zimmerman did not want the roadway so near his house. (It was about 30 feet from the boundary of his premises.) Consequently, he began negotiations with Houston, sometime before July, 1936, to purchase approximately one-half an acre of rocky land lying directly north of his 4.10 acres, the land burdened with Young's claimed easement. It was worthless for any practical purpose and was purchased for $62.50. Houston refused to furnish a certificate of title. The purchase apparently was made for the purpose of attempting to acquire a prior recorded title to Young's claimed easement. It is now claimed by

plaintiffs that they had no notice of the terms of the unrecorded contract of sale between Houston and Young or of the claimed easement over the ½ acre strip prior to the recordation of their deed. It is further claimed that Young, at the time plaintiffs' deed was recorded, was in default in his payments on his contract and that by its terms Young had forfeited any right he might have had under the contract, i. e., that the contract provided for a payment of $750 on or before September 1, 1935, and that according to the contract endorsements of payment, only $18 in interest had been paid on that date; that the contract rights of Young were automatically forfeited under its terms and that Houston had the right to deed the ½ acre to plaintiffs free and clear of such easement.

As we see it, the main question involved is whether Young's contract right of easement was valid and enforceable by the parties to it, at the time plaintiffs purchased the 1/2 acre, and if so, were plaintiffs possessed of sufficient facts to put them on inquiry as to Young's claim of easement.

[1, 2] Plaintiffs also argue that the licensed surveyor's map, even though recorded, was not sufficient to create an easement for road purposes. This does not appear to be the question involved. It is defendant's position, with which we agree, that the contract of sale between Houston and Young created an easement dependent upon the fulfillment of the terms of the contract, as agreed upon between the parties and that the recordation of the map showing the easement contracted for was evidence of notice to plaintiffs of Young's claimed easement and was one of the circumstances tending to put them on inquiry as to the state of the title at the time of their purchase of the ½ acre. The express right to have conveyed to defendant an easement for road purposes, as set forth in the contract of purchase, is as potent against a purchaser with notice of the grant of the right of way, or of the use of the way, and with knowledge of facts sufficient to put him on inquiry concerning it, as would be a conveyance of the same, so long as the right is in existence. Pollard v. Rebman, 162 Cal. 633, 124 P. 235; Bryan v. Grosse, 155 Cal. 132, 99 P. 499; Lemos v. Farmin, 128 Cal.App. 195, 17 P.2d 148; Taylor v. Ballard, 41 Cal.App. 232, 182 P. 464; Beard v. Morgan, 143 Neb. 503, 10 N.W.2d 253.

Bearing upon the question whether plaintiffs had notice of facts pertaining to the contract of sale affecting the easement across the ½ acre, it should be here noted that the defendant was in actual physical possession of the land conveyed by the contract since the date of its execution. Lemos v. Farmin, supra. When the tract was originally laid out, an easement was shown on the map of the subdivision. Of this, plaintiffs had actual knowledge.

[3] As the grading of the easement at that time would have involved considerable difficulty, due to a cut through a rocky hill, a temporary road was constructed around the hill through a neighbor's land. Defendant was licensed to use this road for several years but when relations over the right of way here involved became strained, the neighbor revoked such license and refused the defendant permission to pass over the temporary route crossing his property. Defendant now contends that he has no other course of ingress to or egress from his property unless he can use the easement granted under his contract of sale. Accordingly, he entered and graded the road over the 20-foot strip and caused a cut of a few feet to be made and a fill of like depth. A small apple tree and some shrubs were removed from the right of way. The tree had been planted there by plaintiffs after defendant notified them that he was claiming the right of way, and advised them against such planting. In this connection it is argued by plaintiffs that defendant abandoned the former right of way by using the other means of access across the neighbor's property for so many years.

The trial court in his oral opinion stated that there had been no abandonment, but did not (directly) find that there had been no abandonment. On the contrary, he did indirectly find that fact because it was found that the contract was valid and en-

forceable to convey the easement described. The evidence supports the finding. Taylor v. Ballard, supra.

[4, 5] It is then stated that if the right to said easement is upheld defendant had no right to cut a roadway, as indicated, through the hill and place the dirt therefrom in a fill; that he was only permitted to use it for "road purposes" as set forth in the contract, in its natural contour, and that therefore the easement was forfeited because the use was greater than the purpose for which it was created, citing Fletcher v. Stapleton, 123 Cal.App. 133, 10 P.2d 1019.

The right to use the property for road purposes carried with it a right to make necessary and reasonable improvements for the purpose for which it was intended to be used. The evidence does not show that the burden on the servient estate has been unreasonably increased, resulting in irreparable injury thereto. No damages were allowed nor was an extinguishment of the easement declared by reason of that fact.

[6] Summarizing the questions presented, the Houston-Young contract created *a right to an easement for roadway purposes.* The contract, as between those parties, was and is still in force and effect, and neither has elected to rescind nor repudiate it. Zimmerman, from his own admissions, and from the undisputed record, had actual, as well as constructive knowledge of the contract right of easement in Young at the time he purchased the ½ acre and he had actual notice of facts and circumstances sufficient to put a prudent man upon inquiry. The finding of the trial court to this effect and that defendant had a contractual right to such easement is fully supported. If the contract is not fulfilled, and by reason thereof becomes ineffective, and the seller exercises his right of forfeiture under it, then a different question might be presented as to plaintiffs' right to the ½ acre tract, unburdened by such easement.

Judgment affirmed.

BARNARD, P. J., and MARKS J., concur.

74 Cal.App.2d 474

**PORTER et al. v. THOMPSON et al.**

**Civ. 7222.**

District Court of Appeal, Third District, California.

May 14, 1946.

**1. Animals ⇐67**

In determining whether cattle auctioneers were guilty of negligence which proximately caused injuries to prospective purchaser who was attacked by cow brought in for sale, question to be determined was what would a reasonably prudent person be required to do, under circumstances, for protection of his invited customers.

**2. Appeal and error ⇐1015(1)**

In action for injuries sustained by prospective purchaser at an auction sale of cattle when a cow seeking to escape jumped over a fence landing on plaintiff who was seated on a seat placed for spectators, whether defendant provided a reasonably safe inclosure by providing a fence four feet eight inches high with a sagging upper cable and provided the inclosure with reasonably competent attendants were questions for the trial court to consider on plaintiff's motion for new trial after verdict for defendants.

**3. Appeal and error ⇐977(3)**

In suit for personal injuries District Court of Appeal could not hold as a matter of law that trial judge abused his discretion in granting a new trial merely because he disagreed with jury regarding defendants' exercise of ordinary care where there was serious conflict of evidence upon that subject.

**4. Animals ⇐67**

Where plaintiff was a prospective purchaser of cattle at an auction sale being conducted by defendant, defendant had duty to exercise reasonable care to maintain supervision, a reasonably safe inclosure and seats for customers so that they would not be injured by cattle attempting to escape from the inclosure.

**5. Negligence ⇐32(2)**

An "invitee," as distinguished from a mere "licensee," is one who enters the

premises where injury occurs for the purpose of mutual interest to himself and the owner or occupant of the property.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee" and "Licensee".

**6. Appeal and error ⇐979(2)**
**New trial ⇐6**

Trial court has a wide discretion in granting or denying a new trial, which may not be disturbed on appeal except for manifest abuse of that discretion, especially when motion for new trial is granted by same judge who tried case, even though there be a conflict of evidence upon essential issues involved, unless it clearly appears that evidence would not support a judgment for prevailing party on the motion.

**7. New trial ⇐72**

Trial judge has ultimate duty, in interest of justice, to determine whether verdict is in accordance with weight of evidence, and to grant a new trial when he is conscientiously of the opinion that it is not in accordance therewith.

**8. New trial ⇐68**

In action for injuries sustained by prospective purchaser at an auction sale of cattle when a cow seeking to escape jumped over a fence landing on plaintiff who was seated on a seat placed for spectators, a verdict for defendants was contrary to the evidence and the trial court did not abuse its discretion in granting plaintiff a new trial.

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Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

Action by Doss Porter and another against Clint Thompson, also known as O. C. Thompson, and another for personal injuries. From an order granting plaintiffs' motion for a new trial after a judgment for defendants, defendants appeal.

Affirmed.

J. W. Hawkins, of Modesto, for appellants.

Myron Moyle, of Modesto, for respondents.

THOMPSON, Justice.

The defendants have appealed from an order granting a new trial, after judgment was rendered in their favor pursuant to the verdict of a jury. The suit was for damages for personal injuries received by the plaintiff, Marie Porter. She sustained a broken leg and ankle as the result of a fractious cow jumping the fence of an enclosure adjacent to which said plaintiff sat upon a bleacher. She was present as a prospective purchaser at an auction sale conducted by the defendants. The enclosure and seats were maintained by the defendants. Mrs. Porter was an invitee at that sale. The defendants were charged with negligence in failing to provide a reasonably safe enclosure and adequate supervision for the protection of the customers. The new trial was granted on the ground, among others, of the insufficiency of the evidence to support the verdict and judgment.

For several years the defendants had owned and operated an auction business near Modesto for the purpose of selling cattle. For that purpose they maintained a corral near a building within which they constructed an enclosure 15 by 30 feet in size for exhibition of the cattle for sale. It was built with heavy posts firmly set in the ground, 7½ feet apart. On the inside of the posts base timbers were nailed, above which there were two 12 inch planks. These timbers extended upward from the ground about 30 inches. Above the planks three one-half inch wire cables extended about 6 inches apart through auger holes bored in the upright posts. The upper cable was placed only 4 feet and 8 inches from the ground, and it sagged several inches between the posts. There were two gates opening into separate lanes leading from the enclosure to the corral on the outside of the building. These lanes were fenced on either side. One gate was used for the cattle to enter, and the other for their exit. Close to the inner enclosure there was constructed, on two sides thereof, three rows of seats for the use of customers. The seats were built on ascending elevations from front to rear, like "bleachers."

On June 7, 1943, the plaintiff, Marie Porter, and her husband, Doss Porter, left a bull with the defendants for sale. Later that day, Mrs. Porter entered defendants' building and sat adjacent to the enclosure on the second row of seats, as a prospective purchaser of a cow. Two or three attendants and the defendant, Clint Thompson, were present. A cow was brought into the enclosure for inspection and sale, and the gates were closed. The cow was nervous and became frightened. It ran frantically about the enclosure, and approaching "upon the dead run," to the side upon which Mrs. Porter sat, it "jumped over" the upper cable, landing upon her, violently striking and pawing her, as a result of which she sustained a broken leg and ankle, a dislocated foot, numerous bruises, and other serious injuries. In scrambling for a foot-hold, to get over the cable, the cow broke the upper plank of the fence. The board upon which Mrs. Porter sat was broken and she was hurled to the ground. She was subsequently removed from the building.

When the cow went on a rampage, instead of opening the gate for it to escape, or attempting to otherwise protect the spectators, the attendants "got out of there as quick as possible." The defendant, Clint Thompson, admitted that he was present on an occasion about a year and a half before this incident, and saw another cow escape from the enclosure by going over or through the fence "between the cables."

At the conclusion of the trial the jury rendered a verdict in favor of the defendants, finding that they were "not guilty of negligence." A judgment was rendered accordingly. A motion for new trial was granted on the specified ground of insufficiency of the evidence to support the verdict. From that order this appeal was perfected.

In support of the order granting the new trial, the respondents challenge, as erroneous, two instructions which were given to the jury at the request of the defendants upon the subject of "latent or concealed perils." In view of our subsequent conclusions it does not appear to be necessary to pass upon the relevancy or accuracy of those instructions.

The chief contention of the appellants is that the court abused its discretion in granting a new trial since the uncontradicted evidence clearly shows that they were not guilty of negligence, and that they had no knowledge of the fact that the cow in question was nervous or dangerous to the spectators.

[1] In determining whether the defendants were guilty of negligence which proximately caused the injuries complained of, it was the duty of the jurors, and the trial judge upon the motion for new trial, to consider all of the proved facts and circumstances surrounding the incident. The question to be determined is, what would a reasonably prudent person be required to do, under such circumstances, for the protection of his invited customers. The fact that the defendants did not actually know that the particular cow in question was fractious, nervous or dangerous does not necessarily acquit them of negligence on that score. They were expert auctioneers of cattle, who had been in that business for several years. They had handled and sold hundreds of cows. We must assume that some of the animals were likely to become fractious, irritable, nervous and dangerous. The defendants handled and sold cattle which we assume had various temperaments, tendencies and natures. On a former occasion another fractious cow broke through the enclosure. It is not unreasonable to assume that the defendants should have anticipated that some of the cows would become uncontrollable and resort to dangerous behavior when driven into the small enclosure in the presence of spectators. Since it was the duty of the defendants to provide a reasonably safe enclosure, it is a proper inquiry as to whether a fence 4 feet 8 inches high, with a sagging upper cable, is reasonably safe for the protection of prospective customers who are seated adjacent thereto. The court might reasonably infer that the enclosure was unsafe, and that defendants should have added another cable to increase the height of the fence, or at least that they should have tightened the sagging top cable. The court also had a right to assume it was the duty of the defendants to provide attendants to reasonably guard

the cattle in the enclosure, and that, instead of fleeing for their own safety when the cow went upon a rampage, they should have opened the gate to permit the animal to escape, or otherwise restrain it for the protection of the spectators.

[2, 3] These and other questions were proper for the judge to consider on the motion for new trial. Certainly this court may not hold as a matter of law that the judge abused his discretion in granting a new trial merely because he disagreed with the jury regarding the defendants' exercise of ordinary care where there is a serious conflict of evidence upon that subject, as there was in this case.

[4, 5] The plaintiff, Marie Porter, was an invitee. She was a prospective purchaser of cattle at the auction sale which was being conducted by the defendants. It was defendants' duty to exercise reasonable care to maintain supervision and a reasonably safe enclosure and seats for the customers. Locke v. Red River Lumber Company, 65 Cal.App.2d 322, 150 P.2d 506. An invitee, as distinguished from a mere licensee, is one who enters the premises where the injury occurs for the purpose of mutual interest to himself and the owner or occupant of the property. 19 Cal.Jur. 621, sec. 55.

[6] The trial court has a wide discretion in granting or denying a new trial, which may not be disturbed on appeal except for manifest abuse of that discretion. This is especially true when the motion for new trial is granted by the same judge who tried the case, even though there be a conflict of evidence upon the essential issues involved, unless it clearly appears that the evidence would in nowise support a judgment for the prevailing party on the motion. Tweedale v. Barnett, 172 Cal. 271, 274, 156 P. 483; Thompson v. Schurman, 65 Cal.App.2d 432, 150 P.2d 509; 20 Cal.Jur. 27, sec. 13. In Rosenberg v. George A. Moore & Co., 194 Cal. 392, at page 396, 229 P. 34, at page 36 it is said: "'If there is a substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion when it has determined that the verdict or the finding is against the weight of the evidence, and that there should be a new trial. "When the evidence is conflicting, the trial court is authorized to review it, and if, in its opinion, the verdict is against the weight of evidence, it is its duty to grant a new trial."' [Citing authorities.]"

In an able dissenting opinion Mr. Justice Edmonds, in the case of McCordic v. Crawford, 23 Cal.2d 1, at page 9, 142 P.2d 7 at page 11 appropriately said: "The Legislature has recognized that the interests of justice may require an independent reweighing of the evidence by the trial judge after rendition of the verdict by the jury, and this court has, upon occasions, criticised the reluctance of trial judges generally to exercise their power of granting a motion for a new trial for insufficiency of the evidence and their inclination to acquiesce in a verdict which does not constitute the just conclusion to be drawn from the evidence. Green v. Soule, 145 Cal. 96, 102, 78 P. 337. In case after case it has been emphasized that the trial judge, unlike an appellate court, has had the same opportunity as the jury to observe the manner of the witnesses and to pass upon their credibility; as a consequence he cannot rely upon a conflict in the evidence to uphold the verdict but must exercise his duty to see that it is not clearly against the weight of the evidence. [Citing many authorities.]"

[7, 8] Numerous cases support the foregoing conclusion that it is the ultimate duty of a trial judge, in the interest of justice, to determine whether the verdict of a jury is in accordance with the weight of the evidence, and to grant a new trial when he is conscientiously of the opinion that it is not in accordance therewith. Green v. Soule, 145 Cal. 96, 102, 78 P. 337; In re Estate of Green, 25 Cal.2d 535, 542, 154 P.2d 692; Helle v. City and County of San Francisco, 54 Cal.App.2d 571, 129 P.2d 461; Whitfield v. De Brincat, 35 Cal.App. 2d 476, 96 P.2d 156; Petroff v. Nunes, 136 Cal.App. 416, 29 P.2d 293; Grover v. Sharp & Fellows Contracting Co., 66 Cal.App.2d 736, 153 P.2d 83; 20 Cal.Jur. 27, sec. 13. In the Petroff case, supra, it is said [136 Cal.App. 416, 29 P.2d 294]: "Both the judge and the jury have their

independent functions to perform, subject only to the sound and sensible restrictions of the law. With due respect for the great benefits derived from our jury system, the conscientious and skilled judge, after all, must assume the final responsibility of seeing that all verdicts substantially conform to justice and law."

The respondents rely upon the doctrine of res ipsa loquitur, and discuss that principle to some extent. But it seems unnecessary, under the circumstances of this case, to determine its applicability to the facts proved.

We conclude that the court did not abuse its discretion in granting the motion for new trial.

The order is affirmed.

ADAMS, P. J., and PEEK, J., concur.




74 Cal.App.2d 528

**PEOPLE v. RICHARDSON.**

**Cr. 2367.**

District Court of Appeal, First District, Division 1, California.

May 18, 1946.

**1. Criminal law ⇐1167(4)**

On appeal from judgment of conviction entered after a second trial, any error in amendment of indictment during course of first trial was not prejudicial to defendant. Pen.Code, §§ 969a, 995, 996, 1008.

**2. Criminal law ⇐892**
**Robbery ⇐30**

Assignments of error that verdict was not entered until after jury was discharged, and that defendant was sentenced as an habitual criminal but not on charge of robbery, were not sustained by record.

**3. Criminal law ⇐824(1), 825(1)**

The rule that verdict of a jury uninstructed as to law relating to facts cannot be sustained merely because proper instructions were not requested must be applied to facts of each particular case, and where an instruction is given, even though inadequate, under certain circumstances, failure to give further instruction is not grounds for reversal.

**4. Criminal law ⇐317**

Admission of evidence which defendant might explain or deny by his testimony renders his failure to testify significant as warranting an inference that he would have given explanation if he had any, or denied such evidence if false.

**5. Criminal law ⇐316, 656(7), 721(1)**

Defendant's failure to explain or deny evidence against him may be commented upon by court and counsel, but such failure does not create presumption or warrant inference of guilt, and jury may consider such failure in light of evidence not explained or denied as tending to indicate truth of such evidence and greater probability of reasonable inferences unfavorable to defendant therefrom.

**6. Criminal law ⇐316**

Defendant's failure to explain or to deny evidence against him by reason of a claim of privilege against self-incrimination gives rise to inferences equally probative as those arising from defendant's failure to take stand to explain or deny adverse evidence.

**7. Criminal law ⇐317**

Defendant's claim of privilege against self-incrimination as a witness and not as a defendant should be treated no differently than a witness' claim of privilege in a civil case if inference to be drawn from claim of privilege is relevant to such issues.

**8. Witnesses ⇐292**

The "privilege against self-incrimination" of witness is to prevent testimony which might be used against him in a subsequent criminal suit and not to keep out probative evidence or any inferences to be drawn from claim of privilege which might be relevant to issue in matter before court.

See Words and Phrases, Permanent Edition, for all other definitions of "Privilege Against Self-Incrimination".

**9. Criminal law ⇐787(2)**

Where defendant on direct examination testified that he left city when officers visited his hotel a few days after robbery and, on cross-examination as to places he visited during his absence from city, claimed his privilege against self-incrimination, court properly refused instruction that no inference against defendant could be drawn from his claim of privilege, since an adverse inference could be drawn from claim of privilege relevant to issue of flight which was probative of defendant's consciousness of guilt.

**10. Criminal law ⇐808½**

An instruction concerning credibility to be accorded the number of witnesses, given substantially in language of statute, was not objectionable. Code Civ.Proc. § 2061, subd. 2.

**11. Criminal law ⇐792(1)**

An instruction on aiding and abetting is proper where more than one person takes part in commission of an offense.

**12. Criminal law ⇐784(1)**

In robbery prosecution where there was not only direct testimony by way of identification that defendant committed offense charged, but also testimony concerning defendant's use of an assumed name, flight, possession of firearms, and the like, the latter evidence justified instruction upon circumstantial evidence.

**13. Criminal law ⇐1202(3)**
**Witnesses ⇐337(5)**

The prosecution may refer to defendant's previous convictions either by proving them, if defendant denies allegations in information or indictment of prior conviction, or by proving that defendant has been convicted of a felony, by way of impeachment if defendant takes stand as a witness. Code Civ.Proc. § 2051; Pen. Code, § 1025.

**14. Criminal law ⇐1202(3)**

Exhibits to establish defendant's prior convictions, authenticated by the wardens and secretaries of state of the respective states where defendant had previously been incarcerated, were properly authenticated. Pen.Code, § 969b.

**15. Criminal law ⇐1202(3, 7)**

Defendant's police history, attached to exhibit introduced in support of an allegation of prior conviction, which record disclosed several escapes, numerous arrests as a suspect, service of various terms in county jail, arrest for murder, and conviction of manslaughter, should have been deleted from exhibit as incompetent, and augmented record showing that such police history went to jury without instruction disclosed prejudicial error. Pen.Code, §§ 969b, 1025; Rules on Appeal, rule 12.

**16. Criminal law ⇐1202(3)**

The method of deletion of police history from exhibit showing prior felony conviction is a practical matter in hands of respective attorneys and trial court. Pen. Code, § 969b.

**17. Criminal law ⇐1202(3)**

In proving prior conviction, fingerprints and other necessary matters of identification are admissible to connect accused therewith. Pen.Code, § 969b.

**18. Criminal law ⇐1202(3)**

Overemphasis of former conviction or introduction of evidence merely having a tendency to show that accused is of a bad character and not necessary to prove a prior conviction may deprive accused of a fair trial. Code Civ.Proc. § 2051.

**19. Witnesses ⇐337(5)**

Where defendant appeared as a witness, he was subject to examination under code section authorizing impeachment for prior conviction of a felony and was required to answer relative to previous conviction irrespective of section providing for procedure and setting forth rights of a defendant when charged with a previous conviction, since, when defendant voluntarily offered himself as a witness, his credibility became subject to same process of impeachment as any other witness. Code Civ.Proc. §§ 2051, 2065; Pen.Code, § 1025.

**20. Witnesses ⇐301**

Where defendant testifies as a witness, impeaching questions with reference to prior felony convictions do not compel self-incriminating answers even in light of code provision that an indictment may be amend-

ed to charge prior conviction. Pen.Code, § 969a.

**21. Witnesses ⇐337(5)**

Defendant who testifies may be impeached by proof of prior conviction of felony notwithstanding that such evidence tends to prejudice him in eyes of jury. Code Civ.Proc. § 2051.

**22. Witnesses ⇐350**

In impeaching the testimony of a defendant by proof of prior convictions of felony, nature of crimes of which he was convicted is a proper subject of inquiry in establishing fact of convictions, but details and circumstances comprising prior offenses are not admissible. Code Civ. Proc. § 2051.

**23. Criminal law ⇐1167(1)**

The inclusion in indictment of charge of prior convictions of felonies, some of which felonies were not included in habitual criminal statute, was not prejudicial to defendant in light of penal code section providing for incorporation into indictment of charge of all prior felonies of which defendant was convicted. Pen. Code, §§ 644, 969a.

**24. Criminal law ⇐1167(1)**

Where defendant testified in his own behalf and hence could properly be impeached by proof of his conviction of any felony, so that all his prior convictions properly went before jury as impeaching evidence, any error in charging in indictment prior felonies which were not listed in habitual criminal statute was not prejudicial. Pen. Code, § 644.

**25. Criminal law ⇐1202(1)**

To sustain an adjudication that defendant is an habitual criminal, proof of previous conviction must conform to offenses enumerated in habitual criminal act, and proof of conviction of a misdemeanor is not sufficient. Pen. Code, § 644.

**26. Criminal law ⇐1202(1)**

Showing of prior conviction of a felonious assault with a deadly weapon, which might have been declared a misdemeanor in the pronounced judgment, of manslaughter, and of a Washington conviction of burglary in the second degree which could have been an offense which would not have amounted to burglary in California, failed to establish prior conviction within contemplation of habitual criminal act. Pen. Code Cal. § 644; Rem. Rev.Stat.Wash. § 2579.

**27. Criminal law ⇐1202(1, 3)**

Mere showing of conviction of second-degree burglary in Washington was not sufficient to establish a prior conviction as respects habitual criminal statute requiring a showing of prior convictions of specific offenses, including burglary, since requisite intent for burglary in Washington at time of offense was to commit some "crime", which includes both felonies and misdemeanors, while in California intent requisite is to commit grand or petit larceny or some felony, and court must assume that defendant was convicted of least offense in Washington, which would not amount to burglary in California. Pen. Code Cal. § 644; Rem.Rev.Stat.Wash. § 2579.

See Words and Phrases, Permanent Edition, for all other definitions of "Crime".

**28. Criminal law ⇐404(3)**

Where witness, who identified defendant as person who committed alleged robbery, also testified that a .45 automatic weapon found in defendant's suitcase was similar to one which had been used on night of robbery, weapon identified was admissible.

**29. Criminal law ⇐404(3)**

Where indictment charged that defendant was armed at time of alleged robbery but did not charge that he was armed at time of arrest, admission of .38 revolver and small nickel-plated revolver, which were not identified with the robbery, upon theory that they were found in possession of defendant at time of arrest, was error, since only guns which could have been used in robbery would be relevant. Pen. Code, § 1158a.

**30. Indictment and Information ⇐179**

Variance between indictment alleging that defendant was armed with a revolver, and proof that he was armed with an automatic, was immaterial as to enhancement of offense of robbery, since statute requires

only that a firearm be carried at time of arrest or commission of offense. Pen. Code, § 1158a.

31. Criminal law ⇐304(2)

Court takes judicial notice of vast difference in appearance between a revolver and an automatic.

32. Criminal law ⇐1192

Where indictment charged that at time of offense defendant was armed with a revolver, and witness testified that defendant was armed with an automatic, and there was no allegation in indictment that defendant was armed at time of arrest but evidence disclosed that he possessed certain revolvers, error in admission of revolvers could be cured on a retrial by amendment of indictment, further identification of weapons, or elimination of revolvers as evidence.

33. Criminal law ⇐683(4)

Time card of defense witness offered in rebuttal by prosecution to refute testimony of witness that he was present at a dinner party relied on by defendant for an alibi was competent. Code Civ.Proc. § 1953f.

34. Witnesses ⇐318

Eyewitnesses who identify a defendant in courtroom may properly be permitted to corroborate their testimony by a statement of fact of a prior identification.

35. Criminal law ⇐1209

The application of the habitual criminal act is not unconstitutional as imposing double punishment because defendant was previously given enhanced punishment in another state as an habitual criminal on the basis of same prior convictions. Pen. Code, § 644(b).

36. Criminal law ⇐1202(1)

Allegations of previous conviction and that accused is an habitual criminal are not allegations of a substantive crime but of a status which aggravates position of accused, in the sense that he comes within classification of those who probably may never be reformed and additional penalty is considered punishment for the last offense. Pen.Code, § 644.

37. Criminal law ⇐1200

The habitual criminal act is legislative expression of theory that penal laws are not so much for punishment of offender as for protection of society and of experience that persistent and hardened offender is more dangerous to society than a person who has committed but one offense and that a severer punishment is demanded in such case, the better to protect society. Pen.Code, § 644.

38. Constitutional law ⇐42

Subsections (a) and (b) of the habitual criminal act, under which defendant was sentenced, being clearly constitutional, defendant could not challenge constitutionality of subsection (c) providing for a determination in exceptional cases that defendant is not an habitual criminal on the ground that such cases are left to discretion of court without legislative guide. Pen.Code, § 644(a–c).

39. Criminal law ⇐1186(1)

Although main question in a criminal case is determination of sufficiency of evidence to support verdict of guilt, court will reverse conviction, notwithstanding sufficiency of evidence, if record discloses that defendant did not have a fair and impartial trial.

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Appeal from Superior Court, City and County of San Francisco; William F. Traverso, Judge.

Floyd Richardson was convicted of robbery in the first degree and adjudicated to be an habitual criminal and, from the judgment and from an order denying his motion for a new trial, he appeals.

Reversed.

Alfred J. Hennessy, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

WARD, Justice.

Defendant was convicted of robbery in the first degree. An adjudication that defendant is an habitual criminal accom-

panied the judgment, which adjudication was based upon the jury's finding of three prior convictions. Penal Code, sec. 644. Defendant appeals from the judgment and order denying his motion for a new trial. Sixteen points involving alleged errors in the admission of evidence, in instructions and in procedure and the constitutionality of the habitual criminal statutes are urged by defendant as grounds for reversal. Some of these points are not worthy of notice; others would not justify a reversal standing alone, and one is of sufficient importance to warrant the reversal of the judgment and order denying the motion for new trial. Only those points which will affect the conduct of the new trial will be considered here.

[1, 2] Certain technical errors relied on for reversal in the indictment, verdict and sentence will first be considered. The indictment charged that the defendant, while using a firearm, a revolver, committed a robbery upon Andre L. Marty, and that defendant had, before the commission of the above offense, been convicted of and served a sentence for four different felonies. The defendant pleaded not guilty to the principal charge and denied the prior convictions. The defendant has been on trial twice; on the first trial the jury failed to agree. The part of the indictment charging the last prior conviction was amended once prior to the first trial to change the offense from murder to manslaughter and again during the first trial to change the date of the conviction. Only after the second amendment did the defendant move to set aside the indictment on the grounds here urged. In support of his position he neither cites authority nor makes any argument but a bald assertion of invalidity of the entire indictment for various reasons. It is unnecessary to say anything further in respect to this claimed error than that the appellant has not presented a record from which the merits of his contentions may be ascertained and that, in any case, he has failed to show any prejudice to defendant in the procedure followed, particularly when it is noted that this appeal is from the judgment following the second trial, no amendments having taken place during it and only immaterial and insubstantial ones during the first trial. In this connection, see secs. 969a, 995, 996 and 1008 of the Penal Code; People v. Egan, 73 Cal.App.2d 894, 167 P.2d 766. Next, with respect to procedure, the appellant asserts that the verdicts were not recorded until after the discharge of the jury. The record before this court is to the contrary. Finally, the appellant asserts that the judgment and sentence are void in that defendant was sentenced as an habitual criminal but not on the charge of robbery. In the present case the record indicates that the claim is without merit when the judgment and sentence are read as a whole. People v. Ure, 68 Cal.App. 545, 548, 229 P. 987.

The next series of alleged errors relied upon by appellant concern the admission of evidence and instructions. Inasmuch as the judgment must be reversed upon the ground that evidence was introduced over objection which prejudiced the rights of the defendant, the details of the evidence for the prosecution need not be related, except that to which exception was taken. The prosecution's case was rested principally upon the identification of defendant by Marty, operator of a cleaning and dyeing establishment, Marty's daughter, and one Collins who drove for Marty's establishment where the robbery occurred. In substance each witness testified that defendant and a companion threatened them with a firearm, tied and gagged all three, and forced them to lie on the floor. The defendant denied the charges and relied on an alibi for the time the offense was committed. The perpetrators of the crime took approximately $518 in cash, numerous checks, bank books and sundry trinkets.

Defendant testified in his own behalf on direct examination that when officers arrived at his hotel in San Francisco a few days after the robbery, he left the hotel and San Francisco, returning to San Francisco at a much later date. On cross-examination he was asked questions relating to places he had visited during the period of his absence from San Francisco subsequent to the commission of the offense alleged in the indictment. He refused to answer certain questions on the grounds that the answers thereto would tend to in-

criminate him. The trial court sustained his claim of privilege. At the times in question he was on parole, and if he had left the State of California, he might be declared a parole violator. Appellant now claims that he was entitled to an instruction on the court's own motion that no "unfavorable inference against the defendant" could be drawn from the claim of privilege.

[3] Recent Supreme Court decisions have stressed the necessity in a criminal case of a trial judge giving an instruction, on his own motion without request from the defendant, on law which is vital to the issues involved. Nearly all defendants in criminal cases on appeal now cite People v. Putnam, 20 Cal.2d 885, 129 P.2d 367, 370 and suggest some instruction which the trial judge should have given "of its own motion." The Putnam case was a sex case and has no application to the facts of this case. The Supreme Court in People v. Bender, 163 P.2d 8, 16, makes it clear that the rule stated in the Putnam case that the verdict of a jury uninstructed as to law relating to the facts cannot be sustained merely because proper instructions were not requested, must be applied to the facts of each particular case, and the court there held that even though a particular instruction was inadequate, upon the record before the court, "the failure to give the further instruction is not * * * ground for reversal."

[4-6] In any event there was no error here in failing to give an instruction that no unfavorable inference to defendant could be drawn from his claim of the privilege against self-incrimination when testifying as a witness in his own behalf. In People v. Adamson, Cal., 165 P.2d 3, an accused failed to take the stand and explain evidence introduced against him. In reference to comment by the prosecutor on that subject the court instructed (165 P.2d at page 9): "'It is the right of court and counsel to comment on the failure of defendant to explain or deny any evidence against him * * *; yet the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of witnesses.'" With respect to the weight which the jury could give to the fact that the defendant failed to take the stand, 165 P.2d at page 9, the court said: "The failure of the accused to testify becomes significant because of the presence of evidence that he might 'explain or to deny by his testimony' * * *, for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it." "The jury, however, is concerned with the scope and nature of the consideration that it may give defendant's failure to explain or to deny incriminating evidence, and in the present case should have been instructed that the defendant's failure to deny or explain evidence presented against him does not create a presumption or warrant an inference of guilt, but should be considered only in relation to evidence that he fails to explain or deny; and that if it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." These inferences which the jury may draw with respect to evidence when the accused fails to take the stand are equally probative and no more subject to any constitutional prohibition when the question involves the defendant's claim of privilege as a witness. Further, in the present case there has not been called to this court's attention that the record discloses comment upon the subject of the inference to be drawn from defendant's claim of privilege.

[7-9] The cases relied upon by defendant to show that no inference is permissible from a witness' claim of privilege, of which the first one, People v. Glass, 158 Cal. 650, 112 P. 281, is a fair example, are distinguishable from the present case in that they involve cases where the inference to be drawn against the defendant was based upon a claim of privilege by a witness other than the defendant. People v. Kynette, 15 Cal.2d 731, 104 P.2d 794. The defendant's claim of privilege against self-incrimina-

tion as a witness and not as a defendant should be treated no differently than a witness' claim of privilege in a civil case if the inference to be drawn from the claim of privilege is relevant to these issues. Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350. The witness' privilege is to prevent testimony which might be used against him in a subsequent criminal suit and not to keep out probative evidence or any inferences to be drawn from the claim of privilege which might be relevent to the issues in the matter before the court. Here the inference to be drawn from the defendant witness' claim of privilege was relevant to the issue of flight. The evidence of flight could be considered as probative of defendant's consciousness of guilt. People v. Santora, 51 Cal.App.2d 707, 125 P.2d 606; People v. Gregoris, 70 Cal.App.2d 716, 161 P.2d 568; People v. Hall, 199 Cal. 451, 249 P. 859; People v. Ellis, 188 Cal. 682, 206 P. 753. Although no inference of guilt of the principal offense charged could have been drawn solely by reason of the claim of privilege, the inferences above noted were permissible, and consequently there was no error in failing to instruct that no inference against the defendant could be drawn from his claim of privilege. It should be noted, however, that the court is not deciding whether or not the trial court properly allowed the claim of privilege in view of the defendant's testimony on direct examination which in some instances might be considered a waiver of his claim of privilege.

[10-12] A number of other complaints are made with respect to instructions which were given or refused. The objections are technical and were they well taken, viewing the instructions as a whole, could not be classified as prejudicial. The instruction concerning credibility to be accorded the number of witnesses was given substantially in the language of the statute. Code Civ.Proc. sec. 2061(2). An instruction on aiding and abetting is proper where more than one person, as in this case, take part in the commission of an offense. In the present case there was not only direct testimony by way of identification that the defendant committed the offense charged, but also testimony concerning the defendant's use of an assumed name, flight, possession of firearms, etc., which latter evidence justified instructions on circumstantial evidence. The instruction concerning the weight to be given direct or circumstantial evidence did not invade the province of the jury. Finally, the jury were adequately instructed with respect to the use to which the proof of the prior convictions could be put, had the proof been free from defects.

[13-16] In a trial of a criminal case there are at least two ways in which the prosecution may refer to previous convictions: (1) if the defendant denies allegations in the information or indictment of prior convictions, the state must prove the prior convictions (Penal Code, sec. 1025); and (2) if the defendant takes the stand as a witness he may be impeached by proof that he has been convicted of a felony. Code Civ.Proc. sec. 2051. The defendant in this case denied that he had suffered any of the prior convictions alleged in the indictment, thereby necessitating proof of the prior convictions which respondent attempted to make by introducing certain exhibits authenticated by the wardens and secretaries of state of the respective states where defendant had previously been incarcerated. There is no merit in appellant's contentions that these exhibits were not properly authenticated. Penal Code, sec. 969b; People v. Santos, 36 Cal.App.2d 599, 601, 97 P.2d 1050. However, attached to the exhibit introduced in support of the allegation of a prior conviction in Colorado was a "criminal record" which formed no part of the necessary proof of conviction and service of sentence. The question was raised as to whether the criminal record or police history was known to the jury. The record failed to disclose the answer, whereupon this court under the provision of rule 12 of the Rules on Appeal (22 Cal.2d 1) directed the trial court to augment the record in this respect. The order of this court was complied with and the trial court found that the contents of the exhibit were known to the jury and that it was taken into the jury room. The appellant objected to the introduction of the exhibit in its entirety on the grounds that it was

hearsay and contained irrelevant and highly prejudicial matters. This criminal record shows that defendant has escaped from a governmental agency several times; that he has been arrested as a suspect of other crimes on numerous occasions, in some instances the charges being dismissed; that defendant has been arrested on a murder charge; that he had served various terms in county jails on various minor accusations. The record shows that he was convicted only of manslaughter instead of murder. The mere reading of this history might prejudice a member of an appellate court experienced with similar histories. If this is possible, it must be concluded that twelve laymen might be astounded and become prejudiced against the defendant on the charge alleged in the indictment in this case. Although the court instructed that evidence of prior convictions could not be considered as evidence of the defendant's guilt on the charge "the defendant is now on trial for," no instruction was given that the criminal record, with its accusation, arrests and escapes, should not be considered on either the prior conviction or the issue of robbery. The objectionable criminal history could and should have been deleted from the copies of the prison records and the certificate of the "official custodian of such records" (Penal Code, sec. 969b) as incompetent and irrelevant matter. The method of elimination is a practical matter in the hands of the respective attorneys and the trial court. The admission of such evidence in a criminal trial is error of an extremely prejudicial variety. The other exhibits introduced in support of the prior convictions are subject to the same objection, although standing alone the irrelevant and prejudicial matter contained therein, might not require a reversal. The court is here considering only the most flagrant example in the exhibits which was called to the court's attention in the briefs.

[17, 18] The statements herein should not be construed as an attempt to disapprove the rule that in proving prior convictions, finger prints and other necessary matters of identification are admissible to connect the accused with the prior conviction. People v. Santos, supra; People v. Wilson, 139 Cal.App. 139, 33 P.2d 476; Penal Code, sec. 969b. Photographs and finger prints for identification purposes may not be deemed prejudicial as such evidence may be necessary, but "over-emphasis" of former convictions (Triboro Coach Corporation v. New York State Labor Relations Board, 286 N.Y. 314, 287 N.Y. 647, 36 N.E.2d 315, 39 N.E.2d 276, 144 A.L.R. 420) or the introduction of evidence merely having a tendency to show that the accused is of a bad character may deprive and in this case did deprive the defendant of a fair trial. In People v. McFarlan, 126 Cal.App. 777, 14 P.2d 1066, extraneous matters connected with certificate from prison officials were held not to be objectionable on the theory that the objection did not differentiate between competent and incompetent evidence. In the present case it was pointed out that "it is highly prejudicial, that so-called history." In addition, the district attorney admitted that the criminal history "is not a portion of the required documents necessary to prove a prior conviction."

[19-22] Further, the statements herein should not be construed as impairing the right on cross-examination to impeach a witness "not by evidence of particular wrongful acts" but by proof that the witness has "been convicted of a felony." Code Civ.Proc. sec. 2051. The defendant in the present case appeared as a witness and was therefore subject to examination under the provisions of Code of Civil Procedure, sec. 2051. A witness must answer relative to a previous conviction (Code Civ.Proc. sec. 2065), irrespective of Penal Code section 1025, which provides for procedure and sets forth the rights of a defendant when charged with a previous conviction. Having voluntarily offered himself as a witness, his credibility was subject to the same process of impeachment as any other witness. People v. La Verne, 212 Cal. 29, 297 P. 561; People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951. Section 969a provides that an indictment may be amended to charge prior convictions, but in People v. Romer, 218 Cal. 449, at page 452, 23 P.2d 749, at page 750, the court said: "We are unable to agree

with defendants that the effect of these questions is to compel self-incriminating answers." In the present case as in people v. David, 12 Cal.2d 639, 86 P.2d 811, the defendant took the stand and made reference to previous conviction, but the prosecution did not go beyond the fact of convictions. At page 646 of 12 Cal.2d, at page 814 of 86 P.2d the court said: "In this state the testimony of a witness may be impeached by proof that he has suffered the prior conviction of a felony. Code Civ.Proc. § 2051. This rule applies to a defendant who testifies in his own behalf in a criminal trial notwithstanding the fact that such evidence tends to prejudice him in the eyes of the jury. People v. Romer, 218 Cal. 449, 23 P.2d 749; People v. La Verne, 212 Cal. 29, 297 P. 561. The nature of the crime or crimes of which he was convicted is a proper subject of inquiry in establishing the fact of his conviction. People v. Higbee, 78 Cal.App. 455, 248 P. 927; People v. Craig, 196 Cal. 19, 235 P. 721. But details and circumstances comprising the prior offenses are not admissible." See, also, People v. Oliver, 7 Cal.App. 601, 95 P. 172; People v. Silva, 2 Cal.App.2d 616, 38 P.2d 481; People v. Williams, Cal., 163 P.2d 692.

[23, 24] In this connection it should be noted that there is no merit in the appellant's contention that he was prejudiced by the charge of prior convictions of felonies in the indictment which did not come within Penal Code, sec. 644. Sec. 644 of the Penal Code is not the only section under which the fact of a prior conviction and service of sentence for a felony by the accused becomes important. Sec. 969a of the Penal Code provides for the amendment of an indictment or information "Whenever it shall be discovered that a pending indictment * * * does not charge *all prior felonies* of which the defendant has been convicted." (Italics added) "One who is threatened with a more severe penalty because the People contend that his offense is not his first, should be given an opportunity to know of it, and govern himself accordingly. If he acknowledges the existence of a prior conviction and fears that the trier of fact will be prejudiced by it, an admission of its existence before a trial to a jury begins avoids the danger." People v. Ratner, 67 Cal.App.2d Supp. 902, 908, 153 P.2d 790, 793. The Legislature seems to have balanced the evils and realized that the People should not have to elect which of the prior convictions they can expect to prove beyond a reasonable doubt and which of the felonies as a matter of law comes within specific provisions of the Penal Code. This is not a case where the prosecuting official could be deemed to have deliberately attempted to prejudice the defendant by a long series of irrelevant charges in the indictment. Further, as above noted, the defendant here took the stand. Having taken the stand and testified in his own behalf, he could be impeached by proof of his conviction of any felony and consequently all the priors here charged went before the jury as proper impeaching evidence in answer to questions propounded by the prosecution on cross-examination. On the facts of the instant case, no prejudice could possibly have resulted had the prior convictions been improperly charged in the indictment.

[25-27] However, in order for the adjudication that defendant is an habitual criminal to be sustained the proof of the previous convictions must conform to the offenses that are enumerated and designated in Penal Code, sec. 644 as the "aforementioned felonies." People v. McChesney, 39 Cal.App.2d 36, 102 P.2d 455; People v. Dawson, 210 Cal. 366, 292 P. 267; Ex parte Schneider, 23 Cal.2d 427, 144 P.2d 329. The conviction of a misdemeanor would not conform to the provision of the section. This is emphasized in at least one instance by reference to a "felonious assault with a deadly weapon." If such assault had been declared a misdemeanor in the pronounced judgment it would not be a recognized prior conviction within the meaning of Penal Code, sec. 644. On oral argument, respondent conceded that as the record now stands, there is no proof that the prior conviction in Colorado comes within the definition of any similar felony in California which is enumerated in sec. 644 of the Penal Code. The manslaughter conviction does not

come within the terms of sec. 644. And as the record now stands, the conviction of "burglary in the second degree" in the State of Washington could have been an offense that would not have been burglary in California. The requisite intent for burglary in the second degree in Washington at the time of defendant's offense, Dec. 5, 1919, was "to commit some crime" (Rem. Rev.Stat. § 2579, L. of 1909, p. 989, sec. 327), whereas in California the requisite intent was "to commit grand or petit larceny or any felony." A crime includes both felonies and misdemeanors. We must assume that defendant was convicted of the least offense in Washington. In re Gilliam, 26 Cal.2d 860, 861, 161 P.2d 793, 794. Consequently as the record now stands the People have failed to prove that the prior conviction for second degree burglary in the State of Washington comes within the requirements of the habitual criminal statute. Upon retrial these defects in proof might be remedied.

[28-31] The appellant next claims error in respect to the admission in evidence of four guns—two 45 automatics, one 38 revolver and one small nickel plated revolver. The respondent seeks to justify the admission in evidence of these exhibits as follows: A witness who identified the defendant as the person who committed the alleged robbery also testified that a "45 automatic" weapon found in defendant's suitcase was similar to the one which had been used on the night of the robbery. This weapon was admissible in evidence. People v. Ferdinand, 194 Cal. 555, 229 P. 341; People v. Hightower, 40 Cal.App.2d 102, 104 P.2d 378; People v. Beltowski, 71 Cal.App.2d 18, 162 P.2d 59. The second 45 automatic and the 38 revolver were taken from the defendant *at the time of his arrest.* The small nickel plated revolver was taken from a suitcase which is claimed to be the property of the defendant. The evidence does not show that this small nickel plated revolver was used in the commission of the offense. The admissibility of the 38 revolver and the small nickel plated weapon must rest upon the theory that they were found in the possession of defendant at the time of arrest. In this connection it must be noted that when it is charged that the accused was armed with a weapon, either at the time of the commission of the offense or at the time of his arrest, or both, and the defendant enters a plea of not guilty, the jury if it finds the defendant guilty on the offense charged or of an offense included therein must also find separately on the allegation that the defendant was armed as charged. Penal Code, sec. 1158a. The indictment in the present case alleges that "he, the said Floyd Richardson, at the time of the commission of the said offense being then and there armed with a certain firearm, to-wit: a revolver, without having a license or permit to carry such firearm, in violation of Section 5, Chapter 339, Statutes of 1923, as amended." *There is no allegation that the accused was armed at the time of his arrest.* The variance between the indictment and the proof with respect to revolvers and automatics is immaterial so far as the enhancement of the offense is concerned inasmuch as the statute requires only that a firearm be carried at the time of the arrest or the commission of the offense. However, the errors with respect to the admission of all the guns in evidence are evident from the lack of the two separate charges—at the time of the arrest and at the time of the commission of the crime—in the indictment. Only guns which could have been used in the commission of the crime would be relevant to the issues here. And for these purposes the court will take judicial notice of the vast difference between a revolver and an automatic in appearance.

[32] In the Beltowski case, supra, the record does not disclose the present error. The court, 71 Cal.App.2d at page 23, 162 P.2d at page 61, says: "Here, however, two or three pistols were found in Beltowski's room (together with other arms and ammunition) at the time of the arrest. See People v. Nakis, 184 Cal. 105, 113, 114, 193 P. 92. It was proper for the prosecution to lay before the jury all the circumstances surrounding the arrest. People v. Mar Gin Suie, 11 Cal.App. 42, 103 P. 951; People v. Stoerkel, 87 Cal. App. 336, 340, 262 P. 825. Nor need there be positive identification of a weapon. People v. Ferdinand, 194 Cal. 555, 563, 564,

229 P. 341. The possession by a defendant of means such as were used to commit the crime renders the same admissible even though not identified in any way by the eye-witness to the offense. People v. Radovich, supra [122 Cal.App. 176, 9 P. 2d 542], and cases cited. People v. Hale, 81 Cal.App. 734, 735, 254 P. 639; People v. Stoerkel, supra; People v. Mar Gin Suie, supra; People v. Hightower, 40 Cal. App.2d 102, 107, 104 P.2d 378. In People v. Abbey, 124 Cal.App. 412, 417, 12 P.2d 655, the victim did not even see the gun, which was concealed in the defendant's coat pocket. It was nevertheless held admissible." Here the prosecution relied on a specific type of weapon to which the identifying witnesses testified. However, standing alone, the admission in evidence of the revolvers would not be prejudicially erroneous. People v. Beltowski, supra; People v. Planagan, 65 Cal.App.2d 371, 150 P.2d 927; People v. Pianezzi, 42 Cal.App. 2d 265, 108 P.2d 732; People v. Simeone, 26 Cal.2d 795, 161 P.2d 369. On the retrial of the present case to cure the error the indictment might be amended, further identification made of the weapons, or the evidence eliminated.

[33, 34] Objections to other admissions of evidence introduced are without merit. The time card of one Joseph Hume which was offered in rebuttal by the prosecution to refute testimony that Joseph Hume was present at the dinner party relied on by defendant for an alibi was properly admitted under sec. 1953f of the Code of Civil Procedure (Uniform Records as Evidence Act) and decisions thereunder (People v. Jones, 61 Cal.App.2d 608, 626, 143 P.2d 726; Doyle v. Chief Oil Co., 64 Cal. App.2d 284, 293, 148 P.2d 915), inasmuch as the sub-foreman in charge of the crew in which Mr. Hume worked testified as to the usual course of business with respect to the card and his custodianship and supervision of its preparation. It is perfectly proper to permit eye-witnesses who identify the defendant in the court room to corroborate their testimony by a statement of the fact of a prior identification which was all that was done here. 22 Cal. Jur. 859; IV Wigmore on Evidence, p. 208, sec. 1130.

[35-37] Various attacks are made upon the constitutionality of sec. 644 of the Penal Code. There is no merit in the contention that the application of the provisions of sec. 644 in this case would result in double punishment. Defendant argues that he has already suffered "enhanced punishment" as an habitual criminal in the State of Washington upon certain prior convictions that are also alleged in the present indictment. If this argument is sound, then section 644(b) would be inoperative. In other words, if upon a trial for an offense such as robbery a defendant had been declared an habitual criminal as one who had been twice convicted (subd. a) and suffered conviction upon the charge of robbery and was adjudged an habitual criminal and incarcerated in prison for a term prescribed by law and in due course released, then it is appellant's contention that upon the conviction of another offense of robbery that the first two priors used in the former conviction could not be used in a subsequent conviction. Allegations of previous convictions, and that an accused is an habitual criminal, are not allegations of a substantive crime, but are a status which, in the eyes of the law, aggravates the position of the perpetrator of the primary offense alleged in the indictment in the sense that he comes within the classification of those who probably may never be reformed. He has evidenced a predeliction to commit certain offenses which has become a settled custom, indicating a tendency toward repetition. Such an offender, so the legislature has decreed, is subject to the infliction of a longer term of imprisonment. People v. Biggs, 9 Cal.2d 508, 71 P.2d 214, 116 A.L.R. 205; In re Rosencrantz, 205 Cal. 534, 271 P. 902. "Aside from the offender and his victim there is always another party concerned in every crime committed—the state; and it does no violence to any constitutional guaranty for the state to rid itself of depravity when its efforts to reform have failed." 8 R.C.L., p. 271, sec. 284. "The additional penalty is considered punishment for the last offense." People v. Quiel, 68 Cal.App. 2d 674, 680, 157 P.2d 446, 449. To uphold appellant's contention would mean that

when convicted of an offense with two priors an accused should be declared an habitual criminal, but when convicted with three priors the defendant could be imprisoned for the last offense and all priors would be eliminated from consideration, which would defeat the very purpose of the statute, namely, the protection of society. The use of the word "punishment" is not always appropriate. "Penal laws are not so much for the punishment of the offender as for the protection of society, and experience has shown that the persistent and hardened offender is more dangerous to society than a person who has committed but one offense, and that a severer punishment is demanded in such case, the better to protect society." People v. Coleman, 145 Cal. 609, 611, 79 P. 283, 284.

[38] In appellant's closing brief a new contention with respect to the habitual criminal statute is presented, without citation, namely, that subsection (c) renders Penal Code, sec. 644 unconstitutional. Subsection (c) reads: "Provided, however, that in exceptional cases, at any time not later than 60 days after the actual commencement of imprisonment, the court may, in its discretion, provide that the defendant is not an habitual criminal, and in such case the defendant shall not be subject to the provisions of this section or of Sections 3047 and 3048 of this code." Appellant contends that "Exceptional cases" are left to the "discretion" of "the court," without legislative guide. In People v. Biggs, 9 Cal.2d 508, 515, 71 P.2d 214, 116 A.L.R. 205 and People v. Jones, 6 Cal.2d 554, 59 P.2d 89, the Supreme Court has presumed that subsection (c) of sec. 644 of the Penal Code is constitutional. Further, on the facts of this case a complete answer to appellant's contention is found in People v. Keilly, 54 Cal.App.2d 764, 768, 129 P.2d 939 (hearing by Supreme Court denied). Subsections (a) and (b) under which appellant was sentenced are clearly constitutional. People v. D'A Phillipo, 220 Cal. 620, 32 P.2d 962; In re Rosencrantz, supra; 7 Cal.Jur. 846–848; 8 R.C.L. 271; People v. Gowasky, 244 N.Y. 451, 155 N. E. 737, 58 A.L.R. 20.

[39] This court is zealous in guarding the constitutional right of every person charged with crime to have a fair and impartial trial. Although the main question in a criminal case is to determine if there is evidence to support the verdict that the defendant is guilty of the crime charged, in the face of the record in this particular case, it must be held that the defendant did not have a fair and impartial trial because of the presentation to the jury of the records of his criminal career, most of which had no bearing on the questions at issue. People v. Sarazzawski, Cal., 161 P.2d 934. The reversal is placed solely upon this ground. The judgment and the order denying defendant's motion for a new trial are reversed.

PETERS, P.J., and SCHOTTKY, J. pro tem., concur.




74 Cal.App.2d 480

**TROENDLE v. CLINCH et al.**

**Civ. 15026.**

District Court of Appeal, Second District, Division 1, California.

May 15, 1946.

Hearing Denied July 11, 1946.

**1. Execution ⇐73**

The granting or denial of judgment creditor's motion for issuance of an execution more than five years after entry of judgment, rests in discretion of trial court. Code Civ.Proc. § 685.

**2. Appeal and error ⇐983(3)**
**Execution ⇐73**

The word "discretion" in rule authorizing trial court in its discretion to grant or deny judgment creditor's motion for issuance of execution more than five years after entry of judgment should not be interpreted as authorizing trial court to extend or refuse such remedial action as the trial court sees fit, or as permitting an appellate court to summarily dispose of such a mat-

ter by refusing to interfere with such so-called discretion when manifest injustice appears to have resulted. Code Civ.Proc. § 685.

See Words and Phrases, Permanent Edition, for all other definitions of "Discretion".

3. Execution ⇐73

The circumstances of each case in which judgment creditor seeks issuance of execution more than five years after entry of judgment, must be considered to the end that justice may be accomplished. Code Civ.Proc. § 685.

4. Execution ⇐73

The basic question in determining whether judgment creditor is entitled to issuance of execution more than five years after entry of judgment is not whether the judgment creditor has exercised extreme diligence but whether the judgment creditor has exercised due diligence in attempting to enforce judgment during the five year period. Code Civ.Proc. § 685.

5. Execution ⇐73

The statute relating to issuance of execution more than five years after entry of judgment does not require that a judgment creditor must have pursued every possible means to collect a judgment before the relief can be granted. Code Civ.Proc. § 685.

6. Execution ⇐73

A judgment creditor who follows the customary procedure that would be taken in the average law office to collect a judgment, has exercised due diligence in attempting to enforce the judgment, so as to be entitled to issuance of execution after five years from entry of judgment. Code Civ.Proc. § 685.

7. Execution ⇐73

A judgment creditor's assignee who instituted supplementary proceeding against judgment debtor disclosing no assets and who thereafter followed the customary procedure that would be taken in the average law office to collect judgment where the records revealed no assets, and who employed investigator to make a yearly check of the records, exercised due diligence in attempting to enforce judgment so as to be entitled to issuance of execution after five years from entry of judgment. Code Civ. Proc. § 685.

8. Judgment ⇐847

An assignee of judgment had a collectible interest in the judgment.

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Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Isabel M. Troendle against Mostyn C. H. Clinch and Clive Preston Thurtle, individually and as copartners doing business under the firm name and style of Clinch and Thurtle, and Grace Donnell and another. The plaintiff recovered a judgment against the named defendants. Theodora K. Troendle and Phil S. Gibson were substituted as parties plaintiff in lieu of Isabel M. Troendle, deceased. The judgment was assigned to Theodora K. Troendle who filed a motion for execution against Clive Preston Thurtle. The motion was denied, and Theodora K. Troendle appeals.

Order reversed with direction.

Edward M. Raskin, of Los Angeles, for appellant.

Laurence B. Martin, of Los Angeles, for respondent, Clive Preston Thurtle.

DORAN, Justice.

The record discloses that an action claiming damages for fraud was commenced by appellant's assignor, Isabel M. Troendle, deceased, on September 16, 1929 against several defendants, one of whom is the respondent Clive Preston Thurtle. On October 22, 1929 a judgment was entered in favor of the plaintiff in such action and against the defendants Mostyn C. H. Clinch, Clive Preston Thurtle and Grace Donnell, in the sum of $12,625, plus costs of $83.85. This judgment was affirmed by the District Court of Appeal on July 29, 1932. 125 Cal. App. 147, 13 P.2d 852.

On October 1, 1932 Isabel M. Troendle assigned a one-half interest in said judgment to appellant, her daughter, and the remaining one-half to her attorney Phil S. Gibson who on August 27, 1942 assigned to appellant. The respondent Thurtle was, on October 17, 1933, examined on supplementary proceedings concerning his assets

and was discharged. In November of 1933, the sum of $8,500 on account of said judgment, was collected from the estate of Lem A. Brunson, a surety on the appeal bond in such action. The respondent has never paid anything, nor has the balance due on the judgment been paid by anyone.

In June, 1935 one Roy Rosen, employed for that purpose, commenced an investigation to discover possible assets which might be levied upon, and thereafter, at least once each year until 1941, examined the records in the offices of the County Recorder and Tax Assessor of Los Angeles County. These records failed to disclose any such assets. Finally, on November 19, 1941, according to Rosen's affidavit, the records showed the respondent Thurtle and wife to be the owners of certain real estate in Los Angeles subject to an FHA loan of $8,600. Also, two automobiles were found to be registered in respondent's name. In October, 1942, after learning that Thurtle was employed in Los Angeles, Mr. Rosen confronted respondent with the apparent ownership of real estate and automobiles. According to the Rosen affidavit Thurtle said: "I have no interest in that property of any kind because it belongs to my wife as her separate property"; further, that an execution against the automobiles would yield nothing because they were heavily encumbered. Later, about October 21, 1942 Rosen learned that Thurtle had caused a homestead to be recorded in respect to the real estate. Thurtle's attorney, Laurence B. Martin, advised Rosen that Thurtle was unable to pay the judgment and that the latter's "financial situation was not good". The Rosen affidavit further states that in 1944 Rosen discovered that Thurtle was engaged in the real estate business in Beverly Hills; that in January, 1945 Thurtle handled a series of real estate transactions from which resulted large commissions. In reference to the other defendants Rosen averred that Mostyn C. H. Clinch died in 1937 or 1938, apparently leaving no estate; that Grace Donnell had left Los Angeles in 1934 or 1935 and had remarried; and that affiant had been unable to discover any property of any of the defendants other than as mentioned.

Appellant's motion under Section 685 of the Code of Civil Procedure, seeking the issuance of an execution after five years from entry of judgment was filed on March 9, 1945; such motion was denied on April 16, 1945 and the present appeal followed. In the respondent's counter affidavit contesting appellant's right to such execution, it is stated that "during the period of five years following the date when the said judgment became final, affiant had assets, income and resources sufficient to have paid the balance then due on said judgment. * * * That affiant has never stated that he had been unable to accumulate assets * * * or that he had not * * * been able to make any payment * * *". Respondent's affidavit specifies his earnings as approximately $200 per month from July, 1933 to Feb. 19, 1934, and thereafter as follows: 1934, $3,411.86; 1935, $5,347.85; 1936, $8,950.32; 1937, $9,000; 1938, $9,893.50.

[1] According to the briefs of both parties, the chief question is whether the denial of appellant's motion for issuance of an execution amounts to an abuse of discretion on the part of the trial court. It is apparently conceded by both parties that the granting or denial of such motion is a discretionary matter; consequently those cases which merely deal with the general rule in that respect, do not aid the present inquiry. Many, if not most of the cases cited by the respondent are of this character.

In Hull v. Santino, 68 Cal.App.2d 300, 301, 156 P.2d 946, 947, the court said: "The problem which the trial judge was called upon to solve was whether the creditor has exercised *due diligence, under the circumstances of this case,* in attempting to enforce his judgment during the five year period." (Italics added.) A denial of a motion for execution was there held proper where it appeared that the debtor was the owner of valuable land which had produced crops during the entire life of the judgment, and that the creditor had not demanded payment or made sufficient inquiry. The facts of the Hull v. Santino case are in no wise comparable to those of the present controversy; the decision does not purport to do more than follow the usual rule as to dis-

cretion, and is not authority for respondent's contention. Obviously, each case must be judged on its own merits as to "whether the creditor has exercised due diligence, under the circumstances".

[2, 3] In Mongerson v. Williams, 64 Cal.App.2d 279, 282, 148 P.2d 419, 420, the court said: "It is well settled that this discretion (of the trial court) is not a capricious nor arbitrary one but is one guided and controlled in its exercise by fixed legal principles, and intended to subserve and not to impede or defeat the ends of substantial justice. McClelland v. Shaw, 23 Cal.App.2d 107, 72 P.2d 225; McNabb v. McNabb, 47 Cal.App.2d 623, 118 P.2d 869." A petition for hearing was denied by the Supreme Court in the Mongerson case. There is similar pronouncement in the case of Demens v. Huene, 89 Cal.App. 748, 753, 265 P. 389, 391, where the trial court's exercise of discretion in respect to denying execution after five years, likewise was held to have been abused. In the Demens case the court said in part, as follows: "It is the intent of the law, and it would seem the intent, as well, of good morals, that everyone being able should pay his debts. * * * The law does not contemplate that, the time of the statute of limitations having run, the liability to pay has completely passed. The motion made in this case is provided for by law. There must, then, be something added to the mere fact of the expiration of the time and that the judgment debtors were possessed of personal property, which would move the court to deny the right given by the statute". In this connection it is well to note that, in the language of Sharon v. Sharon, 75 Cal. 1, 48, 16 P. 345, 366, " 'abuse of discretion' in making such orders does not necessarily imply a willful abuse, or intentional wrong. In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason, all the circumstances before it being considered." To interpret the term "discretion" as authorizing a trial court to extend or refuse this remedial action as it sees fit is obviously wrong. Likewise, for an appellate court to summarily dispose of such a matter by refusing to interfere with such so-called discretion when manifest injustice appears to have resulted, cannot be right. As stated in many of the cases cited herein, and elsewhere, the circumstances of each case must be considered to the end that justice may be accomplished.

[4, 5] The basic question, as stated in appellant's reply brief, "is not whether the judgment creditor has exercised *extreme diligence,* but whether appellant has exercised *due diligence*". By its terms Section 685 does not require that a judgment creditor must have pursued every possible means to collect a judgment before the relief can be granted; such a rule is not suggested in any of the reported decisions. Indeed, such a construction would render the code provision practically worthless, and would place a premium upon the dubious acts of a judgment debtor who manages to get by the five year period without paying his just debts. Such cannot be and is not the law.

In the present case, as was said in Terrill v. Shepherd, 57 Cal.App.2d 290, 294, 134 P. 2d 491, 494, appellant's affidavit seeking the relief afforded by Section 685, "indicates about the usual procedure that would be taken in the average law office to collect a judgment where the records revealed no assets belonging to the judgment debtor. Extreme diligence is not demanded * * *." It may also be noted that, in the Terrill case, the creditor had not gone to the trouble of instituting supplementary proceedings to examine the judgment debtor, as had the appellant in the instant case, yet the appellate court said that such course was unnecessary and held that the judgment creditor was not "guilty of laches in failing to take action when he had every reason to believe that his efforts would have been futile."

This matter of respondent's examination under supplementary proceedings instituted by appellant in 1933, is, however, not without importance in the present controversy. In this connection the record recites that "Mostyn C. H. Clinch and Clyde Preston Thurtle are sworn, examined and discharged." Since Section 714 of the Code of Civil Procedure authorizing such proceeding is for the expressed purpose of "requiring such judgment debtor to appear and answer concerning his property", the record entry above referred to can only

mean that Thurtle testified under oath that he possessed no property subject to execution, otherwise he would not have been discharged. The respondent's brief "concedes appellant's assertions * * * concerning an examination of the former's (Thurtle's) assets". Yet it is to be noted that Thurtle's counter affidavit hereinbefore referred to makes the following statement: "That during the period of five years following the date when said judgment became final affiant had assets, income and resources sufficient to have paid the balance then due on said judgment". Certainly the appellant had no information concerning these assets, nor knowledge as to any bank account which respondent now states that he had, and in the supplementary proceedings the respondent made no such disclosure. In this particular at least, judgment creditors can hardly be expected to be clairvoyant, nor are they to be penalized for lack of knowledge.

[6] Following the supplementary examination disclosing no assets, it appears that appellant followed the customary, usual, reasonable and diligent procedure "that would be taken in the average law office to collect a judgment where the records revealed no assets", which, in the language of Terrill v. Shepherd, 57 Cal.App.2d 290, 294, 134 P.2d 491, is all that is required. As stated in appellant's brief, it is not "obligatory for a judgment creditor to place detectives upon the trail of the judgment debtor in order to show due diligence". However, appellant did employ an investigator to make a yearly check of the records, and in 1942 this investigator confronted Thurtle with information concerning apparent ownership of automobiles and real estate. Thurtle, according to Rosen, denied ownership in the realty and claimed the automobiles were heavily encumbered. Again, on January 6, 1943 Thurtle's attorney wrote the investigator that his client's "financial situation is not good", and that "naturally, we will do what we can to resist any such effort" to collect the judgment. And on Jan. 9, 1943, through his attorney, Thurtle "declines to supply the affidavit" as to respondent's financial situation, and "simply states that his present financial situation is not only critical, but largely a month to month proposition". Doubtless, no single fact can be taken as controlling herein; the over-all picture, however, seems reasonably clear,—namely, that the respondent was making every possible effort to avoid the payment of the judgment in question.

Conceivably, the judgment creditor might have gone to more extreme lengths. This fact, however, is quite immaterial providing the creditor's activity satisfies the due diligence rule. To require more than customary law office procedure as constituting due diligence, would amount to strict construction of Section 685, in clear opposition to Section 4 of the Code of Civil Procedure providing that "all proceedings under it (the Code) are to be *liberally construed, with a view to effect its objects and to promote justice.*" (Italics added.) Likewise Section 1858 of the same Code specifies that "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon * * *." In this connection note may be taken of the recent case of Helvey v. Castles, March 27, 1946, reported in 167 P.2d 492, 496, where, in affirming an order granting an execution under Section 685 of the Code of Civil Procedure, the court said: "the statute under consideration should not be given a construction which would penalize a creditor for inactivity when he in good faith explores the available sources of information."

[7, 8] "Applying these rules to the instant case", as was said in Mongerson v. Williams, 64 Cal.App.2d 279, 282, 148 P.2d 419, 421, "we find no facts in the record before us justifying a conclusion that the plaintiff failed to exercise due diligence during the five-year period, or, as a matter of fact, after that period had expired. Nor are any subsequent developments shown which justify the conclusion that the defendant has in any way been led to change his position or that the plaintiff should no longer be entitled to collect his judgment." The respondent's affirmation "That at this late date to now permit execution to issue would work a grievous injustice upon affiant", is not explained; on the contrary, it appears that the denial of this statutory remedy to the appellant has, indeed, worked

a grievous unjustice, which if permitted to stand as a precedent would almost entirely nullify the provisions of the statute. The respondent's final contention that the appellant did not have a collectible interest in the judgment was apparently not urged in the court below, and in any event, appears to be without substantial merit.

The order appealed from is therefore reversed and the Superior Court is directed to issue a writ of execution upon the judgment in question.

YORK, P. J., and WHITE, J., concur.




## MEYERS v. EL TEJON OIL & REFINING CO.*

Civ. 3190.

District Court of Appeal, Fourth District, California.

May 21, 1946.

Hearing Granted July 18, 1946.

1. Corporations ⇐298(3)

A special meeting of directors of a corporation held without call or notice, or without written waiver of notice, or consent to the meeting signed by absent directors is illegal, and the directors present at such meeting cannot perform any valid corporate act. Civ.Code, §§ 307a, 307b.

2. Corporations ⇐425(6)

Defendant corporation was not estopped from urging invalidity of note given by it to one of its stockholders in lieu of payment of cash dividends on ground that special meeting of board of directors at which note was issued was held without call or notice and without waiver of notice or consent to meeting signed by absent directors, where stockholder to whom note was given was charged with notice of invalidity of the meeting. Civ.Code, §§ 307a, 307b.

3. Corporations ⇐155(5)

Evidence failed to show that note given to plaintiff by defendant corporation in lieu of payment of cash dividend was lawfully issued for a valid consideration, so as to permit recovery on the note.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Walter J. Meyers against El Tejon Oil & Refining Company on a note. From a judgment in favor of plaintiff for principal and interest, attorneys' fees and costs, the defendant appeals.

Reversed.

Kendall, Howell & Deadrich, of Bakersfield, and Roy P. Dolley, of Los Angeles, for appellant.

Calvin H. Conron, Jr., of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment in favor of plaintiff for principal and interest, attorneys' fees and costs, based on a promissory note given to plaintiff by defendant.

Actually the promissory note was given in lieu of payment of a cash dividend, according to the testimony of plaintiff and the secretary of the corporation. The corporation gave plaintiff a check for the amount of the dividend and he immediately gave his check to the corporation for a like amount in exchange for the note.

The corporation had nine directors, all of whom were stockholders. There were other stockholders, the exact number being undisclosed.

The record before us is not as complete as could be desired. However, we will assume certain facts to have been proved which are relied upon by plaintiff to authorize the payment of a dividend as we believe the turning point of the case is the lack of regularity of the special meeting of the board of directors at which the dividend was attempted to be declared and perhaps a resolution passed attempting to authorize the issuance of promissory notes.

* Subsequent opinion 174 P.2d 1.

to each director "in full payment of the dividend due them".

The directors of the corporation were Gould M. Fitch, Clare R. Fitch, Walter J. Meyers, Helen K. O'Neal, George W. Gill, Jr., Emil Hefty and Joe D. Weedon. Gould M. Fitch, George W. Gill, Jr., Walter J. Meyers and Joe D. Weedon were present at the meeting and voted in favor of declaring the dividend and may have decided to give the directors the promissory notes in lieu of paying the dividend in cash. Directors Clare R. Fitch, Helen K. O'Neal and Emil Hefty were not present. As far as the record shows there was no call of the special meeting, no notice of it given to any of the directors (Sec. 307a, Civil Code), and no waiver of notice nor consent to the meeting signed by any of the absent directors. Sec. 307b, Civil Code.

[1] It is well established in this State that a special meeting held without call or notice, or without written waiver of notice, or consent to the meeting signed by the absent directors is illegal, and that the directors present at such meeting cannot perform any valid corporate act. As said in Curtin v. Salmon River, etc., Co., 130 Cal. 345, 62 P. 552, 553, 80 Am.St. Rep. 132: "It was shown by the testimony of the secretary that no notice of the meeting was given to either of the two directors who were absent therefrom, and the minutes of the corporation contain no entry of the service of any notice of the meeting; nor were the minutes of that meeting ever approved at any subsequent meeting of the board of directors. Under well-settled rules, it must be held that the directors present at that meeting could not perform any valid corporate act. Harding v. Vandewater, 40 Cal. 77; Thompson v. Williams, 76 Cal. 153, 18 P. 153 [9 Am. St.Rep. 187]; Smith v. Dorn, 96 Cal. 73, 30 P. 1024 [Pauly v. Pauly, 107 Cal. 8, 40 P. 29, 48 Am.St.Rep. 98]." See also, Cheney v. Canfield, 158 Cal. 342, 111 P. 92, 32 L.R.A.,N.S., 16, and cases cited in 6a Cal.Juris. Sec. 599, pages 1075-1076.

[2] Plaintiff argues that defendant is estopped to urge the invalidity of the note. We cannot see how estoppel can arise from the facts before us. Plaintiff was a director and the vice president of the corporation and is charged with notice of the invalidity of the meeting.

[3] As the evidence fails to show that the promissory note was lawfully issued for a valid consideration the judgment in favor of plaintiff cannot be supported.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.




74 Cal.App.2d 500

**BLISS v. MARTIN.**

Civ. 12745.

District Court of Appeal, First District, Division 1, California.

May 16, 1946.

Hearing Denied July 15, 1946.

**1. Limitation of actions ⇐193**

The duty of pleading and proving that a fraud was not discovered until within three years prior to the filing of a complaint, and that plaintiff had no actual or presumptive knowledge of facts sufficient to put him on inquiry, is on the plaintiff. Code Civ.Proc. § 338, subd. 4; Civ.Code, § 19.

**2. Limitation of actions ⇐199(2)**

Whether a certain circumstance within the knowledge of an alleged defrauded party is sufficient to make it the duty of such persons to investigate, so as to avoid bar of three-year statute of limitations, is a question of fact for jury or trial court. Code Civ.Proc. § 338, subd. 4.

**3. Limitation of actions ⇐196(1)**

In action to recover from defendant as constructive trustee funds originally the property of deceased and deposited by deceased in joint tenancy with plaintiff and subsequently withdrawn by defendant, in determining date upon which three-year statute of limitations began to run against plaintiff, court had right to consider fact that plaintiff as a lawyer was well aware

of his legal rights under the statute of limitations and his duty to investigate status of the joint account. Code Civ. Proc. § 338, subd. 4; Civ.Code, § 19.

**4. Limitation of actions ⇐100(11)**

Under the statute providing that a cause of action for fraud within the three-year statute of limitations is not to be deemed to have accrued until discovery by aggrieved party of the facts constituting the fraud, an inquiry must be made if the party alleged to be defrauded is aware of facts which would make a reasonably prudent person suspicious. Code Civ.Proc. § 338, subd. 4.

**5. Limitation of actions ⇐197(2)**

In action to recover from defendant as constructive trustee funds originally property of deceased and deposited by the deceased in joint tenancy with plaintiff and subsequently withdrawn by defendant, evidence established that plaintiff's cause of action was barred by the three-year statute of limitations on ground that plaintiff could have discovered, acting as a reasonably prudent person, that funds had been withdrawn more than three years prior to the bringing of the action, as against plaintiff's contention that the date of discovery was the date on which he was appointed executor of the decedent's estate, which would be within the three-year limitation period. Code Civ.Proc. § 338, subd. 4; Civ.Code, § 19.

PETERS, P. J., dissenting.

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Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Charles A. Bliss against Irene Martin to recover from defendant, as constructive trustee, funds placed by Lulu H. Coffin, formerly Lulu H. Montgomery, in joint tenancy with plaintiff. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Joseph C. Prior, of Oakland, for appellant.

Pierre A. Fontaine and J. Leonard Rose, both of Oakland, for respondent.

WARD, Justice.

This is an action wherein appellant seeks to recover from respondent, as constructive trustee, certain funds, originally the property of Lulu H. Coffin, deceased, placed by said Lulu H. Coffin, formerly Lulu H. Montgomery, in joint tenancy with plaintiff, Chas. A. Bliss. The appeal is presented in the form of a bill of exceptions with a stipulation to the effect that the evidence, minute orders, etc., contained therein, are true and correct.

The bill of exceptions contains the following: "Plaintiff was duly sworn and testified that he was the plaintiff in said action; that he was an attorney at law, and had been such for over forty years; that he had known one Lulu H. Montgomery during all of that time, and had acted as one of her attorneys from 1911 until her death, on September 8th, 1937, and that a confidential relationship existed between them during most of said time; plaintiff residing at Sacramento, California, and she at Oakland; that said Lulu H. Montgomery at various times informed plaintiff that for services rendered and to be rendered by plaintiff she desired to create joint tenancy bank accounts between herself and plaintiff and did cause certain joint tenancy bank accounts to be established by the execution by both of said persons of written agreements, and the deposit of moneys in bank in said joint accounts.

"That on July 17, 1926 said Lulu H. Montgomery, also known as L. H. Brown, owned and possessed herself alone in the name of L. H. Brown, a savings account No. 92674 in the Central Bank of Oakland, and which said account No. 92674 was created and opened in said Central Bank in herself alone under the name of L. H. Brown on August 5, 1921 with an initial deposit of $7243.00; that the balance in said savings account No. 92674 on July 17, 1926 was the sum of $14,563.45." The account in accordance with a new local bank system was changed and transferred on July 17, 1926 to account No. 42950. It should be noted that Lulu H. Coffin, in the real estate business, over a number of years opened savings accounts with different relatives and friends under various

assumed names. The names assumed by the joint tenants generally bore some resemblance to the true names of the parties. Whether this procedure was for tax or other business purposes is of no consequence in the outcome of this case, except in tracing various accounts. Plaintiff knew that Lulu H. Coffin used various names as three other accounts were opened with him under the names of Lulu H. Montgomery, L. H. Brown and Hannah Brown. These accounts likewise provided that the money might be withdrawn by either party without reference to "original ownership." Other accounts in other banks were opened with plaintiff. Some of the accounts were closed out prior to the death of Lulu H. Coffin, and some were subsequently paid by the banks to appellant Bliss.

The bill of exceptions relates: "That on June 27, 1927 said Savings Account No. 42950 was changed from a single account in said name of L. H. Brown to an account in the names of L. H. Brown or Chas. A. Bliss in joint tenancy. That plaintiff's Exhibit No. 1 consists of two separate and distinct signature cards affecting said Account No. 92674 transferred by said Central Bank on July 17, 1926 to said new Savings Account No. 42950, and a Deposit Agreement affecting said new Savings Account No. 42950 dated June 27, 1927 and signed by said L. H. Brown and said Chas. A. Bliss * * *." The deposit agreement provided: "All moneys now or at any time deposited by us or either of us, with Central Savings Bank of Oakland, to the credit of the above account, are and shall be so deposited by us and received by it upon the following terms and conditions of repayment, namely; that the amount thereof and all dividends thereon shall be paid by Central Savings Bank of Oakland, to us or either of us, or to the survivor of us, or the executors, administrators or assigns of such survivors; or upon the written order of any such person so entitled to payment; and without reference to the original ownership of the moneys deposited."

The bill of exceptions continues: "That on May 27, 1929 said L. H. Montgomery, also known as L. H. Brown, without the knowledge or consent of said plaintiff, withdrew from said Savings Account No. 42950 the sum of $17,714.94 and thereby closed said Account No. 42950. That at no time did said plaintiff deposit or contribute to or withdraw any moneys from said Account No. 92674 which was changed by said Central Bank on July 17, 1926 to said Account No. 42950, nor did said plaintiff at any time deposit or contribute to or withdraw any moneys from said Account No. 42950; that on May 27, 1929 said Lulu H. Montgomery owned and possessed a joint savings Account No. 31104 in said Central Bank in the name of herself, Lulu H. Montgomery, or Fannie Frances Alpi, her sister, and which said Account No. 31104 was created and opened by said Lulu H. Montgomery with said bank in the manner aforesaid on October 9, 1928 with an initial deposit of $50.18 and that on May 27, 1929 said Lulu H. Montgomery, without the knowledge or consent of plaintiff, deposited in said Savings Account No. 31104 the said sum of $17,714.94 which she had withdrawn on May 27, 1929, from said Savings Account No. 42950. That plaintiff had full faith and confidence in said Lulu H. Montgomery and never inquired at the said Central Bank to ascertain if said Lulu H. Montgomery had withdrawn any of said funds from said Account No. 42950 although plaintiff at all times could have inquired into and examined said Account No. 42950 to ascertain if said Lulu H. Montgomery had withdrawn any funds therefrom * * *."

Lulu H. Coffin had joint bank accounts with other persons than plaintiff. Some of the names appear as Laura Frances Dunnigan, Laura Alpi and Fannie Frances Alpi. The accounts were closed out by Lulu H. Coffin under whatever name she used.

The bill of exceptions further sets forth: "That at the time of the death of said Lulu H. Montgomery, to-wit: On September 8, 1937, said Lulu H. Montgomery owned and possessed a joint savings account No. 78410 with said Central Bank under the name of Jean Watts or Irene Martin, defendant herein, which Account No. 78410 was created and opened by said Lulu H. Montgomery with said bank in the manner aforesaid on July 3, 1935 with an initial

deposit of $5000.00, and that the balance in said account No. 78410 on September 8, 1937 was $8225.74." Similar accounts with defendant existed at the time of the death of Lulu H. Coffin with the joint tenants listed as "Fannie A. Brown or Jennie Miller," "Lulu B. Anderson or Ruth Rogers," "Lulu A. Anderson or Ruth Rogers," "Jean Watts or Jennie Miller," "Fannie A. Brown or Ruth Miller."

Standing in the names of decedent and defendant as Fannie A. Brown or Ruth Miller was a joint safe deposit box at the Central Bank. The bill of exceptions states: "That on September 16, 1937 said safe deposit box No. 13726 at the request of said plaintiff, as aforesaid, was opened and its contents *seen by* John R. Ober, deputy treasurer of said Alameda County *and said plaintiff,* and plaintiff testified that at that time, to-wit: September 16, 1937, *he first learned that said Account No. 42950 had been closed by said Lulu H. Montgomery.*

"That on September 16, 1937 there was among the contents of said safe deposit box No. 13726, the bank pass book of said savings Account No. 92674, later changed by said Central Bank to said Account No. 42950, and which said bank pass book showed the withdrawal therefrom by said Lulu H. Montgomery on May 27, 1929 of said sum of $17,714.94 and which said bank pass book was then and there, to-wit: on September 16, 1937, seen *and could have been examined* by said plaintiff in the presence of said Deputy Treasurer John R. Ober * * *." (Emphasis added) The bill of exceptions then lists the various pass books material to this case as documents that were seen and could have been examined by appellant at that time.

Finally, the bill of exceptions sets forth: "That prior to March 13, 1940, other than his signing on June 27, 1927 of a joint tenancy card with said Lulu H. Brown as joint tenant in Account No. 42950, plaintiff did not assert any claim to any of said savings Accounts Nos. 92674, later changed to 42950, 31104, 78410, 58979, 38768, 3519 or 3520 or to any of the funds or moneys contained in said accounts or either of them.

"That at no time did said plaintiff deposit or contribute or withdraw any moneys to or from said Accounts Nos. 31104, 78410, 58979, 38768, 3519 or 3520 or any of them.

"That by the agreement and conduct of said plaintiff as such executor, said plaintiff as such executor treated and regarded said Accounts Nos. 78410, 58979, 38768, 3519 and 3520 and the moneys and funds therein contained as the property of said defendant and *permitted said defendant upon his sanction, approval and direction* as such executor, to withdraw, use and enjoy all moneys and funds from said Accounts Nos. 78410, 58979, 38768, 3519 and 3520, *and said plaintiff as such executor made demand upon said defendant and in compliance with said demand said defendant did pay her share of State Inheritance Tax and Federal Estate Tax on the moneys contained in said savings Accounts Nos. 78410, 58979, 38768, 3519* and 3520." (Emphasis added) It is true plaintiff testified that he made only a cursory examination of the savings account books at the time the same deposit box was opened. Plaintiff testified that he observed on September 16, 1937, that the book showing Account No. 42950 indicated that all funds therein had been withdrawn on May 27, 1929.

On the basis of the foregoing facts with respect to plaintiff's rights against the accounts in the names of decedent and defendant the court found, not that a confidential relationship existed between the parties, but that during the period appellant acted as Mrs. Coffin's attorney that "his relation with her was confidential." The court also found: "That on May 27, 1929 said Lulu H. Montgomery, also known as L. H. Brown, without the knowledge or consent of plaintiff, withdrew from said savings account No. 42950 the sum of $17,714.94 and thereby closed said account No. 42950;

"That at no time did said plaintiff deposit or contribute or withdraw any moneys to or from said account No. 92674 which was changed by said bank on July 17, 1926 to

said account No. 42950 as aforesaid." The findings then trace the funds removed in 1926 to other accounts existing at the time of Mrs. Coffin's death in the names of defendant and decedent. Without repetition herein as to the particular accounts, the court specifically designated the accounts by number, amount, date, etc., and found that in each instance the "pass book was then and there, to-wit: on September 16, 1937 seen and could have been examined by said plaintiff." The findings then relate that as executor plaintiff delivered the respective bank books to the defendant and permitted defendant to withdraw the respective balances and close the accounts. The court also found that since June 27, 1927 "plaintiff did have the means of knowledge and notice" of the original account and of the condition of the deposits and withdrawals up to the date the account was closed, and that "on September 16, 1937 and at all times thereafter said plaintiff did have the means of knowledge and notice of said savings accounts * * * [in the names of defendant and decedent] and of the condition of said accounts and each of them and of the moneys contained in said accounts and each of them."

The court, as a conclusion of law, found that plaintiff was guilty of laches and that the action is barred by the provisions of subd. 4 of sec. 338 of the Code of Civil Procedure, which was pleaded by defendant. If the provisions of subd. 4 of sec. 338 may be invoked, the subject of laches need not be considered. The subdivision of the section provides that an action for relief on the ground of fraud or mistake must be commenced within three years, and further provides: "The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Appellant has evolved a theory which, upon examination, appears to be quite involved. Briefly, it is that the statute of limitations could not commence to operate until appellant gained knowledge of facts from which he could trace the disposition of the funds to respondent. Appellant then sets the date of October 14, 1937, the date of his appointment as executor, as the date when he was able to trace the funds. It seems to be appellant's theory that it was his appointment as executor that gave him the legal right to check decedent's bank accounts. Defendant and decedent under fictitious names owned the right to a safety deposit box. All of the bank pass books in documentary form, giving a complete history of the various transactions, were available to appellant to examine when he opened that safety deposit box. Appellant did not deny on the witness stand that he could have thoroughly examined the accounts on September 16, 1937. His position is that his examination was cursory. There is a suggestion that appellant did not desire to take action against respondent while he acted as executor. It was stipulated as a fact in the bill of exceptions "that plaintiff was still acting as executor of the decedent's estate, when this action was filed on October 11, 1940."

Each side approached the appeal in statements to the effect that the problem to be decided is when did plaintiff discover the fact that the money, deposited in joint tenancy by Lulu H. Coffin under the names of L. H. Brown and Chas. A. Bliss, had been withdrawn by Mrs. Coffin and deposited in the various accounts here considered. Appellant asserts that this is the sole question to be decided, but that the date of discovery is October 14, 1937, the date upon which plaintiff was appointed the executor of Mrs. Coffin's estate. Respondent accepts the challenge and proceeds to demonstrate that the finding that appellant saw and could have examined the various bank books is supported by the testimony of appellant that he actually examined the account numbered 42950 and that such bank book showed that "all funds therein had been withdrawn."

[1-5] "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." Civil Code, sec. 19. The duty of "pleading and proving" that a fraud was not discovered until within three years prior to the filing of a complaint, and that he had "no actual or presumptive knowl-

edge of facts sufficient to put him on inquiry," is on the plaintiff. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958, 972. Whether a certain circumstance within the knowledge of an alleged defrauded party is sufficient to make it a duty of such person to investigate *is a question of fact* to be determined by the jury or the trial court. The court had the right to consider the fact that appellant as a lawyer was well aware of his legal rights under the statute of limitations (Hobart v. Hobart Estate Co., supra,) and his duty to investigate. The trial court here had before it the testimony of appellant that the bank pass book was examined by appellant on September 16, 1937. The bank book, an exhibit in this case, shows eight entries, the last one of which was the withdrawal of the entire balance. No more convincing evidence could be presented than the documentary evidence that the money was gone "to arouse the suspicions of a reasonable person." Hobart v. Hobart Estate Co., supra, 26 Cal.2d 412, 159 P.2d at page 974. In appellant's closing brief, the following statement is made: "He did look at the book covering account No. 42,950 and saw that all the funds had been withdrawn." With equal ease he could have found that in account No. 31104, in the name of Lulu H. Montgomery and her sister, there was deposited on the same date the identical amount withdrawn from account No. 42950. Such evidence at least falls within the rule announced in the Hobart case—that an inquiry must be made if the party alleged to be defrauded "is aware of facts which would make a reasonably prudent person suspicious." Hobart v. Hobart Estate Co., supra, 26 Cal.2d 412, 159 P.2d at page 973; see, also Scafidi v. Western Loan & Bldg. Co., Cal.App., 165 P.2d 260, petition for hearing in Supreme Court denied. In the Hobart case the fraud was not discovered at one time, nor could it have been discovered at one time. Hobart only learned of the fraud from time to time. Here the discovery that a fraud had been committed when Mrs. Coffin withdrew the money was made immediately when the safe deposit box was opened—the entire fraud was discovered just as soon as appellant found out the entire account had been withdrawn.

It has been suggested that a new cause of action arose with each successive transfer of money held originally in the joint tenancy account, and that such causes of action shall not be deemed to have accrued until the original joint tenant has means of knowledge relative to each successive transfer. Even assuming this theory is correct, it is admitted that on September 16, 1937, the appellant here saw that his account had been closed and that there were innumerable other accounts in which the decedent had an interest prior to her death. It can not be said that the trial court was unjustified in concluding that appellant had "knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud [i. e., the transfer into the account with defendant]." Hobart v. Hobart Estate Co., supra, 26 Cal.2d 412, 159 P.2d at page 974. It is true that here, although the means of discovery were available to plaintiff at an earlier date as found by the trial court, prior to his examination of the safe deposit box the circumstances were not such that appellant had a duty to inquire so that his failure so to do became a negligent omission during that time. However, it should not be said that the trial court's determination putting him under a duty as of September 16, 1937, was erroneous as a matter of law, even under this theory, where it appears that plaintiff saw the other bank books. The determination that his duty to inquire started at that date is supported by the evidence that he knew of decedent's proclivities for having accounts in fictitious names, her habit of having many accounts and that the money in the joint account in his name had been withdrawn. To give this theory of successive fraudulent acts any greater weight in determining the date this cause of action was discovered within sec. 338(4) would require that June, 1939—the date appellant selected as the date that he *actually obtained knowledge* that the funds had been transferred to respondent—be selected as the date from which the statute started to run. The admission of appellant that on October 14, 1937, the statute of limitations actually started to run would be worthless. The facts in this case warrant the application of the recent rule that the statute commenc-

es to run only after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud. Civil Code, sec. 19; Hobart v. Hobart Estate Co., supra. However, there is nothing in the Hobart case which compels this court to go contrary to the conclusions of the trial court with respect to means of knowledge and suspicious circumstances where the conclusion of the trial court is based on facts susceptible to conflicting inferences.

In view of all the circumstances supporting the finding of the court, it should not be said by an appellate court as a matter of law or as a matter of fact that the statute of limitations did not commence to run from September 16, 1937.

The judgment is affirmed.

KNIGHT, J., concurs.

PETERS, Presiding Justice (dissenting).

I dissent.

The majority opinion holds that plaintiff gained knowledge of facts sufficient to put a reasonable person under a duty to investigate on September 16, 1937, and for that reason it holds that the complaint filed on October 11, 1940, was filed twenty-five days after the period prescribed in § 338, sub. 4 of the Code of Civil Procedure had elapsed. This holding is made in spite of the fact that on the day thus selected to start the running of the statute of limitations the plaintiff had no legal right to the possession of the bank books that were his sole source of knowledge, and had no legal right to make inquiry at the banks concerning the bank accounts in question. The plaintiff had no legal right to the possession of the books and had no legal right to make inquiry at the banks concerning accounts not his own until October 14, 1937, and did not, in fact, ascertain the true facts until June of 1939. It is at once obvious that the earliest possible date that the statute could start to run was October 14, 1937, and that the complaint filed on October 11, 1940, was filed three days before the statute had run. The majority holding, in my opinion, is based upon a failure to realize that the cause of action here involved is one against the donee of a fraudulent trustee, and not one against the fraudulent trustee. We are not required to determine in this case when plaintiff first learned that Mrs. Coffin was fraudulent, but are required to ascertain when he first learned, or should have learned, or was put upon inquiry, that he had a cause of action against this defendant, the donee of the fraudulent trustee. That is the cause of action here involved. To select September 16, 1937, as the date plaintiff was first put upon inquiry that he might have a cause of action against defendant not only results in a holding that the statute was running from September 16, 1937, to October 14, 1937, a period of twenty-eight days during which plaintiff was legally powerless to investigate, but also, in my opinion, disregards the rules of law announced in Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958.

The solution of the problem here involved turns upon a careful analysis of the facts, and upon a careful analysis of the exact nature of the cause of action here pleaded. The majority opinion states most of the pertinent facts but fails to analyze or even to discuss the exact legal nature of the cause of action here pleaded.

Plaintiff is an attorney at law and has practiced at his profession for many years. During the years here involved he resided in Sacramento. For many years he knew, was friendly with, and was attorney for Mrs. Lulu H. Coffin, formerly Lulu H. Montgomery, whose maiden name was Lulu H. Brown, who resided in Oakland. He continued to act as one of Mrs. Coffin's attorneys until her death on September 8, 1937. He testified that during this period a confidential relationship existed between them, and that at various times she had informed him that for services rendered and to be rendered by him she desired to create a joint tenancy bank account between her and him. She carried out this promise on June 27, 1927. On that date, and for some time prior thereto, she owned, under her maiden name of Lulu H. Brown, a savings account number 42950 (formerly account number 92674) in the Central Bank of Oakland. On that date there was on deposit in this account

the sum of $16,370.86. On that date this account was changed into an account in the names of L. H. Brown (the maiden name of Mrs. Coffin) and Chas. A. Bliss, the plaintiff. The signature card relating to this account and dated June 27, 1927, was signed by L. H. Brown and Chas. A. Bliss. The Deposit Agreement relating to this account, and dated the same day, reads as follows:

"Deposit Account No. 42950

"L. H. Brown or Chas. A. Bliss

"All moneys now or at any time deposited by us or either of us, with Central Savings Bank of Oakland, to the credit of the above account, are and shall be so deposited by us and received by it upon the following terms and conditions of repayment, namely: that the amount thereof and all dividends thereon shall be paid by Central Savings Bank of Oakland, to us or either of us, or to the survivor of us, or the executors, administrators or assigns of such survivors; or upon the written order of any such person so entitled to payment; and without reference to the original ownership of the moneys deposited.

"June 27, 1927, L. H. Brown
"Oakland, Cal. Chas. A. Bliss."

The plaintiff at no time deposited in, contributed to, or withdrew from, this account. Mrs. Coffin made certain further deposits in this account so that by May 27, 1929, there was a $17,714.94 balance. On that date, without the knowledge or consent of the plaintiff, Mrs. Coffin withdrew all of the money in this account and it was closed. At this time Mrs. Coffin had another joint account in the same bank, No. 31104, in her then name of Lulu H. Montgomery and the name of Fannie Francis Alpi, her sister. On May 27, 1929, there was a small balance in that account. On the same day that the account with plaintiff was closed Mrs. Coffin deposited in the joint account with her sister, $17,714.94, the exact amount withdrawn from the account with plaintiff. The plaintiff testified that at no time prior to the death of Mrs. Coffin did he ever make inquiry at the bank concerning his account, for the reason that at all times he had full faith and confidence in Mrs. Coffin and had no reason to distrust her or to believe that she had closed their account. Until her death he had no actual knowledge his account had been closed.

By July 3, 1935, the joint account with her sister, No. 31104, had increased so that the balance was then $25,061.04. On that date Mrs. Coffin withdrew $17,385.25 from that account and on July 6, 1935, withdrew an additional $6,000. On July 3, 1935, Mrs. Coffin opened three accounts with the Central Bank in her name and in the name of defendant, each with an initial deposit of $5,000. These accounts were numbered 78410, 58979, and 38768. As to No. 78410 Mrs. Coffin used a fictitious name, but defendant used her real name. As to the other two accounts both Mrs. Coffin and defendant used fictitious names. At the time of Mrs. Coffin's death on September 8, 1937, there was a balance in No. 78410 of $8,225.74; in No. 58979 of $8,225.74; and in No. 38768 of $8,225.48.

On July 5, 1935, defendant opened with the Bank of America two $3,000 joint accounts in defendant's and her names, which accounts were numbered 3519 and 3520. Both Mrs. Coffin and defendant used fictitious names as to these accounts. At the date of Mrs. Coffin's death the balance in each account was $3,129.52.

These five accounts are the subject matter of the present action, it being the theory of plaintiff that Mrs. Coffin wrongfully withdrew the money from their joint account and that that money found its way into the five accounts in which defendant was the surviving joint tenant. It is the theory of plaintiff that if he can trace the money he may hold the defendant as constructive trustee.

Mrs. Coffin had certain other joint accounts with various other persons not here involved, and a couple of other quite small joint accounts with plaintiff. At the time of her death she owned with defendant a joint safe deposit box in the Central Bank. She and defendant used fictitious names in securing this box. Mrs. Coffin died testate. By her will she named

the plaintiff executor. On September 16, 1937, which is the date selected by the majority as the date the statute of limitations started to run, plaintiff, who had not yet been appointed executor, requested the County Treasurer to open the safe deposit box for the purpose of examining its contents. The box was opened on that date in the presence of a deputy treasurer and plaintiff. Among other things in the box were a number of bank books, including the pass books for accounts Nos. 42950 (plaintiff's account), 31104 (the Alpi account), and the five pass books numbered 78410, 58979, 38768, 3519 and 3520, in the names (most of which were fictitious) of Mrs. Coffin and defendant, and other bank books for other accounts. These bank books were seen by the plaintiff on this date. It was on this date that plaintiff first secured actual knowledge that all the money had been withdrawn from account No. 42950 and that that account had been closed in 1929. He testified that at the time the box was opened he made only a cursory examination of the bank books because he knew, not having been appointed executor, that he was not yet entitled to their possession. Moreover, he stated what was the obvious fact that, although he then knew his account had been closed, he could not then tell what disposition had been made of the funds.

The plaintiff was appointed executor of the estate on October 14, 1937, the second key date involved in this appeal. On this date the contents of the safe deposit box were delivered to him. This action was commenced October 11, 1940, the third key date here involved.

The plaintiff testified that after being appointed executor he began a systematic search of all of the banks in Oakland to locate all bank accounts belonging to deceased regardless of the fictitious names she may have used. On February 7, 1939, as executor, he addressed a letter to the Central Bank asking that a full record of all accounts, identifying them by number, be given to him. The bank sent him copies of their deposit and withdrawal records relating to these accounts, but added that it was impossible to trace, through the bank records, the origin of any particular account. In June of 1939 he first became convinced that the money in defendant's accounts was the money withdrawn from his joint tenancy account and he made a formal demand upon defendant in March of 1940.

There is one other factor that should be mentioned. The plaintiff, as executor of the estate, determined that defendant was the surviving joint tenant of accounts Nos. 78410, 58979, 38768, 3519 and 3520, and as executor delivered the pass books to defendant on February 9th and 10th, 1938. Defendant immediately withdrew the money. There was some dispute over the state inheritance and the federal estate taxes on these accounts. Defendant, at the request of plaintiff as executor, paid her share of such taxes, and in June of 1938 a compromise agreement relating to such taxes was approved by the Probate Court.

The trial court found, as pointed out in the majority opinion, that plaintiff's cause of action was barred by laches and by the provisions of § 338, sub. 4, of the Code of Civil Procedure. It also found that plaintiff's relationship with Mrs. Coffin was confidential; that on June 27, 1927, account No. 42950 was changed from Mrs. Coffin's name to the names of Mrs. Coffin and plaintiff in joint tenancy; that on May 27, 1929, without the knowledge or consent of plaintiff, Mrs. Coffin withdrew the money from this account and deposited it in account No. 31104; that on July 3rd and July 6th, 1935, Mrs. Coffin withdrew a total of $23,385.25 from this account without the knowledge or consent of plaintiff and opened up the five accounts with defendant; that plaintiff was not aware of the existence of the Coffin-defendant joint accounts until after the death of Mrs. Coffin; that at all times since June 27, 1927, the plaintiff had the means of knowledge and notice of account No. 42950 and of the deposits and withdrawals in said account. The same finding of knowledge and notice was made as to account No. 31104 since it was opened on May 27, 1929. The court then found that on September 16, 1937, the date the safe deposit box was opened, the plaintiff had the means of knowledge and notice of the

five Coffin-defendant accounts and the moneys contained in them; that plaintiff first asserted his claim to the various accounts on March 13, 1940; that by the agreement and conduct of plaintiff as executor of the Coffin estate plaintiff treated and regarded the five Coffin-defendant accounts as the property of defendant, and permitted defendant to withdraw, use and enjoy the money contained in these accounts; that the funds in the five Coffin-defendant accounts came from the funds and accruals originally deposited in account No. 42950.

In accordance with these findings, judgment was entered for defendant.

It is important to note that the trial court found that the original Coffin-plaintiff account was in joint tenancy. The form of the deposit agreement supports this finding. Wallace v. Riley, 23 Cal. App.2d 669, 74 P.2d 800; see, also, In re Estate of Gaines, 15 Cal.2d 255, 260, 100 P.2d 1055.

Section 15a of the Bank Act, 1 Deering's Gen.Laws, Act 652, at page 210, provides in part: "When a deposit shall be made in any bank by any person or persons whether minor or adult in the names of such depositor or depositors and another person or persons, and in form to be paid to any of them or the survivor or survivors of them, such deposit and any additions thereto made by any such persons after the making thereof, shall become the property of such persons as joint tenants, and the deposit together with all dividends or interest thereon, shall be held for the exclusive use of such persons and may be paid to any of them during their lifetime or to the survivor or survivors after the death of one or more of them, and such payment and the receipt or acquittance of the person or persons to whom such payment is made shall be valid and sufficient release and discharge to such bank for all payments made on account of such deposit prior to the receipt by such bank of notice in writing not to pay such deposit in accordance with the terms thereof. The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors."

There have been several important cases dealing with the presumptions that exist in connection with joint tenancy accounts. When a joint tenancy account is created in the form prescribed by § 15a of the Bank Act, a conclusive presumption arises, in the absence of fraud or undue influence, in favor of the survivor as to his title and right to any funds remaining in the account upon the death of the other joint depositor. This is so unless after the death of the depositor who was the original owner of the fund, there shall be proof that the account was opened without his knowledge and consent, express or implied. However, it is merely a rebuttable presumption in any contest between the depositors during their joint lives, and also is rebuttable after the death of either as to moneys previously withdrawn from such account. In these latter two instances, proof may be received that the tenancy created was in truth something different from the character of the tenancy defined by the legal presumption. Wallace v. Riley, 23 Cal.App.2d 654, 74 P.2d 807 and Id., 23 Cal.App.2d 669, 74 P.2d 800; Moskowitz v. Marrow, 251 N.Y. 380, at pages 396, 397, 167 N.E. 506, 66 A.L.R. 870, and Marrow v. Moskowitz, 255 N.Y. 219, at page 221, 174 N.E. 460. See the majority and dissenting opinions in Walsh v. Keenan, 293 N.Y. 573, 59 N.E.2d 409.

It is also the law of this state, contrary to the rule in some states, that if money is withdrawn from a joint account by one depositor without the consent of the other, property acquired by the money so withdrawn, *or another account in which the money is traced,* will retain its character as property held in joint tenancy like the original fund, unless there has been a change in the character by some agreement between the parties. This has been the law of California for many years. In re Estate of Harris, 169 Cal. 725, 147 P. 967; In re Estate of Harris, 9 Cal.2d 649, 72 P.2d 873; Wallace v. Riley, 23 Cal.

App.2d 669, 677, 74 P.2d 800; Young v. Young, 126 Cal.App. 306, 14 P.2d 580; In re Estate of McCoin, 9 Cal.App.2d 480, 50 P.2d 114; Lagar v. Erickson, 13 Cal. App.2d 365, 56 P.2d 1287; In re Kessler, 217 Cal. 32, 17 P.2d 117; Chamberlain v. Chamberlain, 2 Cal.App.2d 684, 38 P.2d 790; Wheeland v. Rodgers, 20 Cal.2d 218, 124 P.2d 816; but see Pedder v. Commissioner of Internal Revenue, 9 Cir., 60 F.2d 866; notes 28 Cal.Law Rev. 224; 10 So. Cal.Law Rev. 119. The rule is contrary to that in many states where the rule is that when one joint tenant withdraws the whole or any part of the account the unity of interest essential to a joint tenancy has been destroyed and the parties become tenants in common of the fund in equal shares. Under this rule the person who is innocent can hold the withdrawing joint tenant as trustee only for one-half of the fund. Goc v. Goc, 133 N.J.Eq. 206, 31 A.2d 335; Stout v. Sutphen, 132 N.J.Eq. 583, 29 A.2d 724; see annotation 77 A.L.R. 799. However logical and fair this last rule may seem to be, and I personally believe the rule in California is wrong and the rule in New Jersey is sound, the rule in this state is that where one joint tenant improperly withdraws the fund without consent, the innocent joint tenant may trace the fund and impose a trust on the entire fund which remains a joint tenancy fund. If there is to be a change in that rule at this late date it should be accomplished by the Supreme Court and not by a lower appellate court.

How do these rules apply to this case? Before plaintiff can recover he must prove that the original account between him and Mrs. Coffin was a joint tenancy account, and he must trace the funds from that account into the five accounts between Mrs. Coffin and defendant. Inasmuch as the money here involved was withdrawn during the lives of the joint depositors, under the rules already discussed, the presumption arising from the form of the deposit that the account was one in joint tenancy is rebuttable, and evidence would be admissible to prove that that account was not a true joint tenancy account, but that Mrs. Coffin and plaintiff had agreed that it should have a different character and effect. That agreement can, of course, be shown by actions and conduct as well as by words. The defendant contends that, regardless of whether plaintiff was guilty of laches or whether the cause is barred by the statute of limitations, that the presumption that the account was a true joint tenancy, as a matter of law, was rebutted. In this connection defendant relies on certain facts and circumstances not necessary to here set forth that undoubtedly would support an inference that the account between Coffin and plaintiff was not a true joint tenancy account. But the trial court did not so find. It found that the account was a joint tenancy account. Defendant as the winning party in the court below is in no legal position to attack that finding on this appeal. Moreover, the rebuttable presumption involved supports the finding. As was said in Lieber v. Rigby, 34 Cal. App.2d 582, 584, 94 P.2d 49, 50, in answering the identical argument: "At least since the decision of our Supreme Court in Smellie v. Southern Pac. Co., 212 Cal. 540, 299 P. 529, our courts are committed to the rule that a rebuttable presumption is a species of evidence which standing alone will support a finding against contradictory evidence produced by the other party. The finding of the trial court that the account was one in joint tenancy is therefore sufficiently supported by the presumption based on the voluntary act of the deceased husband in creating the account, even though appellants' evidence in the absence of the presumption might compel the opposite conclusion."

The same legal situation exists as to the tracing of the funds into the five joint tenancy accounts in the names of Coffin and defendant. The evidence would support a finding either way on that issue. The trial court found that the money wrongfully withdrawn from the Coffin-plaintiff account found itself into these five accounts. So far as this appeal is concerned it must be held that such finding is supported and that defendant cannot attack it.

Now, having stated the facts and the general law applicable to this appeal, let us see if there is any reasonable basis for the holding in the majority opinion that the cause of action is barred by § 338, subd. 4, of the Code of Civil Procedure.

Before this properly can be done the nature of the cause of action involved in this case must be more particularly analyzed.

When Mrs. Coffin withdrew the entire balance in the Coffin-plaintiff account her act of withdrawal constituted a fraud upon plaintiff. In re McCarthy's Estate, 164 Misc. 719, 299 N.Y.S. 715, 721. On that date Mrs. Coffin became an involuntary trustee of those funds for the benefit of plaintiff, subject to her rights as a joint tenant. § 2224, Civil Code. When, at a later date, she opened the joint accounts with the defendant herein and allegedly deposited the money therein, the defendant likewise became a constructive trustee as to these funds. This is so although there is no evidence in the record of any fraud on the part of defendant in regard to the said funds, nor are there any allegations to that effect, and there is no evidence that at the time the money was deposited in the joint accounts with defendant, the defendant had any knowledge of the source of the money or of any rights the plaintiff may have had therein. Airola v. Gorham, 56 Cal.App.2d 42, 133 P.2d 78. There the court stated at page 45 of 56 Cal.App.2d, at page 80 of 133 P.2d: "It is unquestionably the law that upon the transfer of trust property to a stranger to the trust the transferee becomes an involuntary trustee. * * * The wife, though an innocent donee, being the beneficiary of her husband's fraud, takes the property charged with the fraud so as to impress a trust upon it in her hands."

Under this rule, if the money can be traced in defendant's hands, plaintiff can recover a judgment against defendant although the defendant may have spent or otherwise dissipated the money. The general rule is stated as follows in 2 Scott on Trusts, p. 1617, § 292.2: "If a trustee in breach of trust gives trust money to a donee, the fact that the donee spends the money before he has notice of the trust is ordinarily no defense. It is sufficient if the beneficiaries of the trust show that the money was paid in breach of trust and that no consideration was given for it. If this is shown, the donee is called upon to account for the amount which he receives. The donee, to be relieved of liability, must show that before he had notice of the breach of trust he so changed his position that it would be inequitable to hold him liable. The mere fact that he has spent the money is not a defense. It is no defense where it appears that the money was spent by the donee on ordinary living expenses. If, however, he made extraordinary expenditures with the money which he would not have made if he had not received the money, this may well be such a change of position that it would be inequitable to hold him liable." This is likewise the rule of the Restatement. See 2 Restatement of the Law of Trusts, § 292, particularly comment J.

Now when does the statute of limitations start to run on such a cause of action? The general rule, in regard to constructive trusts, is that the period of limitations begins to run upon the doing of the wrongful act by which the trust was created, no repudiation being necessary to set the statute in motion. 25 Cal.Juris., p. 274, § 135. However, there is an exception to this rule, stated in 25 Cal.Juris. at p. 275, as follows: "In some circumstances, the currency of the statute commences, not at the time of the wrongful act by which the trust was created, but only at a subsequent date when the plaintiff became cognizant of the facts. If the trustee concealed his wrongful conduct, the running of the statute is postponed."

The evidence does not show that the defendant gave any consideration to Mrs. Coffin for the transfer of the funds in question to the several joint tenancy accounts standing in their names. It is clear, therefore, that this is a case wherein the exception should apply. As was said in Airola v. Gorham, supra, at page 46, of 56 Cal. App.2d at page 80 of 133 P.2d: "The transfer of trust property to a stranger being a conveyance in fraud of the beneficiary's rights should on principle follow the same rule [referring to the above-mentioned exception]. * * * To hold that where the gift was made secretly to an innocent donee the statute would at once commence to run might well result in barring the cause of action before its discovery by the defrauded party. We are satisfied that this is not the law * * *." It is clear, there-

fore, that the statute of limitations in the instant case did not start to run until plaintiff knew or should have known of Mrs. Coffin's fraudulent act of depositing the funds in the Coffin-defendant accounts.

The trial court found that plaintiff had the means of knowledge since June of 1927 of the deposits and withdrawals in his joint account, and the same finding is made as to the Coffin-Alpi account opened in May of 1929. But when it comes to the five accounts here involved, the court finds that plaintiff did not have the means of knowledge concerning these accounts until September 16, 1937, when the safe deposit box was opened. The differences between these findings is quite important, and cannot be overemphasized. This is not an action against Mrs. Coffin or her estate. We are not here interested in knowing when the statute started to run in her favor. We are here required to ascertain when the statute started to run against plaintiff on his cause of action against defendant, the donee of the fraudulent trustee. In passing, it should be noted that it is obvious that plaintiff had the legal right to inquire at the bank concerning his joint account, and, had he done so, he would have discovered Mrs. Coffin's fraudulent act of withdrawing the funds on May 27, 1929. It is therefore quite clear that plaintiff has had the means of knowledge of that fraudulent act since 1929. But to start the statute running even against her the plaintiff must not only have had the means of knowledge, but there must be a duty to inquire. These two persons were friends. Plaintiff was Mrs. Coffin's lawyer. He had no reason to believe that she was dishonest. He was not required at his peril to assume his trusted friend and client was a rogue. There can be no doubt at all that plaintiff was under no duty to make inquiry until, at the earliest, the death of Mrs. Coffin. Now what did he discover on September 16, 1937? He discovered that his trusted friend and client had been guilty of a fraud and that she had improperly closed out their account. He also was reasonably put on knowledge that the withdrawn account had been deposited in the account of Mrs. Coffin and her sister, and that that account had been partially closed out in July of 1935. There were a lot of other bank books in the safe deposit box, but can it be held that he was then placed under a duty of inquiry, or that he had the means of knowledge, that some of these books may have included the money originally withdrawn from his account? Most of these accounts were in fictitious names. The amounts withdrawn from the Alpi account were not identical with the balance in plaintiff's account, nor were the deposits made in defendant's accounts identical in amount with the withdrawals from the Alpi account. The dates of withdrawal—July 3rd and 6th—and the dates of the new deposits—July 3rd and 5th—are most confusing. Not only were the various names used by Mrs. Coffin fictitious, but the various names used by defendant were fictitious. What means of knowledge did plaintiff then possess? He had no lawful right to the various pass books, having not yet been appointed executor. He had no lawful right to make inquiry at the banks until October 14, 1937. How can it be held that on September 16, 1937, he had either the means of knowledge or that he was then under a duty of inquiry so far as defendant is concerned? The answer is obvious. It was not until October 14, 1937, when plaintiff was appointed and qualified as executor, that he was put on inquiry concerning these accounts.

The law applicable to such a factual situation has been so recently stated by the Supreme Court that it would be needless repetition to do more than quote from the most recent opinion of that court on this subject. In Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958, at page 972, it is stated:

"Defendants assert that in addition to these requirements plaintiff must show that he made a diligent inquiry to discover whether or not he had been defrauded, and they argue that plaintiff failed to prove that earlier inquiry would not have revealed the falsity of the alleged representations. It is not in every case, however, that a person is barred after three years by failure to pursue an available means of discovering possible fraud. The statute commences to run only after one has knowledge of facts sufficient to make a rea-

sonably prudent person suspicious of fraud, thus putting him on inquiry. Section 19 of the Civil Code provides: 'Every person who has actual notice of circumstances *sufficient to put a prudent man upon inquiry* as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.' (Italics added.) Under this section it was held in Tarke v. Bingham, 123 Cal. 163, 55 P. 759, that the plaintiff was not barred by subdivision 4 of section 338 of the Code of Civil Procedure, since nothing had occurred 'to excite his suspicion, or to put him upon inquiry.' 123 Cal. at page 166, 55 P. at page 760. The court said: 'Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, "a prudent man" would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. *The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission.*' (Italics added.) Many other decisions have adopted this view. [Citing cases.] In many cases it has been said that means of knowledge are equivalent to knowledge. [Citing cases.] This is true, however, only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious. In the Lady Washington case [Lady Washington Consol. C. v. Wood], the court said (113 Cal. [482], at page 487, 45 P. [809], at page 810) that 'as the means of knowledge are equivalent to knowledge, *if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry* which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts.' (Italics added.)

"The reason for the rule is well stated in Victor Oil Co. v. Drum, supra, 184 Cal. [226], at page 241, 193 P. [243], at page 249: 'The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part.' It follows that plaintiff is not barred because the means of discovery were available at an earlier date provided he has shown that he was not put on inquiry by any circumstances known to him or his agents at any time prior to the commencement of the three-year period ending June, 1941."

This case has definitely determined that where there is no duty to investigate the statute does not start to run until the plaintiff has notice or knowledge of some incident or fact sufficient to arouse the suspicions of a reasonable person—that is, knowledge of some fact sufficient to make a reasonably prudent person suspicious of fraud.

It is clearly violative of the rules announced in this case to even suggest that plaintiff had means of knowledge or was under a duty to make inquiry, during a period of time that he was legally impotent to pursue such inquiry. For these reasons I am of the opinion that the statute did not start to run until October 14, 1937, and that the complaint filed as it was on October 11, 1940, was filed before the cause of action pleaded was barred.

Inasmuch as the majority opinion holds that the cause of action is barred by the statute of limitations, it quite properly does not discuss the alternative ground of the trial court's holding, namely, that plaintiff was barred by laches. The finding of laches is more or less predicated on the findings holding the cause is barred by the statute of limitations. Moreover, the defendant simply pleaded laches in her amended answer as a conclusion without setting forth any facts upon which the conclusion is based. Certainly the complaint does not disclose on its face that the cause is barred by laches. The rule is, that when a specific statute of limitations applies to an action, as it does in this case, mere delay alone for

a period less than that provided by the statute will not bar the cause of action. Fry v. Board of Education, 17 Cal.2d 753, 112 P.2d 229; Newport v. Hatton, 195 Cal. 132, 231 P. 987; La Shells v. Hench, 98 Cal.App. 6, 276 P. 377; Freeman v. Donohoe, 65 Cal.App. 65, 223 P. 431; see cases collected 10 Cal.Jur. p. 526, § 64. In order for the defense to apply in such a case there must be some material prejudice to defendant caused by plaintiff's delay which could have been avoided had plaintiff been more diligent. Where these facts do not appear on the face of the complaint they should normally be pleaded by defendant as a defense, and appropriate findings should be made.

Defendant's principal argument in support of the challenged finding is that plaintiff should have commenced the action before Mrs. Coffin died, and that she suffered material prejudice by plaintiff's failure to commence the action prior to that date. The argument is unsound. As already pointed out in discussing the statute of limitations, under the facts of this case plaintiff was under no duty to inquire as to the status of the accounts during Mrs. Coffin's lifetime. The lapse of time up to her death is therefore immaterial. As I view the facts, the cause of action did not accrue until October 14, 1937. While it has frequently been stated that it is a material circumstance in determining whether laches exist that the claim was not made until after the death of a person who could have explained the transaction (see cases collected 10 Cal.Jur. p. 532, § 70), such circumstance, under the facts here involved, where there was no duty to investigate prior to such death, does not support the finding of laches. The duty to act or inquire must exist before the cause of action accrues. The true rule is set forth in Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 736, 146 P.2d 673, 682, 151 A.L.R. 1062, as follows: "Where, for example, an action is commenced many years *after its accrual,* the death of witnesses or destruction of evidence, presumed as well as actual, may prejudice the defendant and justify denial of relief because of staleness of the claim."

The trial court also found that plaintiff as executor delivered the pass books to defendant, allowed defendant to secure the money, and compromised state and federal tax claims against the property. No particular facts are found or set forth. This is an equity action. If the prejudice to defendant based on these facts is so material that plaintiff is barred, those facts must appear. But if the financial loss of defendant is small, this being an equity action, the trial court possesses full power to offset any such loss against plaintiff's recovery, if plaintiff is found entitled to recover.

For these reasons I am of the opinion that the cause of action pleaded is barred neither by limitations nor laches, and that the cause should be retried on its merits.

74 Cal.App.2d 577

**HAYS et al. v. SERVICE TANK LINES, Inc., et al.**

**Civ. 15088.**

District Court of Appeal, Second District, Division 3, California.

May 23, 1946.

**1. New trial ⇐70**

A trial judge ruling upon a motion for new trial must review the evidence and pass upon its sufficiency, and, if he concludes that the verdict has resulted in a miscarriage of justice, he must grant the motion for new trial.

**2. Appeal and error ⇐1015(2)**

Where the evidence is in substantial conflict, and a verdict for moving party would have been supported by the evidence, an order granting a new trial on the ground of insufficiency of the evidence will not be disturbed on appeal.

**3. New trial ⇐70**

In action for damages caused by collision which occurred at highway intersection when northbound tank truck and trailer swerved to the left and crashed into southbound motor vehicles, including that of plaintiff, which had stopped on opposite side of crossing for mechanical traffic signal, granting plaintiffs' motion for new trial as to driver and owner of tank truck on ground that verdict and judgment in their favor were not supported by the evidence was not an abuse of discretion. Vehicle Code, § 476.

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Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Wayne Hays and another against the Service Tank Lines, Incorporated, Howard B. Stonebraker, and others for damages sustained as the result of an automobile collision. Trial by jury resulted in verdict in favor of the named defendants. From an order granting plaintiff's motion for new trial as to the named defendants, the named defendants appeal.

Affirmed.

Reginald I. Bauder, of Los Angeles, for appellants.

Carroll M. Counts and Henry E. Kappler, both of Los Angeles, for respondents.

WOOD, Justice.

This is an action against defendants, Service Tank Lines, Inc., Howard R. Stonebraker, and Roy Richard Marley, for damages sustained as the result of an automobile collision. Trial was by jury, and the verdict was in favor of plaintiffs against Marley, and was in favor of defendants Service Tank Lines and Stonebraker. The trial court granted plaintiffs' motion for a new trial as to Service Tank Lines and Stonebraker on the ground that the verdict and the judgment entered thereon were not supported by the evidence. Said last mentioned defendants appeal from the order granting the motion for a new trial.

The collision occurred on Sunday, February 13, 1944, about 3 p.m., at the intersection of Rosemead Boulevard and Anaheim Road in Los Angeles County. Each highway is 76 feet wide, paved and marked for 2 traffic lanes in each direction. Mechanical traffic signals, consisting of red, yellow, and green lights, were in operation on each corner of the right-angle intersection. It was a clear day. There was a one-story building on the northeast corner, and service stations on the other three corners.

Previous to the accident, defendant Marley had been proceeding in his automobile in a westerly direction on Anaheim Road. He observed that the signal for traffic on Anaheim Road was red, and he stopped in the outside lane for westbound traffic, about 5 feet east of the east entrance to the intersection. Another automobile stopped at the east entrance to the intersection, in the inside lane for westbound traffic, to the left of and about 5 feet ahead of Marley.

Plaintiffs, husband and wife, had been proceeding in their automobile in a southerly direction on Rosemead Boulevard, and they stopped in the inside lane for southbound traffic, behind a Chevrolet truck

which was stopped in the same lane, a few feet from the intersection, to await the green signal for traffic to proceed on Rosemead Boulevard. Another automobile stopped in the inside lane for southbound traffic, behind plaintiffs' automobile, and another automobile stopped in the same lane behind that automobile. There was evidence that other southbound automobiles were stopped at the right of the southbound automobiles just mentioned. Another automobile stopped in the outside lane for southbound traffic, near the curb and a few feet north of the entrance to the intersection. At the time of the accident these southbound automobiles were stopped in the position just described.

Defendant Stonebraker, who was operating a Deisel tank truck and trailer, owned by defendant Service Tank Lines, was proceeding in a northerly direction on Rosemead Boulevard. The truck and trailer will be referred to as the truck. The 20-wheel truck was approximately 60 feet in length, was loaded with 5200 gallons of fuel oil, and, including the oil, weighed about 38 tons. As Stonebraker was approaching the intersection, about 200 or 300 feet south thereof, he observed that the signal for traffic on Rosemead Boulevard was green. The evidence is conflicting as to whether the signal for traffic on Rosemead Boulevard, at the time he entered the intersection, was yellow or red, and also is conflicting as to the rate of his speed when he entered the intersection. About this time defendant Marley (who, as stated above, had stopped east of the intersection) proceeded in a westerly direction into the intersection. Stonebraker continued in a straight course through the intersection until he was about 15 feet from Marley's automobile, and then he swerved to the left but a portion of his truck collided with the front left fender and front bumper of the Marley automobile, which automobile was at that time approximately 20 feet west of the east entrance to the intersection. The truck then traveled in a northwesterly direction into the lanes for southbound traffic on Rosemead Boulevard. There it collided with the Chevrolet truck, plaintiffs' automobile, the automobile behind plaintiffs' automobile, and the automobile in the outside traffic lane next to the curb. It continued to travel in a northwesterly direction and went into the lot or driveway of the service station on the northwest corner of the intersection, carrying with it the Chevrolet truck and the automobile which had been in the outside lane next to the curb, the automobile at that time being on its side against the front end of the truck and the Chevrolet truck being on top of the automobile.

The issue on appeal is whether the trial court abused its discretion in granting plaintiffs' motion for a new trial on the ground that the evidence was insufficient to sustain the verdict.

Marley testified that the signal for traffic on Anaheim Road was green when he started his automobile into the intersection; that the automobile, which was stopped to his left, obstructed his view of northbound traffic on Rosemead Boulevard; that he moved ahead of said automobile, then glanced to his left to observe northbound traffic, saw the truck proceeding into the intersection, and stopped his automobile to permit the truck to go around him; that the truck was traveling at a speed of approximately 30 miles an hour, and that the speed was not decreased.

The owner of the automobile which was next to the curb testified that at the time the truck swerved in front of Marley's automobile the signal for traffic on Rosemead Boulevard was red; and that his (the witness') automobile was demolished. He also testified that he first saw the truck when it was approximately 600 feet south of the intersection, at which time the signal for traffic on Rosemead Boulevard was red.

The driver of the automobile, which was behind plaintiffs' automobile, testified that when he stopped behind plaintiffs the signal for traffic on Rosemead was "stop"; that he "just waited there," and before the collision another automobile came to a stop behind his automobile; that he first saw the truck in the middle of the intersection before it swerved, and it was traveling between 30 and 35 miles an hour; and that it cost $250 to repair his automobile.

Another witness testified that at the time of the accident he was stopped at the west entrance to the intersection on Anaheim Road; that he had his eyes "glued" on the signal on the northeast corner, and saw it change from red to green; and that after it changed to green he observed Marley's automobile start into the intersection.

Plaintiff Mrs. Hays testified that she saw the truck approaching the intersection, and it was next to the curb—"kind of hugging the curb"; and at that time 2 automobiles were stopped side by side in the northbound traffic lanes south of the intersection.

Stonebraker testified that he was 200 or 300 feet from the intersection when he first looked at the traffic signal on Rosemead Boulevard; that it was green at that time; that he did not see it change from red to green—he "did not pay any attention"; that he did not know how long it had been green when he first saw it, and he knew it might turn to "amber" at any second; that his speed at that time "could have been" 25 to 30 miles an hour, that when he was about 100 feet from the intersection, he slowed down to "around 25" miles an hour, but at no time did he apply his brakes; that he knew as he approached the intersection, at the speed he was traveling, he would have to take emergency measures to stop if the signal changed from green to another color; that the signal changed to "amber" when he was "around 20 or 40 feet south of the intersection," at which time he was still traveling at the approximate speed of 25 miles an hour, and he made no further observation of signals before entering the intersection; that as he entered the intersection, he observed defendant Marley's automobile "starting out" from Anaheim Road; that he formed no opinion of Marley's speed but it was slow—probably 5 miles an hour; that after he observed Marley's automobile he continued into the intersection at a speed of approximately 25 miles an hour, and did not apply his brakes until "just before" he collided with Marley's automobile; that he applied the foot brakes, which control the truck only, but he did not apply the air brakes, which control the trailer, because they are operated by a hand throttle and he had his hands "too full of steering wheel" and did not have time to apply the hand brakes; that he traveled about 20 feet after he saw the Marley automobile before he swerved; and that the Marley automobile was in motion at the time of the collision. He testified further that when he entered the intersection he was looking straight north in his lane of traffic; that he did not pay any attention to automobiles approaching from the north, nor to any automobiles standing at the west entrance to the intersection, and he did not remember seeing any automobiles stopped south of the intersection; that when the yellow light came on he was not far enough from the intersection to stop without obstructing traffic on Anaheim Road; and that he was traveling "about the width of the car from the center line" of Rosemead Boulevard. He also testified that he was "probably" 10 or 12 feet from the east curb of Rosemead Boulevard. He testified further that at a speed of 25 miles an hour, with the load he was carrying, it would take "around 60 feet" to stop the truck, and at a speed of 30 miles an hour it would take "probably 70 feet" to stop, using both the brakes on the truck and the brakes on the trailer—that it "would probably take 100 feet" to stop under the same conditions using only the foot brakes on the truck; that in coming to a stop, the trailer brakes are applied first to avoid "jackknifing," because the trailer whips around to the side if the speed of the truck is decreased before that of the trailer.

[1] Appellants contend that the evidence was insufficient as a matter of law to support a verdict in favor of plaintiffs. They argue that there was no substantial conflict in the evidence, and that the evidence failed to disclose any negligence on the part of Stonebraker. In ruling upon a motion for a new trial, a trial judge must review the evidence and pass upon its sufficiency, and if he concludes that the verdict has resulted in a miscarriage of justice it is his duty to grant the motion for a new trial. Grover v. Sharp & Fellows, etc., Co., 66 Cal.App.2d 736, 737, 153 P.2d 83. There was a substantial conflict

in the evidence in the present case as to material issues, for example: As to whether the signal for traffic on Rosemead was red or yellow when Stonebraker entered the intersection; as to his rate of speed; as to his position on the highway in relation to the east curbing; as to whether he decreased his speed at any time; and as to whether Marley stopped his automobile in the intersection before the collision. The testimony of four witnesses, as above referred to, would support a finding that the signal for traffic on Rosemead was red when Stonebraker entered the intersection. The evidence considering the type, size and weight of the truck and trailer, the flammable character of the load, and the numerous vehicles at the intersection, would support a finding that he did not drive cautiously into or through the intersection, even if he entered the intersection when the signal was yellow. Section 476 of the Vehicle Code then in effect provided that when traffic is controlled by colored light signals, the yellow light shall indicate that "Vehicular traffic facing the signal shall stop before entering the nearest crosswalk at the intersection or at a marked line, but if such stop can not be made in safety a vehicle may be driven *cautiously* through the intersection or past such signal." (Italics added.) Although Stonebraker knew, according to his testimony, that the green light, which he said he observed a few hundred feet before he arrived at the intersection, might change to yellow at any second, and that he would have to use emergency measures in order to stop without jackknifing the truck and trailer, or to stop at all, he continued to approach the intersection at a speed which would not enable him to stop before he entered the intersection as required in said Section 476.

His negligence is also indicated by the distance he traveled, and the collisions which occurred, after colliding with the Marley automobile. He continued across the intersection, then went on the wrong side of the highway, struck several stopped automobiles with great force, throwing one of them on top of another and then dragging those two automobiles into a service station.

[2, 3] Where the evidence is in substantial conflict, and a verdict for the moving party would have been supported by the evidence, an order granting a new trial on the ground of insufficiency of the evidence will not be disturbed on appeal. Dempsey v. Market Street R. Co., 23 Cal.2d 110, 113, 142 P.2d 929. There was no abuse of discretion on the part of the trial court in granting the motion for a new trial.

The order is affirmed.

DESMOND, P. J., and SHINN, J., concur.




74 Cal.App.2d 682

## RICHARDSON v. SUITER et al.

Civ. 15186.

District Court of Appeal, Second District, Division 2, California.

May 27, 1946.

**1. Executors and administrators ⇐129(1)**

In action by executor to recover money alleged to have been obtained from an aged and infirm couple through fraud of confidential adviser in sale of farm belonging to the couple and retention of rent and a part of the proceeds, a finding that adviser and his wife altered mortgage after its execution by causing to be typed thereon the words "this is a purchase money mortgage" was supported by evidence.

**2. Mortgages ⇐74**

In action by executor to recover money alleged to have been obtained from an aged and infirm couple through fraud of confidential adviser in sale of farm belonging to the couple and retention of rents and a part of the proceeds, evidence supported finding that mortgage was never delivered to the couple or either of them as mortgagee.

**3. Mortgages ⇐70**

The possession of mortgage by secretary of attorney for the adverse party and

the mailing thereof to recorder did not constitute a delivery to mortgagee, in absence of authority to represent them.

**4. Executors and administrators ⇐129(1)**

In action by executor to recover money alleged to have been obtained from aged and infirm couple through fraud of confidential adviser, evidence supported finding that, for the purpose of deceiving and defrauding the couple, adviser falsely represented to couple that it would be necessary for them to convey title to the farm to him and to assign to him their claim for rent in order to facilitate a settlement with tenants and a sale to prospective purchasers, and that title was conveyed to adviser relying upon the representations and upon his further assurance that deed to him was fictitious.

**5. Appeal and error ⇐1011(1)**

In action to recover money alleged to have been obtained through fraud, District Court of Appeal could give no more weight to the contradictory evidence than was given by the trial court.

**6. Estoppel ⇐67**

Aged and infirm widow who was unable to realize the purport of her act was not chargeable with knowledge of the legal effect, if any, of claiming mortgage as a part of the joint estate of herself and her deceased husband.

**7. Estoppel ⇐118**

Executor, seeking to recover money alleged to have been obtained from aged and infirm couple through fraud of confidential adviser in sale of farm belonging to the couple and retention of rent and a part of the proceeds, was not estopped, under the evidence, to deny that a bona fide sale was made, by fact that prior to the death of couple each treated the transaction as a valid sale.

**8. Appeal and error ⇐878(6)**

Where executor obtained judgment for money alleged to have been obtained from an aged and infirm couple through fraud of confidential adviser, but did not appeal from any portion of the judgment, the District Court of Appeal could not order modification requested by executor on appeal by adviser and his wife, in the matter of allowance of commission to adviser for effecting sale of the property.

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Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Gifford D. Richardson, as executor of the estate of Mary E. Compton, deceased, against Charles H. Suiter and another to recover money alleged to have been obtained through fraud of the named defendant. Judgment for plaintiff, and defendants appeal.

Affirmed.

Vernon M. Brydolf and Charles Hollopeter, both of Pasadena, for appellants.

Frederick G. Stoehr, of Pasadena, for respondent.

WILSON, Justice.

This is an action to recover money alleged to have been obtained from an aged and infirm couple through the fraud of defendant, Charles H. Suiter. For the sake of brevity, since he was the actual perpetrator of the fraud, he will be referred to herein as defendant. His wife, Anna I. Suiter, is made a defendant by reason of the fact that the deed hereinafter discussed named her as one of the grantees and presumably she shared in the fruits of the fraud. Defendants have appealed from the judgment rendered against them.

Frank M. Compton and Mary E. Compton, husband and wife, on and prior to August 13, 1943, owned a farm in Missouri. He was 96 years of age, blind, and bedridden; she was 83 years of age, an invalid, and partly blind. They were incapable of attending to their business or of managing their property. They desired to sell the farm and so advised defendant, who was and had been their confidential agent and adviser, whom they trusted and upon whom they relied. He undertook to negotiate the sale of the farm and to attend to the details of consummating the transaction. He told them that it would be necessary that they convey title to the farm to him and to assign their claim for unpaid rent thereon in order to facilitate his collection of rent from the tenants and

his bargaining with prospective purchasers and consummating the sale. He also stated that if they would convey the farm to him he would sell it at a high price and collect the unpaid rent for them. Relying upon said statements Mr. and Mrs. Compton conveyed the legal title about August 13, 1943, to defendant and his wife. On the same day the Suiters executed a mortgage on the property to Mr. and Mrs. Compton and Jennie B. Heflin, the latter being Mrs. Compton's sister, as joint tenants, for the sum of $10,000. The deed and the mortgage were prepared by an attorney at the request of and under instructions from defendant.

Mr. Compton died on September 22, 1943, still believing defendant's representations to be true. Thereafter Mrs. Compton executed an assignment to him of her claim for rent of the farm. About October 30, 1943, defendant went to Missouri and sold the farm for $17,000 and in January, 1944, he collected rent in the sum of $952.55. In November, 1943, defendant paid the sum of $10,000 to Mrs. Compton and retained the balance of the purchase price and all of the rent. Mrs. Compton died December 12, 1943. This action is brought by the executor of her estate to recover the balance of the sale price and the rents collected by defendant.

As grounds for reversal of the judgment it is asserted that certain findings are not supported by the evidence and that plaintiff is estopped to deny that a bona fide sale of the property was made to defendant.

[1] 1. *The finding that an alteration was made in the mortgage after its execution.* The court found that after the execution of the mortgage defendants caused to be typed thereon the words "This is a purchase money mortgage." The attorney who dictated the instrument produced his office copy which did not bear the words in question. He testified that he directed his secretary, Mrs. Stratton, to type the words on the mortgage and according to his best recollection he gave her that direction because defendant told him that he was buying the farm from Mr. and Mrs. Compton and might have said something to him about adding those words. The attorney further testified that he did not tell the Comptons that he was preparing the documents; that the Comptons and the Suiters had all been his clients previously but at that time the Suiters only were his clients, his professional relationship with the Comptons having ceased. More definite evidence concerning the addition of said words to the mortgage than that of the attorney was that of Mrs. Stratton, who testified that the words were typed at her employer's direction immediately after the preparation of the mortgage and before its execution. In view of all the circumstances the court was not required to believe her testimony but was justified in drawing contrary inferences from the entire evidence, written and oral. Since the court observed the witnesses and their manner of testifying and evaluated their evidence, the finding will not be disturbed.

Whatever may be the truth, the finding is immaterial. In fact, a finding that the words were placed on the mortgage at the time it was prepared would not influence the result of the appeal for the reasons (1) that the Comptons never saw the mortgage and knew nothing of its contents, it having been mailed to the county recorder by Mrs. Stratton immediately after it was executed by the Suiters, and (2) that the judgment would not be affected by a finding either way on the subject inasmuch as there are other findings that fully support it.

[2, 3] 2. *The finding that the mortgage was not delivered to the mortgagees.* The court found that the mortgage was never delivered to or came into the possession of the Comptons or either of them. The evidence fully supports the finding. Both the deed and the mortgage were prepared by said attorney at the request of defendant and the latter paid the fee therefor. The Suiters were his clients and the Comptons were not. The attorney did not consult with the Comptons at any time concerning the transaction or concerning the deed or the mortgage.

After having been typewritten the documents were placed in the possession of Mrs. Stratton. Accompanied by defendant she went to the Comptons' home and procured their signatures to and their ac-

knowledgment of the execution of the deed. Mrs. Heflin, Mrs. Compton's sister, was in the room during all the time they were present. She testified that she thought defendant had another paper in his pocket but did not know what it was. Neither defendant nor Mrs. Stratton said anything about a note or mortgage. After the deed had been signed Mrs. Stratton went to defendant's home where he and his wife signed and acknowledged the mortgage. Mrs. Stratton immediately mailed both papers to the county recorder in Missouri. When recorded they were returned by mail to her employer, defendant's attorney.

That the Comptons had no knowledge of the existence of the mortgage is uncontradicted. The possession of the mortgage by Mrs. Stratton and the mailing of the same to the recorder did not constitute a delivery to the Comptons since she was not authorized to represent them and her employer was the attorney for the adverse party.

[4, 5] 3. *The finding that defendant was guilty of fraud.* The court found that defendant undertook and agreed to negotiate a sale of the farm and to attend to the details of consummating the sale, and for the purpose of deceiving and defrauding the Comptons falsely and fraudulently represented to them that it would be necessary for them to convey title to the farm to him and to assign to him their claim for rent in order to facilitate a settlement with the tenants and a sale to prospective purchasers; that if they would convey title to him he would sell the farm at a high price and collect the rent for them; relying upon said representations and upon his further assurance that the deed was fictitious or "phony" the Comptons conveyed title to defendant, who was then their confidential agent and trustee, and later Mrs. Compton executed an assignment of the rent to him. This finding is supported by the evidence.

Mrs. Heflin testified that on one occasion when defendant was at the Comptons' home the sale of the farm was discussed and defendant "proposed that if he had a 'phony' deed made out to him he could go out and sell it [the farm] as if it were his own"; Mrs. Compton said she would give him a "phony" deed; he said he could not sell the farm unless he had the deed and in case Mr. Compton should die he, defendant, would be able to go on with the sale; that on a later date when defendant and Mrs. Stratton came with the deed to be signed by Mr. and Mrs. Compton there was further conversation about its being a "phony" deed. Defendant denied that he ever made any statement about a "phony" deed and Mrs. Stratton stated that she made no reference to such a deed but did not deny that it was mentioned while she was present. Mrs. Heflin's testimony sustains the finding of fraud. We can give no more weight to the contradictory evidence than was given by the trial court.

On the day that defendant left for Missouri to sell the farm he called at the Comptons' home and presented an itemized list of disbursements in connection with the prospective sale. At his request Mrs. Compton paid him $100 to cover expenses. One of the items was for attorney's fees amounting to $20 and another was specified as car fare and berth to Kansas City. While in Missouri he wrote a letter to his attorney stating that he had sold the farm for $17,000; that in connection with the sale he had paid attorney's fees, cost of advertising, farm repairs, agent's commission, and taxes; that in addition to the $10,000 mortgage he expected to pay Mrs. Compton $4,000. If defendant had been a bona fide purchaser, as he contends, there is no reason for his having asked the Comptons to pay his expenses to Missouri, nor is there any reason why he should have itemized the expenses incurred in making the sale.

[6, 7] 4. *The defense of estoppel.* Defendants claim that plaintiff is estopped to deny that a bona fide sale was made for the reason, so they assert, that prior to the death of Mr. and Mrs. Compton each treated the transaction as a valid sale. Mr. Compton was ill and bedridden at the time he signed the deed—so infirm that it was necessary to raise him in his bed to enable him to sign the deed with his mark,

assisted by defendant and Mrs. Stratton. He died shortly thereafter without knowledge of the existence of the mortgage. In the last discussion between him and defendant the latter said that he could not buy the farm and was not interested in buying property in Missouri. Mr. Compton's death occurred before the farm was sold and no act of his can be considered as an estoppel. There was nothing in his conduct to indicate that he regarded defendant in any other capacity than as his trusted agent.

The claim of estoppel made against Mrs. Compton is not sustained by the evidence. In addition to the deed she signed a power of attorney appointing defendant as her attorney in fact, reciting that a question might arise relative to the collection of rents of the farm and disclaiming any interest therein. This document was in furtherance of the original arrangement wherein defendant was authorized to sell the property and to collect the rents.

After her husband's death Mrs. Compton filed a petition to terminate their joint tenancy in certain property, including the mortgage in question. In this proceeding she was represented by the same attorney who had prepared the deed and mortgage at the request of defendant. Since the attorney had knowledge of the mortgage and presumably was without any knowledge or information of the fraud perpetrated by defendant he obviously would deem it proper to list the mortgage as a part of the property held in joint tenancy. Mrs. Compton at that time was unable to realize the purport of her acts and is not chargeable with knowledge of the legal effect, if any, of claiming the mortgage as a part of the joint estate of herself and her deceased husband.

Defendant testified that he saw Mrs. Compton only twice after he returned from Missouri, once on November 16 when she was in a semi-comatose condition due to a narcotic which had been prescribed for her, and once on December 5 when she was asleep. She died on December 12.

There is not the slightest indication in the record that either Mr. or Mrs. Compton ever recognized the transaction as being other than one of agency and there is nothing upon which to base the claim of estoppel.

[8] 5. *Respondent's objection to allowance of commission to appellant.* The court found that defendant was entitled to $1,700 as a reasonable commission for effecting the sale of the property and allowed credit therefor upon the amount realized from the sale. Plaintiff objects to the allowance of the commission upon the ground that the broker, having defrauded his principal as found by the court, forfeited his right to a commission, citing Chain v. Katze, 62 Cal.App. 615, 617, 217 P. 578, which so holds. Since plaintiff has not appealed from any portion of the judgment this court cannot order the modification requested by plaintiff.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.




**BURUM et al. v. STATE COMPENSATION INS. FUND.***

**Civ. 3200.**

**District Court of Appeal, Fourth District, California.**

**May 22, 1946.**

**Rehearing Denied June 17, 1946.**

**Hearing Granted July 18, 1946.**

**1. Officers ⇐11**

The State's Workmen's Compensation Insurance Fund can employ special counsel to protect its interests without the requirement of civil service classification, and can select attorneys who can furnish such service if the services are of such a nature that they could not be performed by a person selected under the provisions of the civil service. Const. art. 24, § 1 et seq.

**2. Workmen's compensation ⇐1049**

Under Insurance Code, the State Compensation Insurance Fund can enter into any contracts or obligations relating to the

* Subsequent opinion 184 P.2d 505.

fund which are authorized or permitted by law as fully and completely as the governing body of a private insurance carrier. Insurance Code, § 11783.

**3. Workmen's compensation ⇐2191, 2252**

Where employer is insured against workmen's compensation liability, insurer has the same right of action as an employer, or is subrogated to the employer's right, and the insurer may enforce its cause of action by a suit in its own name or join as party plaintiff in a suit filed previously by an employee, or can abstain from suit and claim as a first lien against the entire amount of any judgment recovered by the employee, the amount of the expenditures for compensation. Labor Code, §§ 3850(b), 3851–3853, 3856; Insurance Code, § 11662.

**4. Officers ⇐11**

Where the State Compensation Insurance Fund, as insurance carrier, paid award of compensation to widow and minor children of deceased employee, and did not bring suit in its own name against third-party tort-feasors or join as party plaintiff in a damage suit previously filed against third parties by widow and minor children, but filed a claim of lien upon any judgment recovered by widow and minor children in such suit, the Fund could not be adequately represented by attorneys selected under civil service, but could employ outside counsel to protect such lien. Labor Code, §§ 3850(b), 3851–3853, 3856; Insurance Code, § 11662; Const. art. 24, § 1 et seq.

**5. Attorney and client ⇐88**

Where a party appears in court by an attorney at law, such attorney has exclusive control of the case, and the court has no power to recognize anyone in conducting or in the disposition of the case except the attorney of record.

**6. Attorney and client ⇐22**

Attorneys who were employed by widow and minor children of deceased employee to bring damage action against third-party tort-feasors for death of employee, and who were employed by State Compensation Insurance Fund which, as insurance carrier, paid award of compensation to widow and minor children, to recover amount of Fund's lien against any judgment suffered in damage action, did not represent conflicting interests so as to invalidate the attorney's employment by the Fund, where there was a full disclosure of all the surrounding facts to widow and minor children.

**7. Workmen's compensation ⇐2252**

The state is not liable beyond assets of State Compensation Insurance Fund for fees of attorneys employed by the Fund to recover amount of Fund's lien against any judgment recovered in damage action instituted against third parties by deceased employee's widow and children to whom Fund as insurance carrier paid award of compensation. Insurance Code, § 11771.

**8. Statutes ⇐225½**

A special statute dealing expressly with a particular subject controls and takes priority over a general statute.

**9. States ⇐197**

The State Compensation Insurance Fund was designed to be self-operating and of a special unique character, and the Fund could be sued for fees of attorneys employed by the Fund to recover amount of the Fund's lien against any judgment recovered in damage action against third-party tort-feasors by deceased employee's widow and children to whom the fund, as insurance carrier, paid award of compensation, without a previous filing of such claim with the State Board of Control. Pol.Code, §§ 667, 688; Insurance Code, §§ 11771, 11778, 11783.

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Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action to recover attorneys' fees by R. Y. Burum and another against the State Compensation Insurance Fund. From a judgment for the defendant, the plaintiffs appeal.

Reversed.

R. Y. Burum, of Bakersfield, and John Shortridge, in pro. per., of San Francisco, for appellants.

Robert W. Kenny, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

A judgment for defendant was entered following the sustaining of a demurrer to a second amended complaint without leave to amend.

This action was brought by plaintiffs, a firm of attorneys, against the State Compensation Insurance Fund, hereinafter referred to as "The Fund," to recover the sum of $1450, as attorneys' fees alleged to have been earned under a written contract with The Fund by which the plaintiffs agreed to represent it in a certain action for the recovery of damages brought by the widow and minor children of one E. E. Davis, deceased, whose death arose out of and in the course of his employment with an employer for whom The Fund was the insurance carrier, and "to recover the amount of its lien against any judgment obtained or amount paid in settlement of said case."

The contract itself is not set out in full, but it is alleged that under its terms it was agreed that the plaintiffs should receive for their services 25 per cent of any sum or amount recovered or obtained for The Fund by virtue of said litigation.

The second amended complaint further alleges that on an award of the Industrial Accident Commission The Fund paid the widow for herself and as guardian ad litem of the three children, $6,300. It further recites that Davis was killed on January 3, 1944; that plaintiffs were duly employed by the widow and minor children to commence and did commence an action against the defendants there named; that The Fund, on account of the payment of $6,300, claimed a right to recover said amount against said defendants, either in a separate suit brought in its own name, or by lien imposed upon any judgment obtained by the widow and minors. It is then alleged that the claimed right of The Fund against third parties was subject to enhancement if enforced by a lien filed in her action; that The Fund elected to proceed by filing a lien because The Fund, as an insurer claiming through subrogation, would be likely to encounter prejudice on the part of the jury, while an action prosecuted in the name of the widow and minor children would be likely to excite a sympathetic consideration of all of the evidence on the part of the jury; that on the date of the contract here involved, neither the widow nor The Fund knew of the existence of any income or property from which a judgment in excess of $5,000 could be satisfied; that The Fund was entitled to $6,300 before any damages were payable to the widow, and that in view of the priority, no incentive existed for the widow to continue the prosecution of her action; that under the contract, an incentive for her attorneys, plaintiffs herein, existed to obtain a judgment and explore the possibility of discovering additional assets subject to execution if the attorneys for the widow could look to The Fund as well as to the widow for a fee; that through the services of her attorneys, performed simultaneously with the interest of The Fund, it would have a better prospect of obtaining damages than would the services of attorneys in the Civil Service employed by defendant Fund. That The Fund, as a result thereof, then entered into the agreement here sued upon; that plaintiffs fully performed their part of the agreement and obtained a judgment for and actually collected and caused to be paid to The Fund the sum of $5,800, and that plaintiffs are entitled to recover $1,450 under the contract.

It is then alleged that the services contracted for were of such a nature that they could not be performed adequately or satisfactorily by an attorney selected under the provisions of the Civil Service Act of the State; that plaintiffs were at all times actively in charge of the litigation; that as a result of their efforts The Fund was reimbursed to the extent noted; that the widow and minor children entered into an agreement, approved by the court, to pay plaintiffs herein, a percentage of any amount received over and above the amount of the lien claimed by The Fund; that under the circumstances The Fund could not be adequately represented by one of its attorneys selected under Civil Ser-

vice, and consequently it employed plaintiffs; that plaintiffs demanded from The Fund their fee which remains unpaid.

Demurrers, both general and special, were sustained without leave to amend, with the notation "on the ground that The Fund has no authority to make the contract sued on in this case."

It is intimated in the briefs that it has been the practice of The Fund for some years to enter into similar agreements with attorneys in some cases where it has elected to rely upon a lien upon the judgment obtained; that there is no quarrel between the plaintiffs and the defendant, but that out of caution, the attorney general has advised the defendant to refuse to pay the claim.

Defendant's argument, in support of the judgment, is based upon three separately stated contentions. The first is that the Civil Service provision of the State Constitution, Article XXIV, and the Statutes passed pursuant thereto, embrace and control all services of the character contemplated by the contract referred to, so as to require such services to be rendered by persons employed pursuant to such Civil Service provisions; that it was not within the power of The Fund to contract independently for services of such character and without observation of Civil Service requirements; and that there is no allegation that any of these requirements were complied with.

In support of the first argument defendant cites State Compensation Insurance Fund v. Riley, 9 Cal.2d 126, 69 P.2d 985, 111 A.L.R. 1503, often called the McNab case. In that case The Fund entered into an agreement with Mr. McNab, an attorney, by which he was to represent The Fund in respect to certain taxation questions, at a fixed fee. After the agreement was made the State Controller refused to draw a warrant in favor of Mr. McNab. An action in mandamus resulted. The Supreme Court denied the writ and discussed the history of the Constitutional amendment here involved and the statutes enacted relating thereto and affected thereby. A repetition of that discussion will serve no beneficial purpose. Suffice it to say, the court there stated, 9 Cal.2d at page 130 et seq., 69 P.2d at page 987, 111 A.L.R. 1503:

"The Attorney General is not required to represent the fund in this or other cases. Section 473a of the Political Code, adopted in 1933 * * *, provides that: 'No department * * * commission * * * of the State, except the * * * State Compensation Insurance Fund * * * shall employ any legal advisor or attorney other than the Attorney General * * * in any matter in which such department * * * commission * * * is interested.'

"* * * There is no express prohibition in any statute forbidding the employment of additional or special counsel, nor is there any statutory provision making it the duty of the regular attorneys for the fund to represent the fund in an emergency such as is here presented. Under such circumstances, and without now considering the effect of article 24 of the Constitution dealing with civil service, it seems clear that the fund has the power to employ special counsel to protect its rights in pending litigation. The law is well settled that a public agency may employ special counsel to protect its rights, unless specifically prohibited from so doing by statutory or charter provision, and that it possesses this power whether or not such public agency has a regularly appointed attorney, if such regularly appointed attorney is not specifically charged with the particular duty involved. This problem has been frequently presented in reference to the employment by municipal corporations of special counsel to assist the regularly appointed or elected city attorney in special litigation. This subject is discussed at length in an annotation appearing in 83 A.L.R. 135. * * *

"From these cases, and many others that could be cited, it is clear that the fund has the power to employ special counsel to protect its interests in the Gallagher action. However, a determination of this question is not decisive of the problem presented by this petition. The question still remains as to whether or not the fund must employ such counsel through the state personnel board under civil service."

The court then traces the history and purpose of the State Civil Service Constitutional Amendment, reciting that:

"Section 4(a) provides: 'The provisions hereof shall apply to and the term "State civil service" shall include, every officer and employee of this State'", with 14 exceptions not here involved. "* * * This court is without power to create additional exceptions by implication."

In that action it was alleged that the services to be rendered were urgent, temporary, and required expert knowledge and ability. However, it was not alleged, as it is in the instant case, *that the services involved could not be rendered by one selected under the provisions of the Civil Service Act.* The court stated that the constitution and statute makes no distinction between urgent, temporary employment, or between skilled and nonskilled employees, or between professional and nonprofessional services, and that the employment of Mr. McNab was not as an "independent contractor." It was, however, specifically pointed out, 9 Cal.2d at page 135, 69 P.2d at page 989, 111 A.L.R. 1503, that:

"There undoubtedly is a field in which state agencies may enter into contracts with independent contractors. But the true test is, not whether the person is an 'independent contractor' or an 'employee,' but whether the services contracted for, whether temporary or permanent, are *of such a nature that they could be performed by one selected under the provisions of civil service.* If the services could be so performed, then in our opinion it is mandatory upon such appointing power to proceed in accordance with the provisions of the Constitution and statute above summarized. As already stated, the petition does not allege that the services here involved could not be performed satisfactorily by an attorney selected under civil service. The services contracted for are the services of an attorney. Attorneys are included within civil service, and in the absence of a showing to the contrary we must assume that such services could be adequately and competently performed by one selected in accordance with the mandate of the Constitution." (Italics ours.)

Defendant also cites Stookburger v. Riley, 21 Cal.App.2d 165, 68 P.2d 741; Entremont v. Whitsell, 13 Cal.2d 290, 89 P.2d 392; Pinion v. State Personnel Board, 29 Cal.App.2d 314, 84 P.2d 185; and Noce v. Department of Finance, 45 Cal.App.2d 5, 113 P.2d 716.

[1-3] The pivotal question here presented, then, is whether, from the allegations of fact set forth in the amended complaint, it can be said that the services contracted for were of such a nature that they could have been performed by one selected under the provisions of the Civil Service. If they could not have been so performed, then this State agency had the power and right to enter into the field described by the Supreme Court and employ special counsel to protect its interests without the requirement of Civil Service classification, and it could select someone who could furnish such service. Under section 11783 of the Insurance Code The Fund may enter into any contracts or obligations relating to the State Compensation Insurance Fund, which are authorized or permitted by law, as fully and completely as the governing body of a private insurance carrier. As pointed out by defendant, if the employer is insured against Workmen's Compensation liability, the insurer has the same right of action as the employer, or is subrogated to the employer's right. Labor Code sec. 3850, subd. (b); Insurance Code, sec. 11662. The insurer may enforce its cause of action by (1) a suit in its own name. Labor Code secs. 3851 and 3852. Or (2) join as party plaintiff in a suit filed previously by an employee. Labor Code sec. 3853. Or (3) it may abstain from suit and claim as a first lien against the entire amount of any judgment recovered by the employee, the amount of his expenditures for compensation. Labor Code sec. 3856.

[4] In the present action, according to the facts pleaded, The Fund refused or failed to enforce its cause of action by bringing a suit in its own name through its own attorneys. It likewise failed or

refused to join as party plaintiff through its own attorneys, in a suit filed previously by the widow and minor children of the employee. Instead of pursuing these remedies it elected to abstain from suit and to file a claim as a first lien against the entire amount of any judgment recovered by them for the amount of its expenditures for compensation. It is apparent that The Fund then elected only to claim an interest in any judgment that might be recovered. It had, at that time, no legal right to substitute its attorneys or any other attorney selected by Civil Service examination in the place of the attorneys selected by the widow, to prosecute the action in her name and that of the minor children. The only interest The Fund had in that action, at the time, was the claim of lien upon any judgment that might be obtained and, a fortiori, to see that its interest was protected to that extent. A claim of lien upon a judgment, where The Fund elected to abstain from suit itself, surely is such an interest in the damage action as would warrant The Fund in employing outside counsel to protect. The Supreme Court, in the McNab case, 9 Cal.2d at page 131 et seq., 69 P.2d at page 987, 111 A.L.R. 1503, discussed the rights of boards of supervisors, without specific statutory authority, to employ special counsel, to assist the district attorney, not only in cases in which the county was a party, but in any case in which the county was interested, and cited Smith v. Mayor, etc., of Sacramento, 13 Cal. 531, 533. See, also, Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107, in which action it was held that the Building and Loan Commissioner had the power to employ special counsel and assistants to assist in the duties in connection with the liquidation of the Pacific States Building and Loan Company. It was held that such attorneys and assistants were not employees of the State and not permanent appointments and were therefore not bound by the provisions of Article XXIV of the Constitution relating to Civil Service.

[5] Where a party appears in court by an attorney at law, such attorney has the exclusive control of the case, and the court has no power or authority of law to recognize anyone in conducting or in the disposition of the case except the attorney of record. In re Estate of Cowell, 167 Cal. 228, 139 P. 84; Boca, etc., R. Co. v. Superior Court, 150 Cal. 153, 88 P. 718.

The defendant Fund was not a party to the damage action nor was it or its attorneys or any attorney that might have been selected by the Civil Service examination entitled, as a matter of right or law, to appear in that action or prosecute it under the pleadings and facts presented. Therefore, the allegation in the amended complaint here under attack, that under the circumstances The Fund could not be adequately represented by one of its attorneys selected under Civil Service, is supported by the facts alleged and is sufficient, on demurrer, to bring plaintiffs' case within the exception noted in State Compensation Insurance Fund v. Riley (McNab case), supra.

[6] It is next argued that the ethics of employing the widow's attorneys to do the work necessary to recover the amount of The Fund's lien against her judgment, placed the plaintiffs in a position of representing adverse interests, citing Anderson v. Eaton, 211 Cal. 113, 293 P. 788, which was an action in which plaintiff undertook to represent both the defendant employee and the employer's insurance carrier. The court held that the contract with the employee was clearly against public policy and void. In that case there was a direct finding of fraud and no explanation was given to the client by the attorney showing wherein the two employments of the same attorney were adverse. It was held that it was an attorney's duty to protect his client in every possible way, and it was a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all of the facts and circumstances.

The pleadings in the instant case show that it was to The Fund's advantage to have plaintiffs continue the prosecution of the action to a successful conclusion. Otherwise, its lien would be subject to a total loss. They also show that there was

a full disclosure to the widow and minor children of the full facts in relation to plaintiffs' employment by The Fund. They even entered into a written agreement, approved by the trial court, showing all of the surrounding facts. Under such circumstances it cannot be successfully argued that Anderson v. Eaton, supra, has any application. The pleadings do not show nor indicate any undisclosed conflicting interest, nor that any advantage was taken of any of the parties, nor that plaintiffs were required to choose between conflicting duties or to reconcile conflicting interests, rather than enforce, to their full extent, the rights or the interests which they alone should represent.

The last contention is that plaintiffs failed to allege that they had filed a claim with the State Board of control pursuant to sections 667 and 688 of the Political Code; that the filing of such claim was a condition precedent before a court could acquire jurisdiction to entertain the cause for trial, citing Bekins Van & Storage Co. v. State of California, 135 Cal.App. 738, 28 P.2d 61.

[7] Sec. 11783 of the Insurance Code provides that the Industrial Accident Commission may, on behalf of The Fund, in the name of The Fund, sue and be sued in all actions arising out of any act or omission in connection with The Fund, or in connection with its business or affairs. It clearly appears from the Insurance Code, sec. 11771, that there is not and could not be any liability against the State beyond the assets of The Fund, for the payment of any such claim as is here involved. All business and affairs of The Fund are conducted in the name of The Fund and its assets are applicable to the payment of losses, salaries and other expenses. Section 11778 gives general authority for it to prosecute Workmen's Compensation business to the same extent as any other insurer.

Sections 667 and 688 of the Political Code are general in their application. The Workmen's Compensation law, the Insurance Code, and the Labor Code are special statutes.

[8] In Brill v. County of Los Angeles, 16 Cal.2d 726, 732, 108 P.2d 443, it was held that a special statute dealing expressly with a particular subject controls and takes priority over a general statute. See, also, Birch v. County of Orange, 186 Cal. 736, 200 P. 647.

[9] We therefore conclude that the entire framework of The Fund, its organization, its powers, its duties, and its obligations, shows that it was designed to be self-operating, and of a special and unique character, and as such it may be sued, upon the claim here presented, without a previous filing of such claim with the State Board of Control. The order sustaining both demurrers without leave to amend was erroneous.

Judgment reversed.

BARNARD, P. J., and MARKS, J., concur.




74 Cal.App.2d 732

**PEOPLE v. BALES.**

**Cr. 497.**

**District Court of Appeal, Fourth District, California.**

**May 28, 1946.**

**1. Criminal law ⇐878(4)**

A conviction on charge of rape and acquittal on charge of kidnapping were not inconsistent, on ground that the rape was a different offense but connected with the kidnapping and the same unlawful force was relied upon under both counts.

**2. Criminal law ⇐1134(2)**

In prosecution for forcible rape and for kidnapping as a different offense but connected in its commission with the first, complaining witness' testimony as to threat and violence while driving to a country spot where forcible rape allegedly occurred, could not be relied upon in support of testi-

mony as to what thereafter occurred, in view of jury finding for defendant on kidnapping count that defendant had not threatened complaining witness or committed violence upon her as alleged while driving her to the country.

**3. Criminal law ⇐1144(13)**

On appeal from conviction, evidence most favorable to the state was considered.

**4. Rape ⇐51(4)**

In prosecution for forcible rape, evidence insufficient to show force on part of defendant, or real resistance on part of complaining witness, did not sustain conviction.

**5. Rape ⇐14**

The old rule that in order to manifest opposition to rape there must be resistance by the female to the utmost has been relaxed, but not to the extent of doing away with the need of showing some resistance or, in proper cases, showing facts which fairly indicate some good reason for not resisting.

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Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

J. C. Bales was convicted of forcible rape and he appeals.

Judgment reversed.

Leslie L. Burr, of Imperial, for appellant.

Robert W. Kenny, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with forcible rape and, in a second count, as a different offense but connected in its commission with the first, with the crime of kidnaping in that he forcibly took the same woman from the intersection of two streets in the town of Westmorland to a point about one and a half miles away. A jury found him guilty on the first count and not guilty on the second count. This appeal followed.

[1] The appellant contends (1) that his conviction under the rape charge is a nullity as being inconsistent with his acquittal on the kidnaping charge, since the same unlawful force is relied upon under both counts, and (2) that the evidence is insufficient to support the verdict on the rape charge since the only acts testified to whereby her resistance was overcome "by force or violence", or where she was prevented from "resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution" were those relating to the kidnaping charge, of which the jury found him not guilty. There is no necessary inconsistency between these verdicts except as it arises from the evidence, and the essential question here is as to whether the evidence is sufficient to sustain the verdict on the charge of rape.

The evidence discloses that about 3 o'clock p. m. on August 10, 1945, the complaining witness, with her friend Mrs. Van Vliet, went to the "Town Pump", a drinking place in Westmorland; that a few minutes later the appellant entered and the complaining witness spoke to him; that she had seen the appellant before but had never spoken to him; that in response to a question she told him that her husband had gone to Riverside and that she did not expect him to return until Saturday night; that they talked and drank beer until 5:30, each drinking three bottles of beer; that the appellant then drove the two women to their homes in his car; that on his invitation they then went with him to Brawley where they visited several bars and had more drinks, and where another man joined the party; that about 7 o'clock they returned to the home of Mrs. Van Vliet; that Mr. Van Vliet then joined the party and they went to the Town Pump where more beer was consumed; and that about 9 o'clock or a little later they all returned to the home of the complaining witness.

Shortly thereafter, the complaining witness walked to a neighborhood drug store to make a purchase. The evidence is conflicting as to what happened during the next hour and a half. The complaining witness testified that as she was returning to her home the appellant drove up to the curb and asked where she was going; that she replied that she was going home; that he grabbed her, pulled her into the car, closed the door and drove off; that

she was scared and jumped out and ran toward a lighted house; that he caught her and put her in the car and she jumped out again after he had driven about two blocks; that he shoved her back in the car and told her if she did not behave herself he would have to knock her out; that she screamed both times and struggled to get away; that after he put her in the car the second time he hit her on top of the head and she bit her jaw; that she then stayed in the car because she was afraid of his threat to knock her out; and that he then drove into the country and stopped on a side road half a block from the main road.

[2] The appellant testified that while he was driving around looking for the complaining witness she came out of a service station and got in the car; that as they were returning to her home she became sick and commenced to vomit; that she put her head out of the open window and, accidently tripping the latch, fell forward through the opening door; that he reached over and grabbed her clothing and held her to keep her from going completely through the door; that when he succeeded in stopping the car he walked around and assisted her to her feet; that after she got over being sick she asked him to drive her into the country as she wanted to get some air; and that they proceeded to the place described by the complaining witness.

This is all of the evidence material to the kidnaping charge, and the respondent concedes that it is apparent from the verdict that the jury believed the appellant's testimony with respect to this part of the episode and refused to accept that of the complaining witness. This being true, the complaining witness' testimony of a threat and violence in that connection cannot be relied upon in support of her testimony as to what thereafter occurred. In re Johnston, 3 Cal.2d 32, 43 P.2d 541.

[3, 4] With respect to what subsequently happened, the evidence most favorable to the respondent may be briefly stated. The complaining witness testified that when they arrived at the point she described the appellant stopped, came around to her side of the car, and made a remark to the effect that he would then find out what kind of a woman she was; that when he put his hands under her dress and tried to pull off her pants "I stiffened myself and asked him for a cigarette and asked him to let me put my change in the billfold. He said 'I want those pants off' and he gave a good hard jerk and he pulled them off and I locked my ankles and he pulled them apart and then he wedged in between my legs and then he done it." Immediately thereafter, in response to leading questions by the district attorney, she testified "He forced me to do it"; that she did not call out; that there was a house near by "but I am almost certain they would not have heard me if I had hollered"; that she would not have permitted this to be done unless she was "under pressure or force"; and that she was "afraid of the threat" (referring to the previous threat to knock her out if she did not behave). She then testified that after the appellant got through they lit cigarettes and smoked them; that she told him she was not going to tell her husband and asked him not to tell; that she was afraid that if she told him she intended to tell her husband "he really might knock me out again"; that she was in fear of the appellant from the time "I was jumping out of the car" to the time they returned to her home; and that she was with the appellant on this trip for an hour and a half.

Mrs. Van Vliet testified that when the appellant and the complaining witness returned her clothes were torn and her hair was mussed; that she had scratches and bruise marks on her; that these were "on her knees where she fell—I guess she fell," and on her arm and her lip; that she asked the complaining witness what was the matter with her and that she did not reply; that the complaining witness then told Mr. Van Vliet that the appellant "had criminally attacked her"; that the appellant denied this and the complaining witness ordered him out of the house; and that he went sometime later. The complaining witness also testified that she reported the matter to the chief of police of Westmorland the following morning.

The chief of police testified that no such complaint was made to him; that the two women called on him and asked him "what kind of a man Bales was"; that the complaining witness showed no evidence of bruises but looked like she had had a hard night; that she told him she had been out with Bales the night before and that she had been drinking; and that she asked his advice as to whether or not she should tell her husband.

[5] The evidence of bruises on the person of the complaining witness, if believed, is amply explained by that part of the evidence in connection with the kidnaping charge which was accepted by the jury. With respect to what occurred when the appellant stopped the car off the highway, the evidence is not sufficient to show either force on the part of the appellant or any real resistance on the part of the complaining witness. The appellant's first remark, to which the complaining witness testified, indicates an intention to find out whether she would consent to his wishes rather than an intent to enforce the same regardless of her consent. Her testimony that, upon his taking liberties with her immediately thereafter, she merely stiffened herself and asked him for a cigarette and for time to put her change in the billfold is a rather strong indication both of the lack of any fear and of the lack of any serious objection. Her next testimony does not indicate that any real force was used by the appellant. There is an entire absence of evidence that she voiced any objection, made any appeal for help or tried to fight or struggle. There is no evidence of any force or threat by the appellant at that time, and no substantial evidence of any apprehension of immediate bodily harm accompanied by apparent power of execution. The evidence material to this charge fails to show either any reasonable resistance or any reasonable excuse for its absence. The old rule that there must be resistance to the utmost has been relaxed (People v. Cline, 117 Cal.App. 181, 3 P.2d 575), but not to the extent of doing away with the need of showing some resistance or, in proper cases, showing facts which fairly indicate some good reason for not resisting.

Moreover, later on in her testimony the complaining witness was asked whether she had theretofore stated all that the appellant had said to her during the period in question. She replied "No" and then went on to repeat a remark which she said the appellant made to her after the incident was over and when he was ready to take her home. This remark, which need not be repeated here, almost conclusively indicates that no force or threat of force was used on this occasion, and that none was needed.

The evidence is not sufficient to sustain the verdict of the jury on the rape charge.

The judgment is reversed.

MARKS and GRIFFIN, JJ., concur.




74 Cal.App.2d 544

**PEOPLE v. NAVARRO.**

**Cr. 2384.**

District Court of Appeal, First District, Division 1, California.

May 20, 1946.

**1. Criminal law ⇐1159(2)**

Where jury reaches a conclusion of guilt and there is evidence to support verdict, an appellate court is bound by implied findings of jury as reflected in the verdict.

**2. Homicide ⇐254**

Evidence was sufficient to sustain conviction of second-degree murder based on death resulting from an abortion.

**3. Criminal law ⇐784(1), 789(3)**

Where evidence is wholly circumstantial, defendant in a criminal case is entitled to an instruction on necessity of establishing each essential fact beyond a reasonable doubt and that circumstances must be consistent with guilt of defendant and inconsistent with any other rational conclusion.

**4. Criminal law ⇐806(1), 807(1)**

Instructions need not be repeated and argumentative form should not be adopted.

**5. Criminal law ⇐784(4)**

If instruction on circumstantial evidence is certain as applied to facts of case, intelligible, and free from doubt, it is sufficient.

**6. Criminal law ⇐829(1)**

If instructions taken as a whole are as favorable to accused as issues of fact and law justify, refusal of other instructions covering same subject matter is not error.

**7. Criminal law ⇐829(15)**

In prosecution for second-degree murder based on death as the result of an abortion, refusal of requested instructions on circumstantial evidence was not error in view of instructions given. Pen.Code, § 1096.

**8. Criminal law ⇐1001**

Under statute, court in its discretion may summarily deny probation. Pen.Code, § 1203.

**9. Criminal law ⇐1001**

Where defendant was convicted of second-degree murder as a result of an abortion, denial of probation was not an abuse of discretion. Pen.Code, § 1203.

**10. Criminal law ⇐935(1)**

On motion for a new trial from verdict of jury, the losing litigant is entitled to a decision by trial judge on sufficiency of evidence, giving due weight to conflicts and inconsistencies in evidence and credibility of testimony of witnesses, and court must use his own determinative discretion as distinguished from conclusions reached by jury.

**11. Criminal law ⇐1189**

Statements of trial court disclosed that defendant did not receive independent conclusion of trial judge on merits of evidence, on motion for new trial, and therefore case was required to be returned to trial court for reconsideration of motion for new trial even though as a matter of law the evidence was sufficient to sustain verdict.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Mary Frances Navarro was convicted of second-degree murder, and she appeals.

Order denying motion for new trial and judgment of sentence set aside with directions.

James F. Boccardo, of San Jose, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener and Alberta Gattone, Deputy Attys. Gen., and Leonard R. Avilla, Dist. Atty., and A. Andreuccetti and Vernon E. Perren, Asst. Dist. Attys., all of San Jose, for respondent.

WARD, Justice.

The defendant, Mary Navarro, appeals from a judgment of conviction of second degree murder and the order denying her motion for new trial. The charge was based upon the death of one Sarah Castrillo as the result of an abortion allegedly performed by defendant. The court denied probation and committed defendant to the California Institution for Women.

Three points are raised on appeal: (1) Sufficiency of the evidence to support the verdict, including error by the trial court in denying the motion for a new trial; (2) incorrect instructions on circumstantial evidence; and (3) improper procedure in denying defendant's application for probation.

The facts appear as follows: On the third day of February, 1945, Sarah Castrillo, now deceased, the mother of three children, was pregnant. A few weeks prior to that date she had told her sister, Rita Soto, that she was going to get rid of the baby—that she was "going over to Mary's." Rita Soto testified, without objection, that she understood her to mean the defendant Mary Navarro. Over the objection of appellant she also testified she told her she was going to pay about fifty or seventy-five dollars. The husband of deceased testified that his wife was in good health and that on the morning of February 3, 1945, she stated that she was going to get rid of the baby; that she was going over to Mary Navarro's. Sarah Castrillo left the home of her sister, Rita Soto, about 6:30 of the evening of

February 3rd. She arrived at the home of Mary Navarro approximately at 7:15. About 8:30 that evening Mary Navarro called Rita Soto on the telephone and said: "Things don't look so well, I think I will go and look for Raymond," the husband of the deceased. At approximately 9 o'clock p. m. Sarah Castrillo talked to her husband "through the phone." About fifteen or twenty minutes after that phone conversation Mary Navarro came after Raymond Castrillo. She arrived in a Pontiac with another couple and told the husband that his wife had fainted. They rode back to Mary Navarro's place where they found Sarah Castrillo lying on the bed. Raymond Castrillo testified: "Well, she looked to me like she was dead already." At ten o'clock p. m. Sarah Castrillo was picked up by an ambulance at Mary Navarro's place and taken to the hospital. William Freeman, the ambulance driver, testified that he found her at the home of Mary Navarro lyon the bed fully dressed, and "I believe she was still alive."

An expert pathologist and bacteriologist, Dr. Duval, called on behalf of the people, testified that he performed an autopsy upon the body of Sarah Castrillo; that the autopsy disclosed a pregnant womb or uterus in which an abortion had been attempted. He testified that the placenta had been torn from its attachment to the inner lining of the womb and that the womb was torn and lacerated in many places. Dr. Duval further testified that in his opinion severe hemorrhage followed immediately upon the attempted abortion and that the patient probably became comatose in a very few minutes from lack of blood. The doctor further testified that in his opinion it would have been impossible after the bleeding occurred for the patient to have moved herself from one place to another.

In answer to a question whether the deceased could have performed the abortion on herself, the witness stated: "I can't answer that very—I can't answer it put in that way, except to say that it is hardly likely that she could have herself, with an instrument, torn that placenta away from its moorings and lacerated it, because of the pain, for one thing, and the tremendous loss of blood before the placenta was disturbed to the extent we find it here, or I find it here, she would have been exsanguinated and couldn't very well have finished the job as finished as this is." There is some conflict in the record in reference to a girdle found stuffed between mattresses in the Navarro home. The prosecution claimed it was the girdle of the deceased. Appellant's husband said that it was his girdle. There is also conflicting testimony concerning the identity of persons in the car which the appellant occupied on her trip downtown to find decedent's husband. The county pathologist testified to certain facts and conclusions in conflict with the testimony of the autopsy surgeon, particularly in reference to the absence of blood on the clothing of the decedent and around the vagina.

Appellant submits that all that the record shows is that decedent was pregnant; that she said she was going to get rid of the baby and that she was going over to Mary's. Appellant suggests that the evidence shows only opportunity to commit rather than an attempt to commit an abortion, and that if a reasonable inference could be drawn that an abortion or an attempt had been committed, it could have been committed by her step father-in-law or two neighbors who came to appellant's home, or by some other person before she returned to her home, or it might have been performed by the decedent herself. The father-in-law of appellant testified that when decedent was in the Navarro home no one was present except the witness and appellant. Appellant testified that up to the time decedent became ill the father-in-law was resting in the living room. *During part of that time appellant and decedent were alone in another room.* The husband testified that shortly after he arrived appellant "was running around, repeating 'What shall I do? What shall I do?'" Whether the autopsy surgeon's or the city pathologist's testimony should be accepted was a question for the jury. The witness for the defense testified that it is not necessary, even if the abortion is accidental, that blood should "be emitted through the vagina," but that "the hemorrhage is dissolved in the uterus," and that sometimes "in the case of such loosening of the rectal placenta hemorrhage there would be then no external loss of blood."

Therefore it appears that there is ample evidence, if believed, to sustain the verdict against defendant. More than mere opportunity was proved.

[1, 2] The basic legal problem briefed in determining the sufficiency of the evidence in this case, which was based wholly on circumstantial evidence, is the applicability of the statement that "the circumstances proved must not only be wholly consistent with the defendant's guilt, but they must also be inconsistent with any other rational conclusion." The appellant cites no cases in support of the view that the appellate court will apply this rule to reverse a conviction. The rule that the establishment of guilt on circumstantial evidence alone, which evidence seemingly is equally compatible with innocence, should result in a verdict for the accused is not the test on appeal. Where the jury reaches a conclusion of guilt, and there is evidence to support the verdict, an appellate court is bound by the implied finding of the jury as reflected in the verdict. People v. Perkins, 8 Cal.2d 502, 66 P.2d 631; People v. Bradley, 71 Cal.App.2d 114, 162 P.2d 38; People v. Harshaw, 71 Cal. App.2d 146, 161 P.2d 978. In People v. Newland, 15 Cal.2d 678, 680, 104 P.2d 778, a conflict in the California cases is noted and the rule above noted is said to be applicable only as an instruction to the jury in the first instance concerning reasonable doubt, that only where there is no evidence to warrant the jury's inference of guilt will a conviction on circumstantial evidence be reversed. The record before this court shows that there was ample evidence, if believed, to sustain the verdict.

It is claimed, however, that the court erred in the refusal of two instructions on the subject of circumstantial evidence reading as follows:

"When circumstantial evidence is relied upon to establish the guilt of the defendant, each material fact or circumstance necessary to complete the chain or series of independent facts tending to establish the guilt must be established by the prosecution to the same degree of certainty as the main fact which these independent circumstances taken together tend to establish; that is, essential and independent fact in the chain or series of facts relied upon to establish the main fact must be established to a moral certainty and beyond a reasonable doubt, and if you should then have a reasonable doubt upon any single essential fact relied upon to complete the chain of circumstances, you can not convict the defendant so long as you entertain such doubt."

"The guilt of the defendant must be established by substantial and competent evidence. Mere suspicion, however strong, that the defendant committed a crime is not sufficient to warrant a verdict of conviction. If the proof on the part of the prosecution consists solely of circumstantial evidence and such circumstantial evidence may reasonably lead to two conclusions, one being a conclusion of innocence and the other being a conclusion of guilt, the jury is bound to adopt the conclusion which leads to innocence and must not adopt that which leads to guilt. In order for a defendant to be convicted on purely circumstantial evidence must tend to establish the guilt of the defendant and must be entirely inconsistent with any theory of innocence. If the circumstantial evidence is equally consistent with the theory of innocence and one of guilt, you must acquit the defendant."

[3-7] When the evidence is wholly circumstantial the defendant in a criminal case is entitled to an instruction on the necessity of establishing each essential fact beyond a reasonable doubt, and that the circumstances must be consistent with the guilt of the defendant and inconsistent with any other rational conclusion. People v. Hatchett, 63 Cal.App.2d 144, 146 P.2d 469; People v. McClain, 115 Cal.App. 505, 1 P. 2d 1085; People v. Rayol, 65 Cal.App.2d 462, 150 P.2d 812. Words of equal import may be substituted if the principle is substantially but clearly and fairly set forth. People v. Green, 13 Cal.2d 37—44, 87 P. 2d 821; People v. Bender, Cal., 163 P.2d 8. Seldom used verbiage and legal phrases may not be understood or they may be misinterpreted by the ordinary juror. Simple language is preferable. The instruction need not be repeated. An argu-

mentative form should not be adopted. If the instruction is certain as applied to the facts of the case, intelligible and free from doubt, it is sufficient. If the instructions taken as a whole are as favorable to the accused as the issues of fact and law justify, the refusal of other instructions covering the same subject matter is not error. Here the court instructed: "The law has laid down a cardinal rule to govern all criminal cases, and the outstanding principle of the administration of criminal law in this country is that a defendant is presumed to be innocent, and that presumption is with him when the case begins; it follows him all through the trial; it abides with him even into the jury-room after you have retired, and is still with him up until the time when, if at all, he is found to be guilty. That is a species of evidence and is to be taken by you and kept in your mind at all times, that the making of a charge against the defendant is no proof, and has no weight, as to his guilt or innocence; that the presumption of innocence stays with the defendant at all times. He is presumed to be innocent until the contrary is proven and proven beyond a reasonable doubt and to a moral certainty. * * * And I am reading to you now Section 1096 of the Penal Code of the State, and it reads as follows: 'A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."' * * * Circumstantial evidence is evidence of circumstances from which the inference of the fact is drawn, properly, reasonably, logically. Circumstantial evidence is governed by the same rules that direct evidence is, and, in the eyes of the law, is regarded as just as reliable as direct evidence. So that there should be no hesitancy either on the part of a jury in acting upon circumstantial evidence where it is convincing and where it is such as to convince them beyond a reasonable doubt and to a moral certainty of the fact which it is intended to prove. * * * *If you have any reasonable doubt, as I have defined it to you, in your minds, of any fact or circumstance necessary to prove this offense, then the defendant is entitled to be acquitted. The proof necessary to be made in order to establish the commission of this crime must be, not only consistent with the guilt of the defendant, but it must be inconsistent with any other reasonable conclusion. And the jury, in order to find a verdict of guilty must find that the circumstances are such that they are consistent with the guilt of the defendant of the offense charged, and inconsistent with any other reasonable conclusion.*" (Emphasis added.)

The emphasized portion of the instructions, in conjunction with the others, should have left the jurors in no uncertain frame of mind relative to circumstantial evidence. The jury was fully and fairly informed in plain and simple language on the rules and principles applicable to circumstantial evidence. "'When the court fully and fairly charges the jury upon the law appertaining to the facts of the case, its failure to instruct on any particular matter deemed essential is not error in the absence of a request for such an instruction.' 8 Cal.Jur. 309, and cases cited." People v. Warren, 16 Cal.2d 103, 117, 104 P.2d 1024, 1031; see, also, People v. Melone, 71 Cal.App.2d 291, 162 P.2d 505. The Warren case is often cited. Recently it was referred to in People v. Bender, supra. In the Bender case the court's attention was called to the language used in People v. Hatchett, supra, and, on the facts of the Bender case, the court held that, in view of the constitutional provisions (art. VI sec. 4½), it was sufficient in stating a principle to use the language in substance. Here the principle of law omitted in the Bender case and the Hatchett case was stated in unequivocal

language and the second instruction, given in both the cited cases and relied on to cure the omission, was given in substance.

[8, 9] It is also urged that the procedure provided by law was not followed by the trial court on appellant's application for probation. Sec. 1203 of the Penal Code provides that: "After the conviction by plea or verdict of guilty of a public offense in cases where discretion is conferred on the court * * * as to the extent of the punishment the court, upon application of the defendant or of the people or upon its own motion, may summarily deny probation, or at a time fixed may hear and determine in the presence of the defendant the matter of probation of the defendant and the conditions of such probation, if granted; if probation is not denied, the court must immediately refer the matter to the probation officer to investigate and to report to the court at a specified time, upon the circumstances surrounding the crime and concerning the defendant and his prior record, which may be taken into consideration either in aggravation or mitigation of punishment; * * * further provided, however, that probation shall not be granted to any defendant who * * * at the time of the perpetration of said crime * * * of which he was convicted inflicted great bodily injury or torture * * *." By this section the court in its discretion may summarily deny probation. In this connection it might be noted that in People v. Darrow, 212 Cal. 167, 298 P. 1, it was held that whether great bodily injury within the meaning of the code section is present in an abortion is a question of fact for the trial judge. See, also, People v. Harshaw, Cal. App., 161 P.2d 978. It does not appear that the trial judge abused his discretion in this respect. Whether the evidence of bodily injury in this case is sufficient to bring this case within the latter quoted provision of sec. 1203 as a case in which probation could not be granted, need not be determined.

In closing his remarks at the time the court ruled on the motion for a new trial the following appears: "Regardless of what I might do if I were trying a case without a jury, I couldn't grant a new trial in the face of the evidence, that is in a verdict of that jury. The motion for a new trial will be denied." The statement is not definite whether the court was referring to a trial, without a jury, of any case or of this case and so it is necessary to look to other statements of the court (People v. Megladdery, 40 Cal.App.2d 748, 772, 106 P.2d 84) to determine whether the trial court used his discretion, independently of the conclusions of the jury. The following statements appear in the record: "The Court: The motion for a new trial must be considered by the Court when it is made upon a question of evidence in the light of the power of the jury to determine the credibility of the witnesses and the weight to be given the testimony. With that power exercised by the jury, the Court has no right to interfere except in a case where it is obviously exercised without any basis at all. In other words, I am bound on a motion for a new trial, to accept the judgment of the jury as to which witnesses they believed, and I am bound to accept the judgment of the jury as to the weight to be given the evidence. If there is no evidence, or the evidence is so slight it becomes a matter of law, then I can interfere with the jury's verdict, but not otherwise. * * * If I was sitting as a Court in the trial of facts, I would listen to the two doctors and decide for myself which doctor's testimony I would believe. The jury has that power. It was tried before a jury, the jury evidently didn't believe Dr. Proescher, and did believe Dr. Duval,—and so with the other evidence,—and if there was sufficient evidence which they believed, regardless of conflicting evidence or contrary evidence, if you can pick out enough evidence which it believed, would indicate the guilt of the defendant, beyond a reasonable doubt, then there is not anything we can do about it. * * * And in this case there is [the evidence]. If the jury believed and were convinced, it convinces their minds, and apparently they did, I have no power to grant a new trial under those conditions, unless I am convinced myself there was sufficient evidence to create a legal situation which would justify me in setting the verdict aside."

[10] On a motion for a new trial from a verdict of a jury the losing litigant is entitled to a decision by the trial judge on the sufficiency of the evidence, giving due weight to conflicts and inconsistencies in the evidence and the credibility of the testimony of witnesses. The court must use its own determinative discretion as distinguished from the conclusions reached by the jury. "It has frequently been observed that a defendant in any action which is tried before a jury is entitled to two decisions on the evidence, one by the jury and the other by the trial judge in ruling upon a motion for a new trial, Smith v. Royer, 181 Cal. 165, 183 P. 660; People v. Bacos, 14 Cal.App.2d 338, 349, 58 P.2d 221, that the court in the latter instance in passing upon the sufficiency of the evidence is not bound by conflicts in it, Moyer v. Dresch, 2 Cal. App.2d 655, 38 P.2d 849, and that, where the evidence is conflicting, such features as credibility and the manner and appearance of witnesses in testifying, and the proper weight to be accorded to evidence must be given consideration. People v. Bacos, supra. The responsibility resting upon a trial judge when a motion for a new trial is presented again to review a cause and only after such review to decide the motion and the duty imposed upon the court to grant the motion if such review produces a conviction of evidentiary nonsupport of the jury's verdict are matters which have also been emphasized." People v. Mattmueller, 25 Cal. App.2d 418, 420, 77 P.2d 504, 505. "Nevertheless, it is settled that, in any trial which is had with the assistance of a jury, a defendant is entitled to two decisions on the evidence, one by the jury and another by the trial judge in passing upon a motion for a new trial. Smith v. Royer, 181 Cal. 165, 183 P. 660." People v. Cesena, 18 Cal.App. 2d 727, 729, 64 P.2d 732, 733. "An appellate court cannot order a new trial on the ground of insufficiency of the evidence if there is any substantial evidence by which the verdict can be supported. People v. McClennegen, 195 Cal. 445, 449, 450, 234 P. 91; People v. Schafer, 198 Cal. 717, 721, 247 P. 576. But a trial court can grant a motion for new trial where the evidence is legally sufficient and even where the only evidence is that of the prosecution. [Citing cases] As previously indicated the evidence in this case amply supports the verdict but that fact cannot justify us in sustaining a judgment pronounced after a denial of any essential element of a fair trial or of due process of law." People v. Sarazzawski, Cal., 161 P.2d 934, 939.

[11] From the above statements of the trial court and the established rules with respect to the trial court's powers on motion for new trial, it is evident that the defendant did not receive the independent conclusion of the trial judge on the merits of the evidence. It is necessary therefore that the case be returned to the trial court even though as a matter of law the evidence was sufficient to sustain the verdict.

The order denying the motion for a new trial and the judgment of sentence thereafter pronounced are vacated and set aside with directions to the trial court to again hear and determine the motion for a new trial in accordance with the legal rules hereinabove stated. If the trial court determines that a new trial should be granted the cause will be set at large and the appellant will be entitled to a trial on the merits, but if the trial court shall determine that the new trial should be denied then the trial court shall again pronounce judgment of sentence upon the defendant as provided in Pen.Code, §§ 1168, 1191, 1192a, 1193, 1200, 1202, 1207, 1213, 1214, 1215. The time limits provided for in those sections are to run from the filing of the remittitur in the superior court.

PETERS, P. J., and KNIGHT, J., concur.

74 Cal.App.2d 563

## KYNE v. KYNE.

**Civ. 13008, 13009.**

District Court of Appeal, First District, Division 1, California.

May 21, 1946.

**1. Bastards ⇐16, 94**

An illegitimate child is entitled to support from his father, and included in such right to support is the right to a reasonable attorneys' fee.

**2. Bastards ⇐94**

A minor plaintiff in suit to establish his paternity and for support is liable to his attorneys for the reasonable value of their services.

**3. Bastards ⇐94**

A child is entitled as a part of his right to support, to a reasonable attorney's fee and costs in all actions brought on his behalf whether the particular purpose of the proceedings is to determine parentage, to settle allowances or to fix counsel fees.

**4. Divorce ⇐182**

A wife is entitled to an allowance of counsel fees as a matter of right for the taking or defending in good faith of an appeal, and such right to counsel fees includes the right to prosecute or defend an appeal from an order granting or denying a request for counsel fees. Civ.Code, § 137.

**5. Bastards ⇐94**

In action by minor plaintiff to establish his paternity and for support, the plaintiff's right to an attorney's fee for taking an appeal is not absolute, and if upon a proper showing the trial court should find that the plaintiff has taken an unnecessary appeal in bad faith and for the sole purpose of litigating an unsubstantial issue for the purpose of increasing the amount of fees, no allowance should be made.

**6. Bastards ⇐94**

The discretion possessed by trial court in allowing and fixing amount of fees on minor plaintiff's appeal in suit to establish paternity and for support is not an unlimited, uncontrolled discretion, but is a judicial discretion which must be governed by reason and law.

**7. Bastards ⇐94**

A minor plaintiff was entitled to attorneys' fees to take appeal in suit to establish paternity and for support, and to take appeal from order denying him such attorneys' fees, where the appeal in the suit was taken in good faith and was necessary and beneficial to the child who was successful on the appeal.

**8. Appeal and error ⇐1122(2)**

The power of the District Court of Appeal to make additional findings or contrary findings to those of the trial court will not be exercised to support a reversal of the judgment except in most unusual circumstances, but only to support an affirmance. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

**9. Bastards ⇐94**

The trial court and not the District Court of Appeal holding that minor plaintiff was entitled to attorneys' fees to take appeal in suit to establish his paternity and for support and to take appeal from order denying him such attorneys' fees, would fix the reasonable amount of attorneys' fees allowed. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

WARD, J., dissenting.

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Appeal from Superior Court, San Francisco County; I. L. Harris and Frank T. Deasy, Judges.

Action by Tom Kyne, Jr., a minor, against Tom Kyne to establish paternity and to obtain support, costs and attorneys' fees. From an order denying the plaintiff costs and attorneys' fees on the successful prosecution of the plaintiff's appeal in the case, and from an order denying the plaintiff his costs and attorneys' fees on the appeal from the first mentioned order, the plaintiff appeals.

Orders reversed.

Allen Spivock, of San Francisco, for appellant.

Melvin M. Belli and Jonathan H. Rowell, both of San Francisco, for respondent.

PETERS, Presiding Justice.

The two appeals here involved grow out of the case of Kyne v. Kyne, 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221. No. 13,008 is from an order made by one department of the Superior Court of San Francisco on January 29, 1945, denying the minor plaintiff costs and attorney fees on the successful prosecution of his appeal in the above-entitled case. No. 13,009 is from an order made by another department of the same court on March 19, 1945, denying the minor plaintiff his costs and attorneys' fees on the appeal from the order of January 29, 1945.

In order to understand the issues involved some reference must be made to the background of this litigation. In November, 1935, an action was commenced by John Doe Kyne, an unborn minor, by his guardian ad litem, to have it determined that the defendant on these present appeals was the father of the plaintiff, for support, costs and attorneys' fees. Three trials were had. The first trial resulted in a verdict for the defendant. The trial judge granted a new trial on the ground of insufficiency of the evidence. The second trial resulted in a hung jury. The third trial resulted in a verdict for the plaintiff, an award of attorneys' fees of $3,500 for the period November, 1935, to December 16, 1937, and costs. This judgment was affirmed on appeal. Kyne v. Kyne, 38 Cal.App.2d 122, 100 P.2d 806. Thereafter some difficulty was incurred in collecting the amounts awarded as attorneys' fees and costs. One phase of this litigation reached the Supreme Court. Kyne v. Kyne, 16 Cal.2d 436, 106 P.2d 620. Subsequently an order to show cause was secured for the purpose of having defendant adjudicated in contempt for not paying the judgment, and requesting attorneys' fees and costs incurred subsequent to December 16, 1937. The trial court first determined that such attorneys' fees were reasonably worth $3,250, but then reversed itself, holding that because the minor, through his guardian, had signed a court approved contingent contract with his attorneys he had no right to attorneys' fees from defendant. An appeal was taken from this order which resulted in a reversal of the order, this court holding that the contingent contract was invalid, and that the minor child was entitled to attorneys' fees from defendant as part of his right to support. Kyne v. Kyne, 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221. On March 13, 1942, shortly after that appeal was taken, the minor child requested $3,500 as a reasonable attorneys' fee to prosecute the appeal in that case in advance of the legal service to be rendered on that appeal. The motion was submitted to await the result of that appeal. The appeal was decided by this court on August 28, 1943, and the decision became final 60 days thereafter. On November 4, 1943, notice of motion to proceed with the determination of the deferred motion was filed. The judge hearing this motion determined that the order to show cause why additional attorneys' fees should not be paid should be heard with the motion to secure attorneys' fees to take the appeal. It was agreed, however, that the two proceedings were separate and distinct, and they were heard as separate proceedings. The motion for attorneys' fees for taking the appeal was heard first. The attorney for the minor child testified as to the work he had performed on this appeal and estimated that the reasonable value of the services, measured by the tests suggested in Andrade v. Newhouse, 54 Cal.App.2d 339, 128 P.2d 927, was $3,500, and that the uncollected costs were $43.65. No evidence, other than cross-examination of the minor's attorney, was offered by defendant.

The court then proceeded with the hearing of the order to show cause for payment of costs and attorney fees from December 16, 1937, to January, 1945, exclusive of any fees and costs on the appeal culminating in the decision reported in 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221, and exclusive of costs and attorney fees incurred in a proceeding culminating in a decision reported as Kyne v. Kyne, Cal.App., 160 P.2d 910.

On January 29, 1945, the trial court made two orders—one on the order to show cause and the other on the motion to se-

cure attorneys' fees for taking the appeal. On the order to show cause it awarded the minor $3,250 attorneys' fees and $353.10 costs for all legal services rendered to the minor from December 16, 1937, to January 29, 1945. In this order the trial court specifically recited that included in the award was no allowance for attorneys' fees for taking the appeal reported in 60 Cal. App.2d 326, 140 P.2d 886, 141 P.2d 221, and no allowance for legal services in the proceeding culminating in Cal.App., 160 P.2d 910. No appeal has been taken from this first order made on January 29, 1945, and it has become final.

On the same day (January 29, 1945) the trial court entered a second order denying the motion for costs and attorneys' fees for taking the appeal resulting in the 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221, decision. No reasons are assigned in the order for the denial. The minor child promptly appealed from that order, the notice of appeal being dated March 1, 1945. That is the appeal here involved numbered 13,008. The minor child then moved for attorneys' fees, in advance, to prosecute the appeal 13,008. This motion was assigned to a different department of the court and on March 19, 1945, that department made its order denying the motion. The minor child promptly appealed. That is the proceeding numbered 13,009.

It should be noted that in both appeals it is the minor child through his guardian ad litem who is the appellant. The person who has been adjudicated to be the father of this child is the respondent. The attorneys for the child are not parties to either appeal. Some reference must also be made to the legal issues involved in Kyne v. Kyne, 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221. That proceeding was commenced by an order to show cause why the respondent on the present appeals should not be punished for contempt for failure to pay in full the final judgment rendered in Kyne v. Kyne, 38 Cal.App.2d 122, 100 P.2d 806, and why he should not be ordered to pay additional attorneys' fees incurred since the original judgment. Respondent contended, among other things, that the minor child was not entitled to attorneys' fees or costs because the minor child, through his guardian, had entered into a contingent contract with his attorneys to pay such attorneys forty-five per cent of what he might recover. The attorneys renounced the contract and at no time attempted to collect under it. The trial court determined that the contract was valid, and held that it had no power to grant an award to the minor for attorneys' fees and costs. On appeal this court determined that the contingent contract was invalid, and that the minor child was entitled to an award of attorneys' fees and costs against respondent as part of his legal and statutory right to support.

The sole argument offered by respondent in his four-page brief in support of the orders appealed from is that the appeal resulting in the decision reported in 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221, was not taken for the benefit of the child but for the benefit of the attorneys. It is argued that the minor child obtained no benefit from that appeal; that the sole benefit from that appeal was received by the attorneys; that the action in substance was exactly the same as the case in which an attorney, having performed services for an adult client, is forced to sue the client for a fee; that the attorney, while entitled to a fee for the services rendered to the client, is not entitled to a fee for his services rendered to himself in the action to collect his fee. This is the argument that apparently convinced the two trial judges that made the orders challenged by these appeals that the minor child is not entitled to reasonable attorneys' fees and his costs in these proceedings.

[1] The argument of respondent is not sound and the rulings based thereon must be reversed. The argument advanced loses sight entirely of the basic nature of the proceedings here involved. The case is entirely different from the case where a lawyer is forced to sue his client for a fee. The parties to this proceeding are the parent and the child. The attorneys are not parties in fact or in substance. It is the child's right to attorneys' fees, not the attorneys' rights that are involved. The legislature of this state, acting well within

its powers, has determined that an illegitimate child is entitled to support from his father. It has also determined that included within this right to support is the right to a reasonable attorneys' fee. The thought behind such legislation is that an illegitimate child, because of the circumstances of his birth, is peculiarly in need of legal services and ordinarily unable to pay for the same.

It has already been adjudicated in this very litigation that the right to support includes the right to attorneys' fees. In Kyne v. Kyne, 60 Cal.App.2d 326, 328, 140 P.2d 886, 888, 141 P.2d 221, it is stated: "It must be taken as settled law in California that, as stated by this court in Kyne v. Kyne, 38 Cal.App.2d 122, at page 132, 100 P.2d 806, at page 811, 'In cases under section 196a of the Civil Code the allowance of attorney's fee is predicated upon the theory that such legal services are part of the child's right to support.' The child is not only entitled to be awarded an amount necessary for his support, but he is also entitled under our decisions to an allowance of attorneys' fees and costs." It would be a rather futile piece of legislation that would confer upon the illegitimate child the right to an attorney's fee, but deny to him the means of collecting it.

[2, 3] Moreover, there can be no doubt at all but that the appeal in Kyne v. Kyne, 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221, was of material benefit to the minor child. The trial court had determined that the forty-five per cent contingent contract was valid. Respondent argues that the attorneys testified that they had rescinded the contract, and that for this reason, even though valid, the attorneys could never have collected under it. Therefore, so it is urged, whether the contingent contract was valid or invalid the minor could never have been compelled to pay an attorney's fee, and as a result the appeal in question benefited only the attorneys. It is most difficult to follow this somewhat tenuous reasoning. The attorneys rescinded the contingent contract because of their belief, held to be correct on appeal, that it was void. If the appeal had not been taken there would have been a final judgment that it was valid. Whether in that event the attorneys could have collected under the contract on the theory that the rescission was based on a mutual mistake of law need not here be determined. At any rate the minor would have been liable to his attorneys for the reasonable value of their services. Wiley v. Silsbee, 1 Cal.App.2d 520, 36 P.2d 854. This would have materially reduced the $60 a month originally awarded him for his support. It seems obvious, therefore, that under the law the child is entitled to a reasonable attorney's fee and his costs in all actions brought on his behalf whether the particular purpose of the proceedings is to determine parentage, to settle allowances for necessities, or to fix counsel fees. All these are proper elements of the child's right to support granted him by the statute.

[4] There is no material legal difference between the right of a child to an attorney's fee as part of his statutory right of support, and the right of a wife to such a fee granted to her by § 137 of the Civil Code. There are many cases in this and other states holding that a wife is entitled to an allowance of counsel fees as a matter of right for the taking or defending, in good faith, of an appeal. Larkin v. Larkin, 71 Cal. 330, 12 P. 227; Bohnert v. Bohnert, 91 Cal. 428, 27 P. 732; Grannis v. Superior Court, 143 Cal. 630, 77 P. 647; Bruce v. Bruce, 160 Cal. 28, 116 P. 66; Dunphy v. Dunphy, 161 Cal. 87, 118 P. 445; Coleman v. Coleman, 23 Cal.App. 423, 138 P. 362; see, also, cases collected and commented upon 18 A.L.R. 1494; 17 Am.Jur. p. 458, § 580. This right to counsel fees for the good faith prosecution or defense of an appeal includes the right to a fee to prosecute or defend an appeal from an order granting or denying a request for counsel fees. Although no cases are cited by either side on this issue, in every case that we have been able to find that has reached the appellate courts it has been held that a wife, who, in good faith, desires to take or defend an appeal in reference to attorney fees, is entitled to such a fee for the taking or defense of such appeal. Thus in Ex parte Winter, 70 Cal. 291, 11 P. 630, a wife sued her husband for separate main-

tenance. The trial court ordered the husband to pay the wife $250 as counsel fees to prosecute that action. The husband appealed from that order. The trial court thereupon ordered the husband to pay the wife an additional fee to defend that appeal. The husband refused to pay, and this proceeding in contempt was instituted. The Supreme Court held that such an allowance was proper and that the husband was guilty of a contempt for failing to pay the award.

A case directly in point is Largilliere v. Largilliere, 50 Idaho 496, 298 P. 362. In that case the wife started an action for divorce. The husband cross-complained for similar relief. The trial court granted a divorce to the husband. The wife appealed. That is appeal No. 1. On motion of the wife the trial court granted her an allowance of fees to prosecute that appeal. From that order the hubsand appealed. That is appeal No. 2. On motion the trial court thereupon granted the wife a further allowance of fees to defend appeal No. 2. The husband appealed from that order. That is appeal No. 3. The Supreme Court of Idaho affirmed the orders involved in appeals 2 and 3, and modified the judgment involved on appeal No. 1. At page 363 of 298 P., the court stated: "Finally, it is insisted in the third appeal that the court was without right to require the husband to pay counsel fees on an appeal from an order allowing counsel fees." This is the exact contention made by respondent on the present appeals. The Idaho court then quotes its statute similar to § 137 of the Civil Code, and then states: "Counsel earnestly contend that the terminology employed relates to the main action, not to something incidental or collateral * * * unless the wife had been furnished the sinews of war, her main action might have ended in disaster. * * * Without further munitions, she could not have engaged and would have had to retire or supinely rest in the face of attack." See, also, Bedke v. Bedke, 56 Idaho 235, 53 P.2d 1175.

[5] Of course, the right to an attorney's fee for taking an appeal is not absolute. If, upon a proper showing, a trial court should find that a child has taken an unnecessary appeal in bad faith, or for the sole purpose of litigating an unsubstantial issue for the purpose of increasing the amount of fees, then no allowance should be made. But in the present case it cannot be contended that the trial court so found, or, that if it did, that such an implied finding would find any support in the record. The appeal resulting in the opinion found in 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221, was obviously taken in good faith, and for a proper purpose. The result of that appeal demonstrates that fact as a matter of law. That appeal, as already pointed out, was necessary, if not in fact indispensable, to protect the rights of the child. This reasoning disposes of all issues involved on both appeals. Of course, in fixing the allowance for the second appeal, the court can and should take into consideration that no legal work, other than perfecting the appeal, was necessary other than was already done on the first appeal. The same briefs have been filed in both appeals.

The dissenting opinion raises a point not suggested or argued by counsel, namely, that although the trial court had the right to allow additional fees, such allowance rests largely in the discretion of the trial court, and its denial of any fees at all cannot be disturbed, there not appearing, according to the dissenting judge, any abuse of discretion.

To these suggestions there are several conclusive answers. The trial court very carefully and very fairly in its orders separated the services rendered on the appeal in 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221, from the other services rendered. It allowed a fee for specific services rendered between certain fixed dates, but in that order made it crystal clear that no fees at all were being allowed for taking that appeal. Then in a separate order it specifically denied any fees at all for taking the appeal. The dissenting opinion suggests that in denying the fees the trial court must have determined that the other allowances heretofore made were sufficient to compensate the attorneys for their services on the appeal in question. This startling sugges-

tion is made in spite of a record that demonstrates that the trial court had no such thought in mind. In its first order, from which no appeal has been taken, the trial judge very carefully stated that an allowance of $3,250 was being made for services rendered from December 16, 1937, to January 29, 1945, but "not including any legal services rendered on the appeal from the order of this Court herein dated February 26, 1942." Then in a second order it specifically denied any fees for services rendered on that appeal. To support the theory of the dissenting opinion it must be argued that included in the allowance of $3,250 was an allowance for services rendered on the appeal, although the trial court expressly stated no such allowance was being made. Of course, in determining the amount of fees to be allowed for taking these two appeals, the trial court may consider the sums of money heretofore allowed and paid as attorneys' fees throughout this litigation, but it cannot substitute those allowances for some reasonable allowance for the taking of the appeals in question.

[6, 7] A reading of the record demonstrates that the trial court at no time thought it was exercising a discretion in denying fees, but honestly believed that no fees were allowable for taking an appeal involving counsel fees. In this it was in error. If it be urged, however, that a discretion was exercised, then we would be forced to hold that the trial court abused its discretion. The discretion possessed by the trial court in the allowance and fixing the amount of fees is not an unlimited, uncontrolled discretion. It is a judicial discretion—a sound discretion that must be governed by reason and law. The appeal was taken in good faith. It was necessary. It was beneficial to the child. Costs were incurred. The child was successful on that appeal. To hold that the services were of no value to the child is to disregard both the facts and the law. The problem here involved is similar to Cargnani v. Cargnani, 16 Cal.App. 96, 116 P. 306, where the trial court granted a divorce to a husband and denied the wife an allowance to appeal. As does the dissenting justice in the instant case, the husband in that case sought to justify the denial on the theory that the trial court had acted within its discretion. The appellate court had no difficulty disposing of the contention. At page 102 of 16 Cal.App., at page 309 of 116 P. it stated: "In opposition to this contention it is claimed that the allowance of costs of appeal is purely discretionary with the court below, and there is no showing that there was any abuse of discretion in this case. Section 137, Civ.Code; Gay v. Gay, 146 Cal. 237, 79 P. 885. The 'discretion.' though, as has been often held, means discretion guided by law and based upon sound judgment and inspired by a desire to promote justice. It must not be arbitrary nor capricious." The court then quotes from a United States Supreme Court case, Osborn v. Bank of United States, 9 Wheat. 738, 6 L.Ed. 204, and concludes: "While the law here, it is true, does not in terms make it mandatory for the court to allow such costs, yet, in view of the reported cases in which the law has been construed and of the uncontradicted averments of defendant's affidavit, we think the discretion of the court should have been exercised in making some allowance to defendant for her costs on appeal."

The dissenting justice impliedly criticises the opinion in 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221, stating that "the entire record, when read, may indicate" something that the opinion held was not the fact. Then the dissent refers to the opinion of Mr. Justice Knight who dissented from the order denying a rehearing. The purpose of thus casting doubt on the propriety of that decision is not clear. Certainly the same argument was not convincing to the Supreme Court, inasmuch as the record shows that but one justice voted for a hearing. 60 Cal.App.2d at page 335, 140 P.2d 886, 141 P.2d 221. The opinion needs no justification. It stands on its own feet and is the law of the case. Certainly, we are not going to relitigate and have no power to relitigate the merits of that decision on these appeals.

[8, 9] The only other point necessary to discuss is the appellant's contention that under the rule announced in Kirk v. Culley,

202 Cal. 501, 261 P. 994, and under the power conferred by § 4¾ of Art. VI of the Constitution and § 956a of the Code of Civil Procedure, this court should fix the reasonable amount of attorneys' fees for both appeals. While this court has the power to make additional findings or contrary findings to those of a trial court, the power, except in most unusual circumstances, will not be exercised to support a reversal of a judgment but only to support an affirmance. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970; Davis v. Chipman, 210 Cal. 609, 293 P. 40; Isenberg v. Sherman, 212 Cal. 454, 298 P. 1004, 299 P. 528. In Kirk v. Culley, supra, the power was used to affirm rather than to reverse. The wisdom of that rule is well illustrated in this case. In the trial court the attorney testified as to the reasonable value of his services. While respondent offered no direct testimony on the issue, on cross-examination he brought out testimony from which he argued that most of the legal work required on the appeal had already been done for various hearings in the trial court for which the minor child has been compensated. Under the circumstances the value of the services on the appeals is an issue that the trial court is better equipped than this court to handle.

The two orders appealed from are reversed.

KNIGHT, Justice.

I concur in the conclusions reached in the foregoing opinion, and agree generally with the reasons given in support thereof. I concur also in the law as laid down in the opinion in disposing of the legal points involved in the appeals. After the rendition of the decision in Kyne v. Kyne, 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221, a petition for rehearing was filed which in my judgment called for further consideration of the points made therein; and I so expressed myself in a written dissent to the order denying the rehearing. However, thereafter the same points were included in a petition for hearing before the Supreme Court and the petition was denied. Obviously such denial operated as an approval of the decision as rendered; and therefore, the law as laid down in that decision became the law of the case which is binding in determining the present appeals.

WARD, Justice.

I dissent.

The trial judge directed defendant to pay, not to the minor, but *to the attorneys* the sum of $3,250 in addition to $3,500 previously paid, in full payment for all legal services rendered in the action from December 16, 1937 to January 29, 1945, but specifically excepted legal services rendered on the appeal from the order of February 26, 1942, and another order which is of no consequence on the present appeal. That was a matter entirely within the discretion of the trial judge if he concluded, as he evidently did, that previous payments of attorneys' fees were ample to cover subsequent applications for fees. On the appeal from the order denying $3,500 as attorneys' fees an appeal was filed (No. 13,008) and then a motion for $750 on account of attorneys' fees to prosecute the appeal (No. 13,008) was filed. The appeal, No. 13,009, is from the order denying $750 to pay costs and fees on the appeal No. 13,008.

On March 13, 1942, a motion made in advance of the performance of legal services was presented requesting $3,500 for proceeding with an appeal involving an order for attorneys' fees. The court discovered that the attorneys requesting the fees had a contingent fee contract of 45% with the guardian of the minor child. "Respondent also contended that plaintiff was not entitled to further fees and expenses because of misconduct and bad faith on the part of his counsel." Kyne v. Kyne, 60 Cal. App.2d 326, 328, 140 P.2d 886, 887, 141 P.2d 221. The trial court held that the contract was valid and refused to make an order directing defendant to pay further fees. On appeal the major question was attorneys' fees; that is, whether the plaintiff through his guardian should pay these additional attorneys' fees or was it incumbent upon the defendant to pay. It was held that the fee agreement was against public policy and that attorneys' fees under Civil Code sec. 196a "are part of the child's right to support." This quotation in Kyne v. Kyne, 60 Cal.App.2d 326, 328, 140 P.2d 886, 888, 141 P.2d 221, was adopted from Kyne v. Kyne

38 Cal.App.2d 122, 132, 100 P.2d 806. In the latter case the *appellate* court was discussing the participation of the attorneys in three trials and various motions and incidental proceedings for the benefit of the minor child.

In Kyne v. Kyne, 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221, in addition to the specific reason given by the trial court for the denial of additional attorneys' fees, the entire record, when read, may indicate that the trial court was convinced that the attorneys had been amply compensated. In that case the minor did receive some possible "support" in the declaration of the appellate court (page 329 of 60 Cal.App.2d page 888 of 140 P.2d) that "the contingent fee contract here involved was against public policy and therefore void." See, also, Hill v. Hill, 23 Cal.2d 82, 142 P.2d 417. In the Kyne case on motion for rehearing one of the participants in the opinion expressed grave doubt relative to the legal soundness of the opinion. Kyne v. Kyne, 60 Cal.App.2d 326, 334, 335, 140 P.2d 886, 141 P.2d 221. However, the minor may not be relieved entirely from responsibility. Notwithstanding that a contract may be against public policy "there arises an implied contract to pay for services rendered thereunder, and the remedy of action sounding in quantum meruit is available to recover the reasonable value thereof." Wiley v. Silsbee, 1 Cal.App.2d 520, 522, 36 P.2d 854. In brief, the attorneys for the minor in this action may sue their client or their client's opponent for a reasonable fee.

I do not understand that the attorneys have "renounced the contract," as appears in the majority opinion. It is true that in Kyne v. Kyne the following statement appears (pages 331, 332 of 60 Cal.App.2d, page 889 of 140 P.2d): "In what we have heretofore said we do not wish to be understood as intimating that the contingent fee agreement, even if valid, would preclude the court from making an allowance for attorneys' fees. The attorneys for appellant have never sought to recover any fees under said agreement and have, at all stages of the proceedings since the order of the trial court awarding attorneys' fees following the verdict of the jury establishing respondent as the father of the child, disclaimed any intention so to do and renounced any rights under said contract." However, the attorneys seeking additional fees stated on March 8, 1945 before the superior court that "the child at the present time owes his attorneys a reasonable fee for the services on this appeal."

Likewise, I do not understand that "On the order to show cause it [the court] awarded the minor $3,250 attorneys' fees and $353.10 costs * * *." The costs were awarded to minor plaintiff but the "fees," according to the order, are to be paid directly to the attorneys. Likewise, I do not understand that "The attorneys [on these appeals] are not parties in fact or in substance."

In Kyne v. Kyne, 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221, the appellate court merely determined that the contingent fee agreement in and of itself did not preclude an allowance for supplemental fees. The order disallowing fees was reversed with the statement (page 334 of 60 Cal.App.2d, page 890 of 140 P.2d): "Upon a new hearing all issues involved may be heard and determined." The trial court finally granted a hearing and ordered fees on certain matters, but denied fees on the matters involved in Kyne v. Kyne, 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221. If the application for additional fees had been granted, the attorney or attorneys would have received a sum in excess of the monthly stipend paid by the defendant to the minor over a period of approximately ten years. As an appellate justice I am willing to assume, unless there is evidence to the contrary, that the judge presiding in a domestic relation trial court department has the ability and the honesty of purpose prudently to separate all the circumstances that may indicate either a just or an exorbitant claim for additional fees. The action of the trial court in denying fees on this particular item was discretionary. Evidently it took into consideration the sums of money theretofore allowed. It should not be said that it exceeded the bounds of reason in denying the application for $3,500 additional attorneys'

fees in view of all of the facts of this case. Makzoume v. Makzoume, 50 Cal.App. 2d 229, 123 P.2d 72.

The majority opinion states: "If it be urged, however, that a discretion was exercised, then we would be forced to hold that the trial court abused its discretion." It also states: "Under the circumstances the value of the services on the appeals is an issue that the trial court is better equipped than this court to handle."

Whatever may be urged in support of the appeal in Kyne v. Kyne, 60 Cal.App.2d 326, 140 P.2d 886, 141 P.2d 221, upon the theory that the decision therein was of benefit and therefore in "support" of the minor by elimination of the "contingent fee contract," the last appeal, No. 13,009, is based entirely upon the right of attorneys to demand a fee in advance upon a claim of fee without special or advantageous interest to the minor. Stripped of its decorative dress, under Civil Code, sec. 196a and the enforcement power similar to secs. 137, 137.5, 138, 139 and 140, it is merely an action for attorneys' fees. The interest of the minor, at least so far as the contingent agreement is concerned, is eliminated. No authority has been suggested for superimposing attorneys' fees on an appeal for fees which in the sound discretion of the court have been denied. If the views in the majority opinion should be approved, law business could generate law business by repeated motions for additional fees to appeal from denial of motions for fees or from the inadequacy of the amount of the order. In the interest of justice as applied to the facts of this case, and in the interest of justice generally, actions which tend to incite litigation for the benefit of attorneys should be discouraged. In my opinion each order appealed from should be affirmed.

28 Cal.2d 194

**Ex parte PAYTON.**

**Cr. 4692.**

Supreme Court of California, in Bank.

May 10, 1946.

**1. Pardon ⇐10**

A prisoner, whose parole is suspended by valid order of State Board of Prison Terms and Paroles, is fugitive from justice from date of such order until his return to state prison, and such time must be added to period of his original sentence. Pen.Code, § 3064

**2. Pardon ⇐14**

A charge of paroled prisoner's violation of parole conditions, based on official accusation of violation of Penal Code provision, is proper ground for suspending parole. Pen.Code, § 3063.

**3. Pardon ⇐14**

An order of State Board of Prison Terms and Paroles, suspending prisoner's parole on ground of his willful violation of parole conditions, as stated in state parole officer's report of prisoner's arrest on criminal charge, is preliminary in nature, pending investigation and outcome of prosecution of such charge, and finality of order is determined by appropriate board or authorty when truth of charge is shown by conviction and order of affirmance is made. Pen.Code, § 3063.

**4. Pardon ⇐14**

A preliminary order of State Board of Prison Terms and Paroles, suspending prisoner's parole, substantially complies with statute requiring statement of cause for suspension when order shows that such cause consists of violation of parole terms and conditions and refers to state parole officer's filed report specifying facts in detail. Pen.Code, § 3063.

**5. Criminal law ⇐1186(4)**

A proceeding is not invalidated by departure from form or mode prescribed by code, nor by error or mistake therein, unless it actually prejudiced defendant. Pen. Code, § 1404.

**6. Criminal law ⇐1216(6)**
**Pardon ⇐14**

Where order suspending prisoner's parole pending investigation showed that reason therefor was his violation of parole terms, as stated in state parole officer's report of prisoner's arrest on criminal charge, conviction of which was basis for final order of suspension, and prisoner was fully apprised of all charges against him and granted hearings thereon, before State Board of Prison Terms and Paroles affirmed suspension order and forfeited prisoner's credits, prisoner was not prejudiced by failure to state cause for suspension in order, so that it was valid and his term of imprisonment had not expired when board refixed sentence at maximum before expiration of original period plus time elapsing between date of temporary suspension order and prisoner's return to state prison. Pen.Code, §§ 1404, 3063, 3064.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Habeas corpus proceeding by Frank C. Payton. From an order discharging petitioner from the custody of the warden of the State Prison at San Quentin, the People appeal.

Reversed.

Prior opinion, see Cal.App., 163 P.2d 103.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for appellant.

Alexander L. Oster, of Los Angeles, for petitioner.

SHENK, Justice.

In this habeas corpus proceeding the People have appealed from an order of March 12, 1945, discharging the petitioner from custody.

On June 28, 1939, the petitioner was convicted on a charge of grand theft with the prior conviction of a felony. He was sentenced to imprisonment in the State Prison at San Quentin for the term prescribed by law. He entered the prison on January 27, 1940. The Board of Prison Terms and Paroles fixed his term at five years.

On November 12, 1941, the petitioner was released on parole. On June 9, 1943, a written report by a state parole officer was filed with the Board of Prison Terms and Paroles stating that the petitioner had been arrested on a charge of assault and battery committed upon the person of Miss Emens (also known as Mrs. Frank Payton) at a specified time and place, and recommending suspension of parole pending disposition of the charge. On June 14, 1943, the board suspended the petitioner's parole by a written order showing that the cause of suspension was wilful violation of the terms and conditions of parole as stated in the report of June 9th, and directed that the petitioner be re-arrested and be retained in custody pending the further order of the board.

On June 24, 1943, the petitioner was convicted of the charge of assault and battery and served a sentence therefor. On July 20, 1943, he was returned to the state prison to serve the unexpired portion of the five-year term imposed pursuant to the commitment for grand theft. On July 29, 1943, a supplemental report was filed with the board by the parole officer showing the conviction and sentence on the assault and battery charge, and containing three other charges of violation of the parole conditions, specifically, indulgence in the use of intoxicating liquors, cohabiting with Miss Emens who was not his wife and by whom he had had a child, and failure to support his minor children in the custody of his former wife from whom he was divorced. Between August 9 and 18, 1943, the petitioner was heard on the charges. He pleaded guilty to some and was found guilty as to others. The board thereupon affirmed its prior action of June 14th suspending parole, and recommended to the State Board of Prison Directors that all credits earned or to be earned by the petitioner be forfeited. On September 23, 1943, at a meeting of the State Board of Prison Directors, the recommendation was approved and all credits earned or to be earned by the petitioner were declared forfeited.

On March 2, 1944, the petitioner was again released to serve the balance of his term on parole. Again he violated the conditions, and on December 8, 1944, the Adult Authority cancelled his parole. That cancellation was declared invalid by the District Court of Appeal on February 6, 1945, on the ground that the order did not state the cause of cancellation as required by section 3063 of the Penal Code. Ex parte Payton on Habeas Corpus, 67 Cal.App.2d 835, 155 P.2d 837. On February 9, 1945, the Adult Authority made a corrected order cancelling the petitioner's last parole and refixing his sentence at the maximum.

[1] The validity of the order of February 9, 1945, is not in question if it was made prior to the expiration of the petitioner's term. It is contended that it was made after the expiration of the term originally fixed by the board at five years from January 27, 1940. If the order of June 14, 1943, suspending parole be invalid, then the thirty-five days intervening between the date of that order and the petitioner's subsequent return to prison were lawfully spent on parole. In such case the thirty-five days may not be added to the time required to be served, and his term expired on January 27, 1945, before there was an order redetermining his sentence at the maximum. If the order of June 14th be valid then, for the period of thirty-five days until his return to state prison, the petitioner was a fugitive from justice and that time must be added to the five-year period of his sentence as originally fixed. Pen.Code, § 3064; In re Falconi, 22 Cal. App.2d 604, 605, 71 P.2d 948. So considered, his term had not expired when the Adult Authority redetermined his sentence at the maximum, in which event the trial court was in error in releasing the petitioner in this proceeding.

[2-6] To support the trial court's order in his favor the petitioner contends that the order suspending parole of date June 14, 1943, was in substantially the same language and for all purposes identical with the order of December 8, 1944, which was held invalid in Ex parte Payton, supra, 67 Cal.App.2d 835, 155 P.2d 837.

The contention is answered by the decision of this court in In re Etie, 27 Cal.2d 753, 167 P.2d 203. Three propositions were

necessarily determined by that decision and are controlling here, viz: (1) That a charge of violation of parole conditions based on an official accusation of a violation of a provision of the Penal Code is proper ground for suspending parole. As there determined the order is preliminary in nature, "pending investigation" and the outcome of the prosecution of the charge. Its finalty is determined by the appropriate board or authority when the truth of the charge is shown by conviction and an order of affirmance is made. If the prosecution culminate in acquittal, and no other charges support the suspension, it is to be assumed that the proper authority will vacate the preliminary order suspending parole. (2) That such a preliminary order of suspension is in substantial compliance with section 3063 of the Penal Code requiring that the cause for suspension be stated in the order, when, as here, the order shows that the cause of suspension consisted of violations of the terms and conditions of parole and refers to a report on file specifying the facts in detail. (3) That under the provisions of section 1404 of the Penal Code neither a departure from the form or mode prescribed by the code in respect to any pleading or proceeding, nor an error or mistake therein, renders the proceeding invalid unless it has actually prejudiced the defendant. Here the order of suspension of June 14, 1943, showed that the reason for the suspension "pending investigation" was the violation of the terms and conditions of parole as set forth in the report of the state parole officer in that the petitioner had been arrested on a charge of having committed a crime on May 28, 1943. The conviction on that charge was therefore the basis for the final order of suspension. The petitioner was fully apprised of all of the charges against him and was granted hearings thereon prior to the board's action of August, 1943, affirming the order of suspension dated June 14, 1943, and prior to the order of September 23, 1943, by which the petitioner's credits were forfeited. The record thus discloses that the petitioner was not prejudiced by the asserted departure from the requirements of section 3063. It follows that the suspension of parole of June 14, 1943, was valid, and that the petitioner's term of imprisonment had not expired at the time of the order of February 9, 1945, refixing his sentence at the maximum.

The order appealed from is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.




28 Cal.2d 264

**In re DE LA ROI.**

**Cr. 4719.**

Supreme Court of California, in Bank.

May 24, 1946.

Petition Denied June 3, 1946.

**1. Habeas corpus ⇐85(1)**

To invoke remedy of habeas corpus upon theory that due process has been denied in that conviction rests on perjured testimony, petitioner must establish by preponderance of substantial credible evidence not only that perjured testimony was adduced upon his trial but also, if such be the fact, that it was knowingly produced by prosecuting officials.

**2. Habeas corpus ⇐30(1)**

Life-term convict who had been convicted of assault with deadly weapon and sentenced to death, and whose petition for habeas corpus on ground that conviction was obtained by perjured testimony had been denied, was not entitled to relief on subsequent petition for habeas corpus on theory that a confession of another convict established that testimonies of prosecution witnesses that petitioner was the killer were perjured, where confession did not establish petitioner's innocence, did not overcome finding that there had been no perjury at trial and did not even conclusively establish guilt of confessing convict. Code Civ.Proc. § 2061, subd. 3; Pen. Code, §§ 31, 4500.

**3. Convicts ⇐5**

In determining guilt of life prisoner of malicious assault with a deadly weapon on fellow convict, it was immaterial to guilt and to mandatory death penalty whether such prisoner or a cell mate wielded the knife if both of them aided and abetted in commission of the crime. Pen.Code, §§ 31, 4500.

**4. Habeas corpus ⇐120**

A petition for habeas corpus based upon same grounds set forth in previous petition which was denied will be denied where there has been no change in facts or law substantially affecting legal rights of petitioner.

**5. Criminal law ⇐998**

The sentence of death, once pronounced, is a solemn judgment which cannot be lightly vacated or modified, and although the state is solicitous that those who are prosecuted shall be accorded full measure of every legal right, it will not permit a scheming criminal to trifle with its process.

**6. Criminal law ⇐997**

Where habeas corpus petitioner had trifled with judicial process, schemed and conspired to deceive the court and impede or defeat justice in relation to major crime, and he and his witnesses at the the trial or on referee's hearing of habeas corpus petition or on subsequent application for such petition or in some or all of such proceedings willfully presented false and material testimony, the writ coram nobis, even if otherwise proper, would be denied.

**7. Criminal law ⇐997**

An application for writ coram nobis should be addressed in first instance to court in which petitioner was tried and convicted.

**8. Criminal law ⇐997**

The writ of error "coram vobis" issues to correct errors of fact of an inferior tribunal and basis for its issuance is otherwise substantially the same as for a writ coram nobis.

See Words and Phrases, Permanent Edition, for all other definitions of "Coram Vobis".

**9. Criminal law ⇐997**

Where habeas corpus petitioner had trifled with judicial process, schemed and conspired to deceive the court and impede or defeat justice in relation to major crime, and he and his witnesses at trial or on referee's hearing of prior habeas corpus petition or on subsequent application for such petition or in some or all of such proceedings willfully presented false and material testimony, the writ coram vobis, even if otherwise proper, would be denied.

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Proceedings by Wilson De La Roi in habeas corpus to secure release from custody and for writs of error coram nobis and coram vobis.

Writs denied.

Harold C. Brown, of San Francisco, for petitioner.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., John Quincy Brown, Dist. Atty., of Sacramento, and Albert H. Mundt, Chief Deputy Dist. Atty., of Represa, for respondents.

SCHAUER, Justice.

In 1942 Wilson De La Roi, hereinafter sometimes referred to as the petitioner, was convicted of the charge that while undergoing a life sentence in a state prison, on July 15, 1942, he committed an assault with a deadly weapon (with deadly effect) and with malice aforethought upon one William Deal, a fellow convict. The judgment imposing the mandatory death penalty for such offense (Pen.Code, § 4500) was affirmed. (People v. De La Roi (1944), 23 Cal.2d 692, 146 P.2d 225, 151 P.2d 837.) Subsequent to affirmance of the judgment, this court issued a writ of habeas corpus upon a petition in behalf of De La Roi which asserted that his conviction was obtained on perjured testimony offered by the state with knowledge that it was false. After the return to the writ was filed, Superior Court Judge A. L. Pierovich, appointed by us as referee, took evidence upon the factual issues, made findings adverse to petitioner, and concluded "that no witness who testified against Wilson De La Roi at the trial which resulted

in the judgment of conviction * * * committed perjury * * *; and that no witness testified to any material matter which he knew to be false. That there being no perjury committed at the time of the trial, no representative of the State of California caused or suffered any testimony to be introduced knowing that such testimony as given was perjured." This court, convinced that such findings and conclusion were fully supported by the evidence, discharged the writ of habeas corpus and remanded petitioner to custody. (In re De La Roi (1945), 27 Cal.2d 354, 164 P.2d 10.) The evidence adduced at the trial which resulted in the judgment of conviction, as well as that presented to the referee, is recounted and analyzed in considerable detail in our two opinions cited hereinabove and it is unnecessary to again narrate it at length.

De La Roi has now presented his "Petition for a Writ of Habeas Corpus and by Way of Appeal from the Writ of Error Coram Nobis Filed in Sacramento County, and in the Alternative for a Writ of Coram Vobis." At the oral argument counsel for De La Roi conceded in effect that no sufficient showing had been made to justify granting petitioner relief by way of habeas corpus, that the case was not a proper one for the issuance of a writ of error coram vobis, and that petitioner is actually now seeking a further hearing in the nature of coram nobis proceedings. However, it appears to be beyond serious debate, for reasons hereinafter depicted, that the petition, in the light of the showing thereon, is fatally insufficient to warrant either the writ coram nobis or the writ coram vobis, or to vest us with jurisdiction on appeal from the superior court proceeding, and, hence, that it can be considered, if it is not to be dismissed forthwith on the grounds above stated, only as an application for a writ of habeas corpus. Because of the gravity of the penalty adjudged against petitioner, and the possibly like gravity of the consequences to his former cellmate, Walker, which may follow the latter's recent "confession" (hereinafter referred to in more detail) of the crime for which petitioner stands convicted, and because, also, the state is ever solicitous that those whom it prosecutes shall be accorded full measure of every legal right, we do not at all rely upon the concession by petitioner's counsel, which was made in oral argument, under the stress of questioning from the bench, in conscientious performance of his duty to the court as well as to his client. Although we reach the result conceded, we do so only after consideration of the application at length on its merits, insofar as it can be construed to present issues cognizable by us.

So regarded, the petition then is, in substance, a second application to this court for a writ of habeas corpus upon the same legal ground previously advanced; i. e., that the petitioner is unlawfully committed and restrained in that the judgment of conviction upon which he stands committed was obtained through the use of perjured testimony knowingly procured and used by the state, thereby denying him due process of law. (Mooney v. Holohan (1935), 294 U.S. 103, 112, 55 S.Ct. 340, 341-342, 79 L.Ed. 791, 794, 98 A.L.R. 406, 409; In re Mooney (1937), 10 Cal.2d 1, 14, 73 P.2d 554.) In the language of counsel for petitioner the claim is "here is a case where, in effect, there was no trial" and the petitioner, even though previously properly remanded to custody, should on this application be released from the judgment because the evidence is "of a conclusive nature that the defendant did not commit the crime."

More specifically, the petition alleges that on March 1, 1946, before a judge of the Superior Court in Sacramento County "a request was made by the petitioner for a hearing on a Writ of Error Coram Nobis; that defendant's petition on said March 1, 1946, was presented and argued. * * * That * * * defendant's petition for further proceedings was denied and said judgment was entered in the records of this action in said Superior Court. * * * That * * * [the] sentence of death * * * imposed by the Court aforesaid is illegal * * * and said illegality consists in this, to-wit: * * *." Then follows an assertion that De La Roi is innocent of the assault and killing of which he is convicted, and that one Eddie Walker, a fellow convict and prison inmate with

De La Roi at the time of the killing (and presently a convict and prison inmate), "has confessed to be the sole assailant and killer * * * and has completely exonerated" De La Roi. Attached to the petition is a five-page document purporting to be Walker's confession of the crime and alleged to be in his handwriting and signed by him.

It is contended that the truth of the alleged confession is "conclusively," or at least convincingly, established both by the gravity of the consequences as to Walker which may result from it and by certain testimony selected and quoted from that introduced at the referee's hearing on the previous habeas corpus proceeding, and that had the confession been introduced before the referee on the previous hearing "a different finding would have resulted." There is no showing (and in the nature of the situation there could be none) that petitioner has been surprised by the confession of Walker or by the asserted fact of Walker's guilt. According to the confession and the "corroborating" testimony adduced at the referee's hearing, De La Roi was present in the laundry room of the prison (the scene of the slaying), was within a few feet of Walker and Deal, and witnessed the deadly stabbing and cutting by Walker but did not himself wield the knife or touch Deal. The petition reiterates the charge made in the earlier habeas corpus proceeding "that false testimony was procured by state officials and a fraud was practiced on the trial court and on the defendant" and that "all of the evidence produced at the trial was that [De La Roi] * * * was the sole* assailant and killer, which is now admittedly in error." Again certain testimony adduced at the original trial and before the referee is quoted in support of these charges.

The petition concludes with a prayer that (1) a writ of habeas corpus issue or that a further reference be made to adjudge the truthfulness of Walker's confession, or (2) that a writ of error coram vobis issue, or (3) that this court order perfection of an appeal from the alleged judgment of the Superior Court in Sacramento County denying the writ of error coram nobis and for other proper and effective relief.

[1] We are satisfied that petitioner has not established any tenable ground for relief of any class by this court. In order to invoke the remedy of habeas corpus upon the theory that due process has been denied in that the conviction rests on perjured testimony "it is incumbent upon petitioner in this proceeding * * * that he establish by a preponderance of substantial, credible evidence not only that perjured testimony was adduced upon his trial, but also, if such be the fact, that it was knowingly produced by the prosecuting officials. Proof of both elements, perjury and knowledge, by a preponderance of credible evidence, is indispensable under that decision." (In re Mooney (1937), 10 Cal.2d 1, 15, 73 P.2d 554, 560, referring to Mooney v. Holohan (1935), supra, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406.) Upon the former habeas corpus proceeding herein petitioner failed to establish these essential facts, but he now contends that the result of such former proceeding must necessarily have been different if the confession had been available and considered. In other words this present petition is, in effect, an application for a new trial of the issues previously litigated—a new trial of those same issues upon largely the same evidence but with the addition of the confession.

[2] It is asserted that the confession establishes beyond question that Walker is the guilty party, that De La Roi is innocent and, hence, that the testimonies of the witnesses for the prosecution at the trial to the effect that De La Roi was the kill-

* Upon the face of the record the making of this contention by petitioner seems scarcely justifiable. See People v. De La Roi (1944), 23 Cal.2d 692, 699, 146 P.2d 225, 151 P.2d 837, noting that "the evidence for the prosecution tends to an appreciable extent to connect Walker with the defendant in the commission of the offense"; see also 169 P.2d, pages 368, 369. The record indubitably establishes that, if Walker is guilty of any criminal participation in the assault on Deal, whether as asserted in his "confession" or otherwise, it is petitioner above all others who until this time has sought to conceal the fact as to Walker's participation.

er, were indubitably perjured. It is pointed out that on the former habeas corpus proceeding the referee found "that no witness who testified against Wilson De La Roi * * * committed perjury" and "That *there being no perjury committed* at the time of the trial, no representative of the State of California caused or suffered any testimony to be introduced knowing that such testimony as given was perjured." (Italics added.) Since the major finding—that no perjury was committed by state's witnesses—has, it is asserted, been overcome by the confession, the subsidiary and assertedly dependent finding that no perjured testimony was knowingly procured and introduced by the state, must also fall.

One difficulty with petitioner's position is his assumption that the confession conclusively establishes De La Roi's innocence and overcomes the major finding. It does not necessarily do either, nor in view of the circumstances under which it was made, does it even conclusively establish Walker's guilt. It merely cumulates the contradictions in the evidence upon which De La Roi was convicted and in that upon which the referee made his findings. The exculpatory weight to which it might otherwise be entitled is gravely impaired if not wholly destroyed by the following facts: 1. Walker was a defense witness at De La Roi's trial and, in testimony which to a remarkable degree paralleled that of De La Roi, he told a story which quite obviously had been devised and was calculated to protect both of them. The confession, conflicting with his previous testimony in almost every detail, was not made until December, 1945 (an oral confession to the district attorney; the written confession attached to the petition is dated January 5, 1946), although the trial took place in September, 1942, and the referee's hearing was held in September, 1944, with additional evidence taken in June, 1945. 2. The facts asserted in the confession, if they be facts, were necessarily known to both De La Roi and Walker at all times concerned. 3. At the trial a witness for the defendant (one Calvin Hanson) testified that Deal (the victim of the deadly assault) was killed by James Allen, a prosecution witness, yet neither De La Roi nor Walker then suggested that Allen was known by them to be innocent of the crime. 4. The asserted eyewitnesses Frank O'Neal and Norman Austin, upon whom petitioner now principally relies to corroborate the confession of Walker, must have been known to petitioner at the time of his trial but neither was then called as a witness although one of them had been subpoenaed and admittedly "coached" as to his then proposed testimony. 5. The witness James Morgan, relied upon by petitioner to impeach the testimony of Robert M. Trauger (sometimes referred to in the record as "Dutch" Trauger or William Trauger) given at the trial, testified, contrary to the confession, that at the time of the assault on Deal Walker "was walking toward the back gate" and that petitioner was not in the laundry but was "standing in the handball court" or walking toward the back gate. 6. At the trial both De La Roi and Walker testified under oath that both were, at the time of the slaying, in the prison yard at the "back gate," about 435 feet—the most remote point in the main yard—from the laundry, while in the confession it is asserted that both were in the laundry room and that De La Roi witnessed the stabbing of Deal by Walker. It is perhaps worthy of mention that De La Roi, while asking us to believe in and rely upon Walker's confession, has at no time recanted his own first trial testimony. That testimony, hereinafter quoted in part, still stands, contradicting Walker's confession. 7. Although asking us to believe, principally in reliance on Walker's confession and on the corroborating testimonies of Frank O'Neal and Norman Austin, that the state knowingly produced perjured testimony tending to place the guilt for the assault on petitioner and shielding Walker, there is no showing that petitioner himself, Walker, O'Neal or Austin at any time preceding or during the trial, or thereafter until shortly before the referee's supplemental hearing on June 25, 1945, informed any state officer or employe of the "facts" now asserted by them.

On June 25, 1945, O'Neal and Austin testified at the referee's hearing that on July 15, 1942, Walker was the wielder of the knife and the killer of Deal, and claim-

ed that shortly before the date of the hearing, they had disclosed the "facts" to prison officials. Austin, however, admitted that only three months previously, on March 24, 1945, he had been questioned about the case by Mr. Albert H. Mundt, Chief Deputy District Attorney of Sacramento County, and that he then told Mr. Mundt that "neither De La Roi nor Eddie Walker were at the laundry" at the time of the assault on Deal.

It is a statutory rule for the appraisal of evidence that "a witness false in one part of his testimony is to be distrusted in others." (Code Civ.Proc., § 2061(3).) The testimonies of Walker and of petitioner at the trial were necessarily false in nearly every detail if the confession of Walker is true. It is a reasonable deduction from all the evidence that not only were their testimonies at the trial false but so also is the Walker confession, at least insofar as it undertakes to completely absolve De La Roi from guilty participation in the crime. According to petitioner the confession is the most important and conclusive evidence which has been or can be adduced because, he asserts, it establishes Walker's guilt and, hence, his (De La Roi's) innocence. But De La Roi's innocence is not necessarily proven by Walker's guilt. (See Pen.Code, § 31; People v. Harper (1945), 25 Cal.2d 862, 870, 877, 156 P.2d 249.) The important fact of Walker's guilt, if it be a fact, was, according to the confession, at all times known to De La Roi yet he neither suggested that fact to the prison officials when he was interrogated, immediately after the assault, on July 15, 1942, nor to the judge or jury at the trial in September, 1942, nor in his testimony given at the hearing before the referee, in September, 1944, nor even up to this time has he, himself, averred that Walker is guilty of the crime.

Petitioner's showing is more convincing to the end that *he and Walker* have knowingly produced perjured testimony and perhaps suppressed truth as to Walker's guilty participation in the crime than that the state did so. In this connection it is interesting to note that in disposing of petitioner's appeal we found occasion to observe that "Eddie Walker * * * was defendant's cellmate at the time the offense was committed. His testimony, much more closely than that of any other witness, comports with that given by defendant. It is to be noted that *the evidence for the prosecution* tends to an appreciable extent *to connect Walker with the defendant in the commission of the offense charged.*" (Italics added.) (People v. De La Roi (1944), supra, 23 Cal.2d 692, 699, 146 P.2d 225, 228, 151 P.2d 837.) Certainly the evidence falls far short of being convincing that the *state* wilfully and knowingly produced perjured testimony to shield Walker and pin guilt for his crime on petitioner.

The tendency of the confession is not at all to corroborate the testimony of De La Roi or of Walker at the trial; on the contrary it would brand their testimonies as false in nearly every detail. On its face it does not even purport to relate newly discovered facts; on the contrary all the "facts" asserted in the confession were, according to it, as previously mentioned, necessarily known to both De La Roi and Walker at all times concerned. And the testimony of petitioner himself, given at the trial, still stands, unrecanted and in direct conflict with the Walker confession. If petitioner should be released from the judgment he attacks, and if Walker should be tried for the offense, De La Roi could reiterate his testimony given at the trial and could assert, apparently truthfully, that he, himself, had always adhered to that story. Likewise, the testimonies of Johnny De La Roi (brother of petitioner) and of James Morgan given at the trial in corroboration of the testimonies of petitioner and Walker as to their location at the time of the assault still stand unrecanted. (At the referee's hearing Morgan did place petitioner "in the handball court" instead of at the "back gate" but he placed neither petitioner nor Walker in the laundry, the scene of the slaying.)

It is not without significance that in his confession Walker asserts that "This thing started a long time ago when I was at San Quentin and knew Deal there. This was in 1937. I met De La Roi at San Quentin in 1939. * * * I was transferred to Folsom in December, 1941, and met Deal and De La Roi again. [Walker

and De La Roi then became cell-mates.] Deal was a homosexual [and so also, according to the petition, is Walker] and he wanted me to move from De La Roi to go with him. In plain prison language Deal wanted me to marry him. This was the subject of many arguments between Deal and myself. The handball game was the blow-off. [The handball game immediately preceded the assault.] Deal had on previous occasions tried to force me to change my cell. He worked me over that is hit me on one occasion. Deal and De La Roi were good friends and got along swell. * * * In the morning of July 15th Deal again tried to get me to cell with him." In the light of the fact that Walker and De La Roi were cellmates and seemingly were then and are still devoted to one another to a chauvinistic degree, the asserted "good friends" relationship of De La Roi and Deal is difficult to reconcile with the deadly enmity of Walker and Deal.

In connection with the asserted relationship of petitioner, Walker, and Deal, and the conflicting implications of the confession, certain portions of the testimony of petitioner given at the trial are material here. Petitioner testified that about noon on the day of the assault on Deal, "I was just standing there when Walker, Eddie Walker and Bill [Deal] came around and said, 'Well, let's line up' * * * for dinner time * * * we always lined up each noon time together. * * *

"Q. Did you ever cell with Bill Deal? A. I did * * * that has been sometime ago. * * * Bill Deal classed me as one of his best friends that he had in prison.

"Q. What was your feeling toward him? A. The same thing. * * *

"Q. What did you do after you learned he [Deal] had been cut, or hurt? A. Well, we just started walking and talking, and wondering who did it, Eddie and I, walking back and forth, wondering who did it,—I felt pretty bad about it, because Bill was a good friend of mine,—we couldn't figure out why it was done."

Furthermore, petitioner testified: "The Captain asked me [immediately after the stabbing of Deal] if I knew anything about the affair; I asked him, 'What are you talking about?' and he says,—he asked me, 'Is Bill Deal a friend of yours?' I says, 'Yes, one of the best friends I got in the place.' He says, 'Haven't you heard about the knife cutting affair out there?' I says, 'No, I don't know nothing about it.' * * * Captain Ryan told me, *'If you know anything about it, don't be afraid to tell me.' He says, 'I will give you all the protection in the world, you have nothing to fear.'* [Italics added.] I told him I know nothing about it. * * * [and further, after he left Captain Ryan's office] They called us over,—the runner came after Walker and I and told us * * * said we was wanted over in the Captain's office. * * * They took us inside,—they took Eddie Walker on the farther part of the office,—there was a partition sort of there,—they left me in the front part. * * * We went to the Warden's office. * * * The Warden asked me what I knew about it; I says I didn't know nothing about it. * * * I have no idea at all [who actually did the stabbing]. * * * Bill Deal never owed me anything; and, I never owed him anything; anything we had we shared alike. * * * We were the best of friends.

"Q. Isn't it a fact this stabbing was occasioned over that friendship? A. No, sir; I would never think of doing anything like that to any person. * * *

"Q. Now isn't it a fact * * * just prior to the time Bill Deal was killed,—you told Eddie Walker to go in there and if he doesn't give it to you, to give it to him? A. No, sir.

"Q. And Walker went in and returned, isn't that correct? A. That is untrue, sir."

It is obvious from the above-quoted excerpts from the transcript that petitioner was solicited both by prison officials immediately after the assault on Deal and by counsel during the trial to divulge any facts he knew about the slaying and particularly as to any participation in it by Walker. Furthermore, De La Roi was promised "all the protection in the world" if he divulged his knowledge. His "best of friends" had been brutally slain, in a

cowardly manner, he now asks us to believe, by Eddie Walker in his presence, but by his answers to prison officials then, coupled with his conduct since, he has protected the now alleged slayer for nearly four years. He still continues to protect that slayer by allowing his own trial testimony to stand unrecanted.

[3, 4] It is immaterial to petitioner's guilt of the offense (assault with deadly weapon by life-term convict, Pen.Code, § 4500) and to the mandatory death penalty whether petitioner or Walker wielded the knife if both of them aided and abetted in the commission of the crime. (Pen.Code, § 31; People v. Harper (1945), supra, 25 Cal.2d 862, 870, 877, 156 P.2d 249.) Even if we give credence to Walker's declaration that it was he who struck the blows, such fact does not necessarily exculpate De La Roi from guilt. More important in this proceeding it does not establish that the State knowingly procured and produced perjured testimony to convict De La Roi. If the confession be accepted as true in every respect, when we consider it together with all the other evidence adduced, we are overwhelmingly impelled to the conclusion that petitioner and Walker have conspired to procure and produce perjured testimony and to defeat justice rather than that any officer or officers of the state have sought or accomplished any such ends. It thus appears that petitioner's claim that "here is a case where, in effect, there was no trial" and, hence, a denial of due process of law, is not sustained; neither is it true that the evidence now presented is "of a conclusive nature that the defendant did not commit the crime." There is nothing, therefore, to exclude this case from application of the established rule that a petition for habeas corpus based upon the same grounds set forth in a previous petition which was denied will be denied where there has been no change in the facts or law substantially affecting the legal rights of the petitioner. (In re Miller (1941), 17 Cal.2d 734, 735, 112 P.2d 10.) (The only claimed change in the showing now presented to the court, as distinguished from that presented on the prior application, is in the evidence, not in the facts (factual grounds) or in the law.)

[5, 6] As declared in People v. Gilbert (1944), 25 Cal.2d 422, 442, 154 P.2d 657, 667, "The sentence of death, once pronounced, is a solemn judgment which cannot lightly be vacated or modified" and although the State, as it is exacting in ultimately bringing retribution to those who violate its highest laws, is "at least equally solicitous that those who are prosecuted shall be accorded full measure of every legal right," it will not "permit a scheming criminal to trifle with its processes." It is established beyond legal doubt that petitioner De La Roi has trifled with the judicial processes. He has schemed and conspired to deceive the court and impede or defeat justice in relation to a major crime. He and the witnesses produced by him, either at the trial or on the referee's hearing or on this application or in some or all of such proceedings, have wilfully presented false and material testimony. Under such circumstances the writ coram nobis, even if otherwise proper, will not be granted. (People v. Gilbert (1944), supra, 25 Cal.2d 422, 442, 444, 154 P.2d 657, and cases there cited.)

[7] It should also be pointed out that application for a writ coram nobis should be addressed in the first instance to the court in which the petitioner was tried and convicted (see 4 Cal.Jur.10-Yr.Supp., § 496, p. 891). As stated above it is alleged in the petition presently before us that petitioner did apply to the trial court and that his application was denied. But no formal appeal was taken from the judgment of denial and consequently we have no appellate jurisdiction over the cause.

[8, 9] The writ of error coram vobis issues to correct errors of fact of an inferior tribunal. (People v. Black (1928), 89 Cal.App. 225, 226, 264 P. 346.) The basis for its issuance is otherwise substantially the same as for a writ coram nobis. The same fault of petitioner which upon the facts shown here would preclude a trial court from granting the writ coram nobis blocks his application here for coram vobis.

The showing here made, insofar as petitioner is concerned, presents only a case for further investigation and consideration by the Governor of this state, if he be so

advised. (Cal.Const., art. VII, § 1; see, also, People v. Bowers (1888), 2 Cal.Unrep. 878, 883, 18 P. 660; People v. Mooney (1917), 176 Cal. 105, 108, 167 P. 696; People v. Superior Court (1923), 190 Cal. 624, 625, 213 P. 945; People v. Vernon (1935), 9 Cal.App.2d 138, 146, 49 P.2d 326; People v. Kelly (1939), 35 Cal.App.2d 571, 575, 96 P.2d 372.)

Petitioner's application for further reference is denied, as is also his application for a writ of error coram vobis; the writ of habeas corpus heretofore issued is discharged and petitioner, Wilson De La Roi, is remanded to custody.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concurred.




28 Cal.2d 214

**RATTRAY v. SCUDDER, Real Estate Com'r.**
**L. A. 19512.**

Supreme Court of California, in Bank.
May 21, 1946.

Rehearing Denied June 18, 1946.

**1. Mandamus ⇐16(1)**

Action by real estate broker against Real Estate Commissioner of the state for writ of mandate to annul Commissioner's order revoking broker's license on ground that he had been guilty of dishonest dealings, did not become moot after date on which broker's license would have expired in any event, since, if license was properly revoked, a new license might be withheld on the same ground. Business and Professions Code, §§ 10150, 10152, 10153, 10176(f), 10177(f), 10200.

**2. Brokers ⇐3**

Where broker was employed by owner of realty to sell realty for $13,000, and subsequently broker informed owner that broker could not obtain a purchaser for price placed on realty, though broker in fact had a purchaser willing to pay $13,500, and broker offered to buy the realty for his own firm for $10,250, and owner therefore sold realty to broker for $10,250, and the next day broker sold the realty for $13,500, broker's license was properly revoked on ground that broker violated the fiduciary duties of a real estate agent. Business and Professions Code, §§ 10150, 10152, 10176(f), 10177(f); Civ.Code, § 2230.

**3. Brokers ⇐19**

A real estate agent has the same obligation of undivided service and loyalty that the law imposes on a trustee in favor of his beneficiary, and a violation of the trust subjects the agent to the same punitory consequences that are provided for a disloyal or recreant trustee. Business and Professions Code, §§ 10150, 10152, 10176 (f), 10177(f).

**4. Brokers ⇐19**

A real estate agent is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision. Civil Code, § 2230.

**5. Brokers ⇐19**

Even if real estate broker was not acting as broker for owner of realty, and under no fiduciary duties, once the broker told the owner of the realty what price was obtainable for the realty, broker had the duty to speak the whole truth, and not by partial suppression or concealment make the utterance untruthful and misleading. Business and Professions Code, §§ 10176(f), 10177(f).

**6. Brokers ⇐19**

A broker employed to find purchasers for the realty of his principal can be given an option, running concurrently with the agency, to purchase the realty, but in such a case, the broker, when pursuing his own interests, cannot ignore those of his principal and will not be permitted to enjoy the fruits of an advantage taken of a fiduciary relation, whose dominant characteristic is the confidence reposed by one in another.

**7. Brokers ⇐31**

The law does not allow a real estate agent who also has a right to purchase

realty, to wait until someone makes an offer of an amount in excess of the agreed purchase price, and then elect to purchase the realty at the lesser price without informing the owner of the higher offer, and, after the agent has obtained the owner's consent to buy the realty, then immediately sell it for the higher price as his own realty.

**8. Brokers ⇐31**

If a broker employed to sell realty is also given an option to purchase the realty himself, he occupies the dual status of agent and purchaser and he is not entitled to exercise his option except by divesting himself of his obligation as agent by making a full disclosure of any information in his possession as to the prospect of making a sale to another.

**9. Principal and agent ⇐69(1)**

One who acts as an agent and also deals with his principal as to the subject matter of the agency cannot take advantage of his principal by withholding from him information secured by means of the agency.

**10. Principal and agent ⇐69(1)**

A material fact which an agent who is also dealing with his principal as to the subject matter of the agency on his own account must not withhold from his principal is a fact which the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified terms.

**11. Principal and agent ⇐69(1)**

One who acts as an agent and also deals with his principal as to the subject matter of the agency must disclose to the principal that the agent is acting on his own account and must also disclose all other facts which he should realize have or are likely to have a bearing on the desirability of the transaction from the viewpoint of the principal.

CARTER, SHENK, and SCHAUER, JJ., dissenting.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by W. S. Rattray against Hubert B. Scudder, as Real Estate Commissioner of the State of California, for a writ of mandate to annul defendant's order revoking plaintiff's license as a real estate broker. From a judgment granting a peremptory writ of mandate and from an order taxing costs, defendant appeals.

Reversed.

Prior opinion, see 161 P.2d 260.

Robert W. Kenny, Atty. Gen., Walter L. Bowers, Asst. Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for appellant.

Mack, Werdel & Bianco and D. Bianco, all of Bakersfield, for respondent.

TRAYNOR, Justice.

By an order issued April 10, 1944, defendant revoked plaintiff's license as a real estate broker. The trial court issued a writ of mandamus commanding defendant to set aside this order. Defendant appeals.

Plaintiff is a real estate broker associated with Kelly & Son in Bakersfield. Upon a complaint filed with defendant by John L. Humston, then a lieutenant in the United States Army, defendant initiated proceedings against plaintiff and Edward A. Kelly for the revocation of their licenses as real estate brokers. After a hearing defendant made the following findings: "That on or about January 19, 1943, defendant Rattray addressed a letter to complainant requesting price and terms on property, consisting of a seven-unit court, which he owned in Bakersfield, California; that on February 4, 1943, the complainant replied, and placed a price of $13,000 on said property, and also stated that he would consider any fair offer; that on February 11, 1943, defendant Rattray wrote a second letter to complainant advising him that the property had been appraised by a competent appraiser; that $12,000 would be a fair price, and that selling commission would be added; that in said letter was enclosed an instrument, designated as an option, for a sixty day period, in favor of Kelly & Son, em-

bodying the selling price of $12,000, for the signature of the complainant; that relying on those representations the complainant signed said option, and returned it to defendants; that on March 20, 1943, a third letter was addressed to complainant by defendant Rattray stating that in trying to sell the property he was meeting with certain obstacles, namely, the price and the fact that the property was in an unrestricted district, and suggested to complainant that the price be reduced to $10,000 cash, which he thought the complainant would be wise in accepting, and pressed said complainant for an immediate acceptance so that the transaction might be consummated 'within the period of our exclusive listing'; that on April 15, 1943, a long distance telephone conversation was held between defendant Rattray and the complainant, at which time defendant Rattray repeated that $10,000 net was the very best price that he could obtain; that complainant countered by stating he would accept no less than $10,500 net cash, but finally compromised on a price of $10,250 net cash with no expense to him in the transaction;

"That during the negotiations with complainant as set out in the preceding paragraph, defendant Rattray led complainant to believe that he was acting as his agent in this transaction, and when terms and price were agreed upon, that all necessary expenses incident to the sale, together with the regular 5% selling commission, would be added, and relying upon this belief the complainant accepted the $10,250 net cash for the said property, and would not have done so but for his reliance upon that belief and understanding;

"That prior to April 15, 1943, the said defendant Rattray negotiated with one David L. Espey for the purchase of said property for the total price of $13,500; that on April 16, 1943, the property was sold to David L. Espey, and placed in escrow, for the sum of $13,500; that by refinancing, and the complainant deeding the property to defendant Edward A. Kelly, who in turn in the same escrow, deeded the property to David L. Espey, the escrow was duly closed;

"That notwithstanding the negotiations with David L. Espey, the defendant Rattray did not disclose the same to complainant, and at no time told him that he was attempting to sell the property for $13,500; that after all expenses were paid incident to the transaction, defendant Edward A. Kelly received the sum of $2,326.25, together with a note signed by David L. Espey in the sum of $700; that out of the cash received by defendant Edward A. Kelly, the sum of approximately $900 was paid to defendant Rattray;

"That all of the correspondence, negotiations, and representations made in this matter were carried on and made by defendant Rattray; that each and every one of the letters to complainant were on the letter-heads of Kelly & Son, and signed 'W. S. Rattray for Kelly & Son'; that defendant Edward A. Kelly, during the negotiations, did not in any way communicate with complainant, and therefore it is not clear that he had guilty knowledge of the statements and representations made to complainant by defendant Rattray; that inasmuch as there is some doubt in this regard, the Commissioner will waive the doubt in favor of defendant Edward A. Kelly."

Defendant concluded that the revocation of plaintiff's license was warranted under sections 10176(f) and 10177(f) of the Business and Professions Code: "The commissioner may, upon his own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this State, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee within the immediately preceding three years, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following: * * * Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing." (§ 10176(f) "The commissioner may suspend or revoke the license of any real estate licensee, who within three years im-

mediately preceding has done any of the following: * * * Acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license, or for a renewal thereof." (§ 10177(f)[1] A real estate license can be denied if the applicant fails to furnish proof of "honesty, truthfulness and good reputation." (§§ 10150, 10152.)

The trial court did not hear any additional evidence. Basing its findings on the commissioner's record of the two hearings before the commissioner, the trial court found: "it is true that at neither of said hearings was there any evidence that the plaintiff herein was acting as the agent for the complainant John L. Humston; it is true that said John L. Humston never agreed to pay any commission to the plaintiff herein for any of the services of the plaintiff; it is true that the complainant John L. Humston on February 15, 1943, executed to the plaintiff herein and his associates an option to purchase the real property of the complainant; it is true that at no time pertinent herein did the relationship of principal and agent ever exist between the plaintiff herein and the said complainant John L. Humston; it is true that at no time pertinent herein did any relationship of trust and confidence ever exist between the plaintiff herein and the said complainant John L. Humston; it is true that the plaintiff herein in handling the transaction referred to in the complaint of said John L. Humston filed with the defendant herein was not guilty of any conduct which constituted fraud or dishonest dealing and had not acted or conducted himself in any manner which would have warranted the denial of his application for a license or of the renewal of his then existing license." With respect to the commissioner's findings the trial court found: "it is true that the said findings do not support the order of the defendant revoking the license of the plaintiff and it is true that the evidence does not support the order of the defendant in revoking the license of the plaintiff; it is true that in revoking the license of the plaintiff the said defendant acted arbitrarily, capriciously and contrary to law and that his findings and order are unsupported by evidence."

[1] In this state all real estate licenses expire automatically on June 30th of each year. Business & Professions Code, § 10200. The present litigation has not become moot because plaintiff's license would have expired in any event on June 30, 1944. The rights of plaintiff depend on whether or not that license was validly revoked, for if it was, a new license may be withheld on the same ground. Business & Professions Code, §§ 10150, 10153.

In determining this appeal it is not necessary to discuss the scope of review by the trial court of the commissioner's proceedings (see Dare v. Medical Examiners, 21 Cal.2d 790, 136 P.2d 304; Sipper v. Urban, 22 Cal.2d 138, 140, 137 P.2d 425), for even if the record of these proceedings is read as if the evidence before the commissioner had been taken by the trial court itself, the trial court's decision finds no support in the evidence.

The evidence shows without conflict that plaintiff was employed by Humston as a broker. The correspondence initiating the relation between Humston and plaintiff leaves no doubt that plaintiff offered Humston his services as a broker and that Humston retained him in that capacity. On January 19, 1943, plaintiff wrote to Humston on stationery of "Kelly & Son, licensed real estate brokers" as follows: "We have a client who is interested in purchasing property in this district and thought you might wish to sell your property. Accordingly, we will be pleased to receive the price and terms acceptable to you, and enclose stamped envelope for your reply." When Humston advised plain-

[1] Under the statute in effect at the time of plaintiff's activities (§ 12 of the Real Estate Act as amended by Stats.1937, p. 2124), the commissioner could revoke the license of any licensee who within the immediately preceding three years conducted himself in a manner that would have warranted the denial of his application for a license or a renewal thereof, or who was guilty of any conduct constituting fraud or dishonest dealing. Those provisions were incorporated without change into sections 10176(f) and 10177(f) of the Business and Professions Code (Stats.1943, ch. 127, § 1, pp. 841, 842) under which plaintiff's license was revoked.

tiff that he was willing to sell the property for $13,000, to take a small second mortgage, and to consider any fair offer, plaintiff replied: "Our prospective buyer lives in Taft, so we will not contact him until we have heard from you again. We have had your property appraised by a competent appraiser. Considering the age of buildings and furniture, which has a heavy depreciation, a fair price would be $12,000.00. To this we would have to add the selling commission presuming that we can arrive at a mutually satisfactory basis. We are enclosing herewith an option for your signature. Upon receipt of the signed option and your reply, we will proceed with the work of closing the sale. Please state what terms you are willing to make in the space marked with the cross. It may be that our client will not require any terms, but in the event he should, we would like to know what to quote him." These letters were introduced in evidence before the commissioner and there was no evidence contradicting them. They show indisputably that plaintiff offered his services and was employed to find a purchaser willing and able to acquire the property for $12,000 plus a selling commission for plaintiff. Plaintiff himself testified as to his first letter: "My purpose for writing the letter was to get a listing of the property so I could sell it, provided I would be able to have authority to sell the property—to any person whom I might contact who was willing to buy it."

The evidence also shows without conflict that once plaintiff was employed by Humston he reported to him as a broker does to his principal. Uncontradicted documentary evidence was introduced, a letter by plaintiff to Humston, written more than a month after their initial correspondence stating: "We have been diligently working to find a purchaser for the Court on 'P' Street, but two of the obstacles in the way of effecting a sale have been: First, the district being unrestricted has been objectionable to two or three people who otherwise might have considered the property. The second objection is the price. As the property was purchased through this office, we are able to arrive at a more definite valuation than some other office who might not be as well posted as we are. Our purpose for writing you this morning is to inquire whether you would consider $10,000.00 cash, as we have a prospect now, who will likely purchase this property providing we can do some financing for him. Since buying the property through this office some years ago, there has been a depreciation of 3% a year, which would total at least $2,000.00. We, therefore, believe that under present conditions you would be wise in accepting this cash offer, providing we are able to arrange the financing as hereinabove referred to. Will you therefore, let us know immediately if this will be acceptable to you, so that we can proceed with our work. In the event you would consider this offer, we would most likely be able to give you definite information on the sale within the period of our exclusive listing." The evidence of this letter that plaintiff acted as a broker and represented himself to Humston as such is corroborated by his own testimony: "I cannot give the verbatim—along the lines of selling the property—told him working diligently on it—had several inquiries—several had complained about the price being too high—told him had advertised it for fifteen thousand and then thirteen and showed him the ads—others had complained about the unrestricted district—the objections that I pointed out to him. However, I would do the very best I can and get in touch." It is clear that this conversation could not have occurred had not plaintiff considered himself Humston's broker and actively sought a purchaser.

The evidence also shows without conflict that after plaintiff secured a purchaser for the property he violated his fiduciary duties as a broker and by untruthful and misleading statements induced his principal to reduce the price placed upon the property and to sell it to plaintiff's firm. The testimony of Mr. Espey, who acquired the property, was uncontradicted that he saw plaintiff in the latter part of March and told him that although he deemed the property worth not more than $12,500 he would be willing to buy it for $13,500. "I told him I knew that I was light as far as the down payment was concerned; that I had another property on Parkway and Pine that I could use as a

possible—as part of the down payment. I told him at the time that because of the neighborhood that I did not consider the property worth any more than $12,500, but would be willing to give $13,500 because of the way I would be buying it—that the property itself, regular income and that sort of thing seemed to make it a profitable venture and I would be willing to take over the deal on that basis." Espey also testified without contradiction that a week or more after this first conversation he had another conversation with plaintiff in which plaintiff told him that he had not been able to induce the owner of the property, Mr. Humston, to reconsider the price that he was asking for the property, that he had some doubt whether he would be able to let Espey have the property for $13,000 and that there might be some difficulty in financing the deal because of the small amount of cash that Espey had but that Espey should leave the matter in plaintiff's hands. Plaintiff's firm got in touch with one Ceccarelli and his wife, who had done business with Kelly & Son for twenty-five years, with regard to a loan to Espey. They first discussed the matter with Mrs. Ceccarelli and showed her the property and later showed the property to Ceccarelli. The first installment of the loan was received on April 16, 1943, and the balance on April 30, 1943. On April 15th plaintiff had a long distance telephone conversation with Humston as follows: "I told Lt. Humston that I was unable to sell his property for the price he had placed upon it, and the only way we could get him $10,000 cash would be to buy it ourselves. He said 'I won't accept it; I will accept $10,500.00, if that is all you will give.' I said 'we will not pay $10,500.00; we will pay $10,000.00.' He said, 'Will you pay $10,250.00?' I said 'Will you accept $10,250.00?' 'Yes,' he said, 'I think, I will.' I said 'Will you confirm that by wire?' That was the entire conversation as I recall." Plaintiff's own testimony thus shows that he did not reveal to Humston that Espey was willing to buy the property for a price exceeding the $12,000 that Humston had originally asked for the property or the amount of $10,750 that he had asked later, but made the untruthful statements to Humston that "I was unable to sell his property for the price he had placed upon it" and that "the only way we could get him $10,000 cash would be to buy it ourselves." After receiving Humston's telegram reducing the price to $10,250 plaintiff sold the property to Espey the next day, April 16, 1943, for $13,500. Documentary evidence introduced before the commissioner showed without conflict that Espey signed the note for the loan of $12,500 and the deed of trust securing it on April 16th; that on the same day the escrow instructions were given by Espey; that both sales, the sale by Humston to Kelly & Son and the sale by Kelly & Son to Espey, were completed in the same escrow; that Kelly & Son or plaintiff never paid any part of the purchase price to Humston from their own funds, but received out of the escrow about $12,800 in cash and a note of about $700 secured by second deed of trust; and that the $10,250 paid by Kelly & Son to Humston were simply deducted from the cash amount of $12,800 received by Kelly & Son.

[2-5] In the light of the uncontradicted documents and plaintiff's own testimony, it cannot be questioned that plaintiff violated the fiduciary duties of a real estate agent, for "The law of California imposed on * * * the real estate agent, the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary. Violation of his trust is subject to the same punitory consequences that are provided for a disloyal or recreant trustee. King v. Wise, 43 Cal. 628." Langford v. Thomas, 200 Cal. 192, 196, 252 P. 602, 603. Such an agent is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision. Civ.Code, § 2230; Langford v. Thomas, supra, 200 Cal. at page 197, 252 P. 602, 603; Williams v. Lockwood, 175 Cal. 598, 601, 166 P. 587; Feckenscher v. Gamble, 12 Cal.2d 482, 495, 85 P.2d 885; Curry v. King, 6 Cal.App. 568, 575, 92 P. 662; Silver v. Logue, 127 Cal. App. 565, 571, 16 P.2d 183; Jolton v. Minster, Graf & Co., 53 Cal.App.2d 516, 522, 128 P.2d 101; Baird v. Madsen, 57 Cal. App.2d 465, 476, 134 P.2d 885. In the present case, there can be no doubt that Humston would not have sold the property to

Kelly & Son for $10,250 had he known that Espey stood ready to buy the property for $13,500. Nor could plaintiff have any doubt that had Humston known this fact he would not have sold the property to Kelly & Son. He not only failed to disclose the truth but made the misrepresentation that he was unable to sell the property at the price placed upon it by Humston. Even if plaintiff had not been Humston's broker and under no fiduciary duties, once he discussed the question whether a higher price was obtainable, he had to "speak the whole truth, and not by partial suppression or concealment make the utterance untruthful and misleading." American Trust Co. v. California, etc., Ins. Co., 15 Cal.2d 42, 65, 98 P.2d 497, 508.

[6-11] The findings of the trial court that there was no evidence that plaintiff was acting as Humston's agent is so clearly inconsistent with the documentary evidence as well as plaintiff's own testimony that it can be explained only as being based upon the theory that, since plaintiff's firm had an option to purchase and did purchase the property, plaintiff could deal with Humston at arm's length and was not bound by any fiduciary duties. It does not follow, however, that plaintiff was not acting as a broker in this matter. It is well settled that a broker employed to find purchasers for the property of his principal can be given an option, "running concurrently with the agency" to purchase the property. Walter G. Reese Co. v. House, 162 Cal. 740, 744, 124 P. 442, 444; Burt v. Stringfellow, 48 Utah 330, 159 P. 527; Neighbor v. Pacific Realty Association, 40 Utah 610, 124 P. 523, Ann.Cas.1914D, 1200; Walling v. Poulsen, 160 Mich. 392, 125 N.W. 373; Rest., Agency, § 390; see 4 Cal.Jur. 554; 12 C.J.S., Brokers, § 12, p. 33; 8 Am.Jur. 1040. In such a case, the broker, when pursuing his own interests, cannot ignore those of his principal and will not "be permitted to enjoy the fruits of an advantage taken of a fiduciary relation, whose dominant characteristic is the confidence reposed by one in another." Curry v. King, supra, 6 Cal. App. 568, 575, 92 P. 662, 665. It has therefore been stated that, "The law does not allow the agent who has also a right to purchase to wait until some one makes an offer of an amount in excess of the agreed purchase price and then elect to purchase the property at the lesser price without informing the owner of the higher offer, and, after the agent has obtained the consent from the owner to buy the property, then immediately sell it for the higher price as his own property." Neighbor v. Pacific Realty Association, supra, 40 Utah 610, 124 P. 523, 526, Ann.Cas.1914D, 1200. The law is well summarized in 8 American Jurisprudence 1040; "If a broker employed to sell property is also given * * * an option to purchase the property himself, he occupies the dual status of agent and purchaser and he is not entitled to exercise his option except by divesting himself of his obligation as agent by making a full disclosure of any information in his possession as to the prospect of making a sale to another. * * * But if he exercises his option before any negotiations for its sale to another have been made and without knowledge of anyone wishing to purchase, he is not obliged to account to the owner on resale to another." One who acts as an agent and also deals with his principal as to the subject matter of the agency cannot take advantage of his principal by withholding from him information secured by means of the agency. In the language of the Restatement of Agency: "Before dealing with the principal on his own account * * * an agent has a duty, not only to make no misstatements of fact, but also to disclose to the principal all material facts fully and completely. A fact is material * * * if it is one which the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified terms. Hence, the disclosure must include not only the fact that the agent is acting on his own account * * *, but also all other facts which he should realize have or are likely to have a bearing upon the desirability of the transaction from the viewpoint of the principal." § 390, Comment a. When plaintiff disclosed no more to his principal than that Kelly & Son was buying the property he fell short of his duties as an agent. It was his duty to advise Humston fully of the

pending negotiations with Espey. Plaintiff not only violated his fiduciary duty of disclosure, but went beyond the limits that the law draws even for one who has no fiduciary duties, for he misrepresented the facts when he assured Humston that he could not obtain the price placed upon the property and that Humston could do no better than to sell to Kelly & Son at a reduced price. The fact that Espey had only $400 cash and that therefore the greater part of the purchase price had to be covered by a loan affords no excuse for plaintiff's conduct. From the standpoint of the seller Espey was as much a cash buyer as one who did not need a loan. It was immaterial to Humston whether the cash came from the purchaser's own funds or whether he had to secure it from a lender. Since Kelly & Son's sale to Espey resulted in the receipt of approximately $12,800 cash it is clear that Humston would have gained more from a sale to Espey than the one to Kelly & Son. Moreover it was understood that plaintiff would attempt to obtain a loan for a purchaser. In one of his letters plaintiff asked Humston whether he "would consider $10,000 cash, as we have a prospect now who will likely purchase this property providing we can do some financing for him." It does not matter, however, whether plaintiff was under any obligation to Humston to attempt to secure a loan for Espey. The decisive consideration is that when he suggested to Humston that the latter sell the property to plaintiff's firm, he was under a duty to disclose tha Espey would pay $13,500 for the property if his purchase could be financed by a private loan and to disclose the negotiations made to secure that loan. It is immaterial that Humston, according to plaintiff's testimony, later said to plaintiff: "I don't know what you folks got out of it, but I am satisfied with it. I will have a little over nine thousand dollars when I pay some few bills." At that time Humston did not know that plaintiff had misled him when he induced him to reduce the price. When Humston learned that he had been misled he filed his complaint with the commissioner.

The present case is clearly distinguishable from Schomig v. Keiser, 189 Cal. 596, 209 P. 550, on which plaintiff relies, for in that case it was held that the licensee's fraudulent conduct was unconnected with his activities and duties as a broker.

The judgment is reversed.

GIBSON, C. J., and EDMONDS and SPENCE, JJ., concur.

CARTER, Justice.

I dissent. The majority opinion is based upon the premise that: "In determining this appeal it is not necessary to discuss the scope of review by the trial court of the commissioner's proceedings (see Dare v. Medical Examiners, 21 Cal.2d 790, 136 P.2d 304; Sipper v. Urban, 22 Cal.2d 138, 140, 137 P.2d 425, for even if the record of these proceedings is read as if the evidence before the commissioner had been taken by the trial court itself, *the trial court's decision finds no support in the evidence.*"

The italicized statement is not borne out by the record, and this error in premise has resulted in an erroneous conclusion. The fact is that at a hearing before defendant Real Estate Commissioner upon a complaint filed against plaintiff Rattray by one Humston, the evidence adduced was not only conflicting in some respects but such facts as were established without dispute gave rise to conflicting inferences. The commissioner resolved the conflict against plaintiff and concluded that the revocation of his license was warranted. Business & Professions Code, §§ 10176(f), 10177(f).

In reviewing the matter upon an alternative writ of mandate, the superior court received in evidence only a transcript of the record made at the commissioner's hearing. From this record and the conflicting showing therein, the superior court concluded that in revoking plaintiff's license, the commissioner "acted arbitrarily, capriciously and contrary to law and that his findings and order are unsupported by the evidence," and that plaintiff "*was not guilty of any conduct which constituted fraud or dishonest dealing.* * * *"

From the facts I am convinced that the learned trial judge was justified in concluding, as he did, that plaintiff was not guilty of fraud, dishonest dealing, or other

conduct warranting the revocation of his license as a real estate broker. Such being the state of the record, the question arises as to the power of the trial court to review the factual determination of an administrative agency. On this question the views of the members of this court have been and are in sharp disagreement. See Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425; Russell v. Miller, 21 Cal.2d 817, 136 P.2d 318; Dare v. Medical Examiners, 21 Cal.2d 790, 136 P.2d 304; Laisne v. California St. Bd. of Optometry, 19 Cal.2d 831, 123 P.2d 457 and order denying petition for hearing in Wyatt v. Cerf, 64 Cal. App.2d 732, 149 P.2d 309. The majority view is that in a mandamus proceeding to review the action of an administrative board, the findings and order of the board have not the finality of a court judgment, and, although no new evidence is received, the court can make findings and conclusions and render judgment contrary to the determination reached by such board. The minority view is that the factual determination of the administrative board is binding on the court unless it is lacking in evidentiary support, and that relief should be sought by certiorari rather than by mandamus.

In his dissenting opinion in the Laisne case, supra, Chief Justice Gibson said at page 868 of 19 Cal.2d, at page 477 of 123 P.2d: "Where there is neither a constitutional nor statutory requirement that a court make the determination of fact or reweigh the evidence upon which the administrative agency acted, the duty of the judicial branch is adequately fulfilled by a review upon certiorari which extends to the questions of law involved. A review upon the issues of law would, of course, include such questions as whether the agency has regularly pursued the authority vested in it, whether it has acted arbitrarily and whether there is substantial evidence to support its determination of fact. Our decisions have recognized that administrative rulings on questions of law cannot be accorded finality. Such questions may be determined conclusively only by a court exercising constitutional judicial power. [Citing authority.] *Upon issues of fact, however, where there is no constitutional requirement that the facts be judicially determined and no statutory indication that the review was meant to extend to a reexamination of questions of fact, the court should uphold the administrative determination unless it is found that there is no substantial evidence to support the finding.* * * * The proceeding in mandamus in the present case should be treated as a proceeding in certiorari [citing authority], and the judgment of the trial court should be affirmed." (Emphasis added.) Mr. Justice Edmonds and Mr. Justice Traynor concurred with the chief justice in his dissenting opinion in the Laisne case. In his dissenting opinion in the Dare case, supra, Mr. Justice Traynor stated at page 805 of 21 Cal.2d, at page 312 of 136 P.2d: "In an actual certiorari proceeding, the court would be confined to the record of the proceedings before the administrative board, and the board's determination would be quashed if the record disclosed that the board had acted outside its jurisdiction, or had made serious errors of law in the exercise thereof, or that its decision was not supported by substantial evidence. Under the system devised by the majority, however, the record is considered and weighed along with other evidence, a procedure unknown to the common law." The chief justice and Mr. Justice Edmonds concurred with Mr. Justice Traynor in his dissenting opinion in the Dare case. While the majority opinion in the case at bar is written on the theory that the rules applicable to mandamus and not certiorari are here involved, it fails to apply said rules, and, in fact applies the rules applicable to certiorari.

It must be conceded that this is a proceeding in mandamus and that the sole question here involved is whether there is any substantial evidence to support the findings of the trial court. The majority opinion answers this question in the negative, but fails to review and consider the evidence in the light of the conflicting inferences deducible therefrom, from which it is obvious that there is ample evidentiary support for such findings. The majority opinion sets forth in haec verba and at great length the findings of the Real Estate Commissioner determining the facts

adverse to plaintiff, and concludes that these findings are sustained by the evidence. Said opinion also sets forth brief excerpts from the findings of the trial court which determined the facts contrary to the findings of the commissioner, and then concludes that "the trial court's decision finds no support in the evidence." This statement in the majority opinion is refuted by the record.

The evidence which amply supports the superior court's findings and conclusions, and the inferences of which it is reasonably susceptible may be epitomized as follows:

In January, 1943, plaintiff Rattray, who had for more than 35 years been operating as a real estate broker in California, was associated with the firm of Kelly & Son in Bakersfield. On January 19th, using a firm letterhead, he addressed a letter of inquiry to John L. Humston, stating that the firm understood that Mr. Humston owned certain auto court property which he might wish to sell and that they would "be pleased to receive the price and terms acceptable to you, and enclose stamped envelope for your reply."

Mr. Humston, then a second lieutenant in the Army, stationed in Ohio, replied on February 4th, stating: "We would like to sell this property the price is $13,000 and we might take a small second mortgage. * * * We would like to sell the court and would consider any fair offer. * * *"

When Mr. Rattray discussed with Mr. Kelly listing the property through the office of Kelly & Son, Mr. Kelly instructed him to procure an option, saying, so he testified: "I told Rattray that due to my—due to a good many dealings I had had with Mr. Humston which were unsuccessful, and that he was a troublemaker, that the only manner in which I would deal would be on an option for it and a consideration was paid."

Rattray wrote Humston on February 11th mentioning that there was a prospective buyer for the property in Taft (this was not the ultimate purchaser), and that they had had the property appraised. He then said: "Considering the age of the buildings and furniture, which has a heavy depreciation, a fair price would be $12,000. To this we would have to add the selling commission, presuming that we can arrive at a mutually satisfactory basis. We are enclosing herewith an option for your signature. Upon receipt of the signed option and your reply, we will proceed with the work of closing the sale. Please state what terms you are willing to make in the space marked with the cross. It may be that our client will not require any terms but in the event he should, we would like to know what to quote him."

This letter and the option, which was in standard form, and named Kelly & Son as optionee, were received by Humston at San Diego. He understood the wording of the document and wrote in it the following terms for payment of a $12,000 purchase price, to wit: "$10,000 cash $2,000 at 8%." He signed the option and mailed it back to Kelly & Son without comment. By the terms of the option Humston agreed to sell the property to Kelly & Son within 60 days for $12,000.

Thereafter, on February 20th, Rattray advertised the property in a local paper for sale at $15,000; later it was advertised at $13,500. On March 20th Rattray wrote Humston that he had been working diligently to find a purchaser for the court but that two obstacles in the way of effecting a sale had been: "First, the district being unrestricted has been objectionable to two or three people who otherwise might have considered the property. The second objection is the price." He also stated: "Our purpose for writing you this morning is to inquire whether you would consider $10,000.00 cash, as we have a prospect now who will likely purchase this property providing we can do some financing for him. * * * We * * * * believe that under present conditions you would be wise in accepting this cash offer, providing we are able to arrange the financing as hereinabove referred to. Will you, therefore, let us know immediately if this will be acceptable to you so that we can proceed with our work. In the event you would consider this offer, we would most

likely be able to give you definite information on the sale within the period of our exclusive listing."

Following the receipt of this letter, Humston was in Bakersfield and talked with Rattray personally. Rattray showed him the advertisements, promised to work diligently on the property, and asked him to reduce the price another $2,000 to make it easier to sell. About this time one Espey called at the office of Kelly & Son in response to the $13,500 advertisement, but he had only $400 cash. Rattray does not recall whether he mentioned Espey to Humston as a prospective buyer. At any rate, on April 2d Rattray wrote Humston at San Diego as follows:

"As we expected to hear from you before leaving Bakersfield and not having received any word, we are wondering if we misunderstood you. The party we have been negotiating with has telephoned us twice since we talked with you, requesting that we give him an answer. * * * As our time is running short under our option, we would like to either proceed with our work of endeavoring to get this property financed so as to give you $10,000.00 cash for your Court property, or if we should be unsuccessful in accomplishing this, or should you not be willing to accept this offer, then we would like to continue our efforts to find another purchaser. * * * We would also like to know if you would extend our option for another 60 days, provided we are unable to consummate a deal for you before our time expires. We would appreciate an answer from you by wire. * * *"

On April 6th, in response to this letter, Humston wired: "Will take ten thousand seven fifty net."

On April 15th, which was the last day of the option, Rattray called Humston by telephone. He told him that he could not find anyone who could pay $10,000 cash; that the only way that they could get that amount of cash was for them to buy the property themselves. Humston offered to sell for $10,500. Rattray refused the offer. Humston then stated he would take $10,250 cash. Rattray asked that this offer be confirmed by wire, and told Humston that Mr. Kelly was buying the property. Humston thereupon wired, "Will take ten thousand two hundred and fifty net cash within thirty days."

Following the telephone conversation Rattray opened an escrow and forwarded to Humston for execution a deed of the property to Mr. Kelly. Later escrow instructions were sent. Humston understood the purport of these documents, and in fact added two paragraphs to the escrow instructions imposing certain specifications of his own. He knew that he was selling his property to Mr. Kelly for a cash price of $10,250. However, he testified that he thought Mr. Kelly would resell it only for an amount which would give him a selling commission of 5 per cent and expenses. Instead of this, Mr. Kelly consummated a deal whereby he arranged certain financing, and thus procured a higher profit.

Negotiations had been kept open with the prospect Espey. On April 16th, the day after the Kelly purchase, Mr. Rattray telephoned Espey, stating that they could put through a deal for him at $13,500. This deal was consummated. Most of the details were arranged on April 16th. Espey paid in his $400. Mr. Kelly procured a $12,500 loan from a private individual who had faith and confidence in his recommendation. The money was advanced in two installments, on April 16th and April 30th. This loan was secured by first mortgage on the property purchased and also on other property owned by Espey. The sum of about $700, needed to complete the transaction, was represented by a second mortgage to Mr. Kelly. The profit to Mr. Kelly amounted to $2,326.25, of which Rattray received some $900.

Humston paid no commission to Rattray or Kelly & Son for handling his property. He admittedly knew that a sale and resale were contemplated. A few days after April 15th he made a trip to Bakersfield and talked with Mr. Espey but did not ask him how much he paid for the property. He also called at the office of Kelly & Son, and according to the testimony of Rattray, said: "I don't know what you folks got out of it, but I am satisfied with it. I will have

a little over nine thousand dollars when I pay some few bills." Later he discovered the price to Espey and filed a complaint with the Real Estate Commissioner.

The superior court found that at the hearings before the commissioner there was no evidence that plaintiff was acting as agent for Humston; that Humston never agreed to pay any commission to plaintiff; that Humston executed the option of February 15th; that at no time did the relationship of principal and agent ever exist between plaintiff and Humston, nor did any relationship of trust and confidence ever exist between them; that in the handling of the transaction plaintiff was not guilty of any conduct which constituted fraud or dishonest dealing and that he did not act or conduct himself in any manner which would warrant the denial of his application for a license or for a renewal thereof.

The facts afford ample support for the conclusion that the relationship created by Humston's dealings with Rattray was that of vendor and purchaser, and not that of principal and agent. As said in the case of Smith v. Blodget, 187 Cal. 235, 240, 201 P. 584, 586: "Whether an agreement permitting a person 'to sell' land on certain terms creates the relation of principal and agent or that of vendor and purchaser under a contract of sale depends upon the intention of the parties. James, Law of Option Contracts, § 114. Where there was a revocable authorization to a firm of real estate agents to *sell* land for $10,000 net to the owners, with an agreement to pay 'a commission of all over said sum of $10,000 net, for which they may sell said property with our consent,' it was held in this state that a sale by the firm under this agreement was effected in the capacity of vendor on its own account, and not as agent of the owners of the land. Robinson v. Easton, Eldridge & Co., 93 Cal. 80, 28 P. 796, 27 Am.St.Rep. 167. The determining factor in that case was the direct interest in and right to a part of the proceeds of the sale which was granted to the persons making the sale. The written instrument in the case at bar contains no express provision that plaintiffs shall retain that portion of the purchase price which exceeds the specified selling price. * * * But the broad and unrestricted provision giving Smith the right to effect a sale at a net price to the owners of $100 per acre is susceptible of sundry interpretations. * * * The case here presented is one where the intention of the parties is imperfectly expressed and the language employed by them is ambiguous and requires interpretation. It was therefore permissible for the court to take into consideration the construction placed upon the instrument by the various persons concerned. Mitau v. Roddan, 149 Cal. [1], 2, 14, 84 P. 145, 6 L.R.A.,N.S., 275. Taking into consideration the dealings previously set forth, the various assignments of the option and the manner in which the sale was conducted by all the persons involved, the evidence must be held sufficient to support the finding of the trial court 'that the said instrument was acted upon and construed by the grantors thereof and all the parties to this action as an option, and not as a mere agency authorization.'"

The doctrine of this case has been recognized and applied in Ruess v. Baron, 217 Cal. 83, 17 P.2d 119; Tufts v. Mann, 116 Cal.App. 170, 2 P.2d 500; and Cook v. La Vina Land Co., 3 Cal.App.2d 21, 39 P.2d 458. The rule is stated in the Restatement of the Law of Agency, sections 13b and 13c, page 46, in part as follows: "A real estate broker whose sole function is to find someone who will enter into a transaction with the owner of land is ordinarily an agent, but the agreement with him may be such that he has no fiduciary duties and hence is not an agent. The facts in each case must be considered in determining whether or not it is understood that the primary obligation of one party is to act for the benefit of the other. * * *"

Applying the above test and looking to the facts here to ascertain the intent of the parties, it is apparent that there was never any intent on the part of Kelly & Son or Rattray to create with Humston a principal-agent relationship. Indeed both testified to a specific intent to avoid creating that relationship by means of taking an option. Rattray confirmed Kelly's testimony in this respect, saying in response to the question, "Then, will you state to the Commissioner why it was you took the option in the name of Kelly & Sons? A. The simple reason

that when I got the letter back from Lt. Humston, I listed—my letter with his reply—I took the letter to Mr. Kelly. Mr. Kelly said to me, 'Rattray, the only way I will deal with that man is on option—too much trouble with him in the past.' I therefore made up an option and sent it to Lt. Humston for his signature."

The testimony of Humston as to his intent shows that he knew that he was making a sale of the property to Kelly and that Kelly would resell it, and that he also knew that the property was being quoted at $15,000 to $13,500 and that Kelly would make a profit, but he erroneously assumed that there was a state law which would limit the profit to the same amount as a 5 per cent commission. Although Humston may originally have believed that he was hiring Rattray as his agent to sell his property at the best price obtainable, he could hardly have continued to so believe after the negotiations concerning a cash deal, when after considerable dickering the cash price of $10,250 was agreed upon.

In short, the evidence shows no more than that one of the parties to the transaction had a specific intent to create a vendor-purchaser relationship, and the other party may have at the inception of the transaction had a vague idea of creating a principal-agent relationship, but abandoned this intent after dealing at arm's length relative to a cash sale. In such circumstances the option agreement must be construed as a pure option, and nothing more.

That Rattray was not guilty of any fraudulent or dishonest dealing is obvious. He procured for Humston the highest cash price obtainable for the property. No person was found who would buy the property on net cash terms for any greater sum or at all. In fact, the only way a sale for cash could be consummated was through the financing efforts of Mr. Kelly, which lay beyond any duty he would have undertaken as a mere selling agent. The regular channels for financing were closed. No standard lending institution would give a $12,500 loan on a $13,500 purchase price, with only a $400 down payment, nor is it customary for selling agents to take a second mortgage. Mr. Kelly himself was unwilling to embark upon so uncertain a deal unless he would stand to make some profit other than a commission; in other words, unless he could make a cheap enough *cash* purchase of the property, he could not afford to take the chance of financing Espey. When he found he could get the property for $10,250, he promptly approached an individual lender, with whom he had been having dealings for more than twenty-five years, and procured from him the $12,500 loan. He stood the expense of the double transfer, and was required to take a second mortgage to secure a portion of the amount which he was to receive for this service. All this was done in order to make a cash deal for Humston who professed to be satisfied with the sum which he netted.

While persuasive arguments may be advanced against the practice of using options in place of listing agreements in cases of this character, it should be the law that where an option is used and both parties understand the purport of its language, and know that a sale and resale at a profit is contemplated, the relationship is that of vendor and purchaser and not of principal and agent.

The majority opinion fails to give due consideration to the details of the purchase of the property by Kelly for *cash* and the sale of it to Espey who was able to make a down payment of only $400. Humston knew he was selling the property to Kelly for $10,250 net. He was told by Rattray that they would have to do some financing in order to sell the property, which was the truth. He never asked Rattray to advise him as to the purchase price which Kelly received for the property. In fact it was none of his concern. He had received the sum of $10,250 which was agreed upon as the net cash price to him, and he was satisfied. Certainly, in view of these facts the trial court was not compelled to conclude that Rattray was guilty of fraud or dishonest conduct in connection with this transaction. To so hold would be equivalent to saying that if the Real Estate Commissioner had found Rattray not guilty, mandamus would nevertheless lie to compel him to revoke Rattray's license.

The majority opinion contains several statements which are not supported by the record. Said opinion states "The evidence shows without conflict that plaintiff was employed by Humston as a broker." The opinion then proceeds with an interpretation of the evidence which is clearly contrary to the views expressed by the trial court thereon. I am convinced that the interpretation placed on the evidence by the trial court is clearly correct.

The opinion states that "The correspondence initiating the relation between Humston and plaintiff leaves no doubt that plaintiff offered Humston his services as a broker and that Humston retained him in that capacity." This statement is incorrect. The original letter from Rattray to Humston, which I have already quoted, contains no statement from which the creation of an agency or fiduciary relationship could be implied. On the contrary, it reads as an offer to purchase, saying that the firm would be pleased to receive from Humston, "The price and terms acceptable to you, and enclose stamped envelope for your reply." The letter implied, if anything, that the firm was representing a prospective buyer, and would deal with the seller at arm's length.

The second letter to Humston does speak of a "fair price" of $12,000 to which "we would have to add the selling commission presuming that we can arrive at a mutually satisfactory basis," but it obviously makes a loose use of the term "selling commission," without stating the amount of that commission or stating what the "mutually satisfactory basis" would be, and it expressly mentions in two places that an "option" (enclosed for signature) will be required. It also speaks of the prospective buyer as "our client," and makes no reference to Humston as a client.

These letters, considered in the light of the evidence as a whole, clearly give rise to conflicting inferences as to the nature of the relationship between Humston and Kelly & Son, or Rattray. Hence the majority opinion is incorrect in its statement that the letters "show indisputably that plaintiff offered his services and was employed to find a purchaser willing and able to acquire the property for $12,000 plus a selling commission for plaintiff." Furthermore, even if a selling commission were contemplated there is nothing whatsoever limiting or fixing the amount of that commission. Plaintiff's statement, quoted in the majority opinion, that his purpose was to get a listing or authority to sell the property makes no concession respecting the terms of the listing.

The opinion states that the "evidence also shows without conflict that once plaintiff was employed by Humston he reported to him as a broker does to his principal." This is but the conclusion of the author of the opinion. The inference drawn by the trial judge, and it is a reasonable inference, is to the contrary. At no point does the correspondence between Humston and Rattray, or their testimony as to telephone and personal conversations, show other than that they were negotiating to arrive at a price at which Humston would be willing to sell, a cash price.

Next the opinion states that the "evidence also shows without conflict that after plaintiff secured a purchaser for the property he violated his fiduciary duties as a broker and by untruthful and misleading statements induced his principal to reduce the price placed upon the property and to sell it to plaintiff's firm." This again is but the conclusion of the author of the opinion. The evidence, in my opinion and in that of the trial judge, shows no fiduciary relationship. Obviously, there was no misleading or untruthful statement made by Rattray to Humston. He told Humston, and truthfully so, that the price Humston was demanding was so high that no cash buyer could be found; he told Humston about advertising the property as high as $15,000; he told him of a prospective buyer who would have to have help in financing. Mr. Kelly was not willing to arrange this financing unless he himself could buy the property in for cash at a low enough price. It is also uncontradicted that Rattray truthfully told Espey of the financing difficulty. Any sensible man would have realized that a $400 down payment is not sufficient to finance a $13,500

purchase through any of the ordinary commercial financing channels such as banks and other lending institutions.

Mr. Espey testified: "He [Rattray] told me that day [sometime before April 1st] that there would be some doubt because of the smallness of the down payment whether they would be able to finance the deal, so I went home that night and sat down and figured approximately for the purchase, showing what I would be able to pay, that would be taking the rentals from the property I own and the rentals on this. * * * I am not sure of dates again, but a week or more later that I spoke to him [Rattray]. He told me then he had not been able to get Mr. Humston to reconsider the price he was asking for the property and some doubt as to whether or not he would be able to let me have the property for $13,000, and suggested I leave the matter in his hands, and also said some difficulty with financing—might be a task in order to finance the advance interest in order to get the loan through a private party, so I left the matter in that way."

At this point in the negotiations, the record shows without conflict that if a sale was to be made to Espey it could only be through procuring someone who would give a private loan. Mr. Kelly and Mr. Simon of his office were able to make arrangements to borrow $12,500 from one Ceccarelli. Espey could not obtain any loan on the property at all because of the small amount of cash which he had; he could not make the purchase at all without financing aid afforded by Mr. Kelly.

The basic misconception of the majority opinion is its failure to recognize that in the profit made by Mr. Kelly on the two transactions there was no overreaching of Humston. The evidence not only supports the trial judge's conclusion to this effect; it shows that no other conclusion is possible. Rattray was unable to effect any sale for cash for more than the $10,250; Humston would only accept cash. Rattray could not even effect the $10,250 cash sale until he found some channel through which a resale might be made by Mr. Kelly. Humston's erroneous belief that the profit on a transaction of this kind, or on any sale of real estate by an agent, is limited to a selling commission of 5 per cent was not known to Rattray. There is no law fixing the commission which an agent may charge at 5 per cent and no more. In fact the custom of charging not less than 5 per cent is more to protect brokers from undercutting than it is to establish a customary maximum rate. Furthermore, services rendered in financing are not performed gratis, but are generally compensated by a commission. Humston admitted that he never offered Rattray any commission whatsoever, and also that he knew he was selling to Kelly and that a resale was contemplated. When he met Espey he did not even ask him how much he paid for the property. On this point he testified: "I thought Kelly & Son was making the deal for me—that it was all right. Why should I go around and ask somebody about the deal or how much they sold it for. I had confidence in Kelly & Son that they had made a satisfactory deal. Q. Why didn't you at any time ask Mr. Espey what price he had paid for the property? A. That is the only time I ever talked to him—no reason why I should have. * * * Q. Now, did you at any time ever ask Mr. Kelly or Mr. Rattray what their transaction was with Mr. Espey? A. No. Q. Did you ever at any time ask Mr. Kelly or Mr. Rattray to refund to you the portion of the profit that they made on your transaction? A. I never. Q. Did you ever at any time ever offer to pay Mr. Kelly or Mr. Rattray any commission for the handling of this transaction? A. I never." Furthermore, according to Rattray, Humston said to him after the sale: "I don't know what you folks got out of it, but I am satisfied with it. * * *" Likewise Espey never offered to pay a commission for either the selling or the financing.

The majority opinion implies that there was some chicanery by reason of the fact that the deals were "completed in the same escrow." All that the record shows in this respect is that the title company gave the same escrow number to both transactions. However, two separate sales were effectuated and the expenses were paid by

Mr. Kelly. It was not until April 16th, after the option expired, that Espey put his $400 in escrow. Each of the parties gave separate escrow instructions, and it took over a month for the completion of all details. It is immaterial that Mr. Kelly used the proceeds of the $12,500 loan for his payment to Humston, for he himself procured that loan; it was not procured by Espey, or from Espey.

The statement in the majority opinion that "in the light of the uncontradicted documents and plaintiff's own testimony, it cannot be questioned that plaintiff violated the fiduciary duties of a real estate agent * * *," is but a conclusion of the writer, for no fiduciary or agency relationship was established. If such a relationship had been established, or more specifically, if the trial judge had chosen to infer that such a relationship existed, then the cases cited in the majority opinion would be in point, particularly those relating to the necessity of a full disclosure. As the record stands, they are inapplicable. No mention is made of the cases hereinabove cited, which support the holding here announced.

The conclusion, "Nor could plaintiff have any doubt that had Humston known this fact [that Espey was purchasing for $13,500] he would not have sold the property to Kelly & Son," and that "He [Rattray] not only failed to disclose the truth but made the misrepresentation that he was unable to sell the property at the price placed upon it by Humston," simply ignores the uncontradicted fact that Humston did know that a resale was contemplated, and that a higher price was being asked, and that it was the truth that the property could not be sold *for cash* for more than the price paid Humston.

The majority statement, "The findings of the trial court that there was no evidence that plaintiff was acting as Humston's agent is so clearly inconsistent with the documentary evidence as well as plaintiff's own testimony that it can be explained only as being based upon the theory that, since plaintiff's firm had an option to purchase and did purchase the property, plaintiff could deal with Humston at arm's length and was not bound by any fiduciary duties," is not justified. As already stated, the evidence bearing on the question whether there was an agency or fiduciary relationship is susceptible of conflicting inferences and the inferences drawn by the trial court are justifiable, reasonable, and conclusive. It is true, as the majority opinion goes on to say, that a broker can be given an option which runs "concurrent with the agency," and in such case there is a fiduciary relation, and a duty of full disclosure. But here there is sufficient support for the conclusion that an option only was given; there was no agency. The cases cited in the majority opinion are therefore not controlling.

The majority opinion then states that "The fact that Espey had only $400 cash and that therefore the greater part of the purchase price had to be covered by a loan affords no excuse for plaintiff's conduct. From the standpoint of the seller Espey was as much a cash buyer as one who did not need a loan. It was immaterial to Humston whether the cash came from the purchaser's own funds or whether he had to secure it from a lender. Since Kelly & Son's sale to Espey resulted in the receipt of approximately $12,800 cash it is clear that Humston would have gained more from a sale to Espey than the one to Kelly & Son." This statement again shows the basic misconception of the author. From the standpoint of the seller, Espey was not even a prospect, for he had no cash to pay. There was nothing in plaintiff's conduct to excuse. He truthfully disclosed to Humston that he was to sell to Kelly, and that some financing would have to be done for the next purchaser, and Humston understood that Rattray's remuneration would come out of whatever profit was made on the resale. The only thing that aroused Humston's ire was that the profit was more than the 5 per cent which he erroneously may have inferred it would be. He has never claimed he did not receive the full cash price to which he agreed.

It may be noted too that Kelly did not in fact consummate his purchase until the option (or listing, if it be denominated as such) had expired. Instead of receiving $10,000 cash and $2,000 on a deferred payment as provided in the option, Humston received $10,250 as the full purchase price

of the property. There is no uncertainty as to this agreement. It was the subject of a telephone conversation between Rattray and Humston, and confirmed by Humston by wire. At the time this agreement was made, no purchaser had been found who would pay $10,000 cash for the property except Kelly who was able to finance the resale of the property. From these facts the trial court concluded that Rattray was not acting in the capacity of agent or broker for Humston but was acting for and on behalf of Kelly who was the purchaser of the property.

By reversing the judgment of the trial court in this case the majority of this court disregard all conflicts in the evidence and draw all inferences and deductions from the evidence adverse to plaintiff. The rule that all intendments are in favor of the judgment of the trial court and that all reasonable inferences and deductions should be drawn from the evidence in support of the judgment is entirely disregarded. This rule has been so clearly and forcibly stated in two recent decisions of this court that I cannot refrain from quoting from the majority opinions therein. In the Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, 690, the court said: "The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case. Estate of Snowball, 1910, 157 Cal. 301, 305, 107 P. 598; Estate of Barr, 1924, 69 Cal.App. 16, 33, 230 P. 181. The rule as to our province is: 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) Crawford v. Southern Pacific Co., 1935, 3 Cal.2d 427, 429, 45 P.2d 183, 184. The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict. The critical word in the definition is *'substantial';* it is a door which can lead as readily to abuse as to practical or enlightened justice. It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover whether such doubt or conflict exists, the court should be realistic and practical. Upon such view of the law we cannot hold that any essential finding in this case is unsupported."

In the Estate of Rule, 25 Cal.2d 1, at page 10, 152 P.2d 1003, 1007, 155 A.L.R. 1319, which involved the interpretation of a contract for the payment of a commission to a real estate broker, this court said: "The fact is, however, that the trial court had before it and undoubtedly *did* consider evidence of the surrounding circumstances, including the Brownscombe letter, and yet determined that respondent broker was entitled to his earned commission. And, in the absence of findings of fact and conclusions of law, every intendment is in favor of the judgment or order appealed from and it is presumed that every fact or inference essential to the support of the order and warranted by the evidence was found by the court. See Haime v. de Beaulieu, 1942, 20 Cal.2d 849, 852, 129 P.2d 345; Bekins Van Lines, Inc. v. Johnson, 1942, 21 Cal.2d 135, 137, 130 P.2d 421; Estate of Shaw, 1927, 85 Cal.App. 518, 525, 260 P. 351; 2 Cal.Jur. 852, § 499; 10 Cal. Jur. 741, § 62. Whether, in the light of the conflicting inferences to be drawn from the evidence, the parties by their contract intended to provide for the payment to respondent of a commission for his past services—which had not yet matured int-

a confirmed sale and which, hence, in one sense, were services in course of rendition —in securing Willig as a bidder and prospective purchaser, or contemplated payment for future services only, was for the determination of the trial court and its decision may not be interfered with by us on appeal. The rule is that an 'appellate court will accept or adhere to the interpretation [of a contract] adopted by the trial court—and not substitute another of its own—* * * where parol evidence was introduced in aid of its interpretation, and such evidence * * * is such that conflicting inferences may be drawn therefrom.' 4 Cal.Jur. 10-Yr.Supp. (1943 rev.) 146-147, § 192; see also 2 Cal.Jur. 934-939, § 549. Certainly inferences may be drawn from the contract and the surrounding circumstances here which would support the finding which we must presume was made by the trial court relative to the intention of the contracting parties."

The circumstance that the trial court in the case at bar had before it only a transcript of the proceedings and evidence taken before the Real Estate Commissioner does not change the rule with respect to the function of the trial court in determining the facts, as it cannot be questioned that under our system of jurisprudence the trial court is the forum for the determination of issues of fact whether those issues are presented by way of written or oral testimony or by ocular observation. If such were not the case, we would have a different rule with respect to evidence submitted in the form of deposition or affidavit than that received in the form of oral testimony and ocular observation. It is clear that under all of the authorities the function of the trial court in the determination of the facts is the same regardless of the form in which the evidence is presented.

In my opinion there is clear, positive, convincing and substantial evidence in the record in this case to support the findings of the trial court and the judgment based thereon should be affirmed.

SHENK and SCHAUER, JJ., concur.

Rehearing denied SHENK, CARTER, and SCHAUER, JJ., dissenting.

74 Cal.App.2d 790

**BLOOM v. CARPENTER et al.**

**Civ. 13024.**

District Court of Appeal, First District, Division 1, California.

June 5, 1946.

**1. Venue ⇐68**

Failure to file counter affidavit in opposition to motion for change of venue is not fatal where complaint shows that jurisdiction is in the county selected by plaintiff. Code Civ.Proc. § 396.

**2. Venue ⇐72**

In passing on motion for change of venue, court may inspect complaint for purpose of determining the character of the action and the judgment that may be rendered thereon. Code Civ.Proc. § 396.

**3. Venue ⇐72**

The question of transitory or local character of cause of action must be determined from the allegations of complaint on file when motion for change of venue is made and from the nature of the judgment which may be rendered thereon, assuming the truth of the allegations. Code Civ.Proc. § 396.

**4. Venue ⇐7**

In action upon a contract in which one individual appears to be the real party in interest, in absence of allegation that defendant contracted to perform obligation in particular county or that contract was entered into in a particular county, the venue is in county where the individuals resided at time of commencement of action. Code Civ.Proc. § 395.

**5. Venue ⇐7**

Venue of an action arising out of a contract should be laid in county in which obligation is incurred, unless there is a special contract in writing to the contrary, even though obligation is to be or may be performed in different counties. Code Civ. Proc. § 395.

**6. Venue ⇐7**

Venue of action for loss of furniture delivered to defendants as a carrier, for a reasonable reward, at San Francisco for

transportation to Oregon was properly laid in San Francisco county, though defendants were residents of Los Angeles. Code Civ.Proc. § 395.

**7. Venue ⇐7**

Action for loss of furniture delivered to defendants as a carrier, for a reasonable reward, at San Francisco for transportation to Oregon was an action for damages for breach of contract which occurred as a result of defendants' negligence and not an action in tort, so that venue was properly laid in San Francisco county, though complaint alleged that defendants so negligently conducted and so misbehaved in regard to the furniture as such carrier that it was wholly destroyed and lost. Code Civ.Proc. § 395.

**8. Venue ⇐45**

Common carrier engaged in interstate commerce being sued in San Francisco county where goods were delivered to it for transportation to Oregon for loss of the goods was not entitled to change of venue to county of carrier's residence or of the destination of goods on theory that interstate commerce was involved and venue should be governed by bill of lading. Code Civ.Proc. § 395.

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Appeal from Superior Court, San Francisco County; Melvyn I. Cronin, Judge.

Action by G. H. Bloom against William L. Carpenter, doing business under the firm name and style of Argonne Van Lines and Argonne Van & Storage Company, and others to recover for loss of household furniture, furnishings and equipment delivered to defendants for transportation to Oregon. From an order denying defendants' motion for change of venue, defendants appeal.

Order affirmed.

W. L. Carpenter, of Los Angeles, in pro. per.

Leonard J. Bloom, of San Francisco (Phillip A. Kennedy, of San Francisco, of counsel), for respondent.

WARD, Justice.

This appeal was taken by defendant in propria persona from an order of the Superior Court of the City and County of San Francisco denying a motion for a change of venue to the county of defendant's residence, Los Angeles County.

The complaint is in two counts. The allegations in the first count pertinent to the propriety of the order denying the motion are that "II. At all times herein mentioned, defendants were and now are a common carrier transporting property for hire by motor vehicles between the cities of San Francisco, California, and Glencullen, Oregon. III. At all times herein mentioned, plaintiff was the owner of certain household furniture, furnishings and equipment of the reasonable value of $2,250.00. IV. On December 26, 1942, plaintiff delivered said furniture, furnishings and equipment to defendants at San Francisco, California, as such carrier, and the same was received by them to be safely carried by them to Glencullen, Oregon and there delivered to plaintiff for a reasonable reward. V. Defendants failed, neglected and refused to deliver to plaintiff said household furniture, furnishings and equipment at Glencullen Oregon, or any other place, and although plaintiff has demanded of defendants the delivery thereof, or its equivalent in money, defendants have ever since failed and neglected to deliver said property or to pay said money."

The second count incorporates paragraphs II, III and IV and alleges that "Defendants did not safely carry and deliver said household furniture, furnishings and equipment; but, on the contrary, so negligently conducted and so misbehaved in regard to the same as such carrier, that the same were wholly destroyed and lost to the plaintiff to his damage in the sum of $2,250.00."

[1-3] The affidavit of merits in support of the motion alleges that defendant is now and for twenty years has been a resident of Los Angeles County; that the place of business of his van and storage company is in the City of Los Angeles, and that he has filed the Los Angeles address with the

Interstate Commerce Commission as the proper place "for the service of process and/or orders issued to your affiant by the Interstate Commerce Commission." The affidavit also sets forth that it would be a hardship to go to San Francisco and defend this action. No counter affidavits were filed. This is not fatal to an application of this type if the complaint shows that the jurisdiction is in the county selected by the plaintiff. The notice of motion specified that the motion would be made on the affidavit and "the papers on file in the case." East-West Dairymen's Ass'n v. Dias, 59 Cal.App.2d 437, 138 P.2d 772; Connell v. Bowes, 49 Cal.App.2d 542, 122 P.2d 71. That the complaint in the absence of counter affidavits may be considered appears in the opening lines of Code Civ. Proc. § 396: "If an action or proceeding is commenced in a court which lacks jurisdiction of the subject matter thereof, as determined by the complaint or petition." "For the purpose of considering the motion for a change of place of trial the court is permitted to inspect the complaint for the purpose of determining the character of the action, and the judgment which might be rendered thereon. McFarland v. Martin, 144 Cal. 771, 78 P. 239." Sheeley v. Jones, 192 Cal. 256, 257, 219 P. 744. "The question of the transitory or local character of the causes of action must be determined from the allegations of the complaint on file at the time the motion was made and from the nature of the judgment which might be rendered thereon, assuming the truth of the allegations." Neet v. Holmes, 19 Cal.2d 605, 607, 122 P.2d 557, 558; see, also, Eckstrand v. Wilshusen, 217 Cal. 380, 18 P.2d 931; Sloan v. Court Hotel, 72 Cal.App.2d 308, 164 P.2d 516.

[4, 5] In an action upon a contract in which one individual appears to be the real party in interest, in the absence of allegations that defendant had contracted to perform an obligation in a particular county, or that the contract was entered into in a certain county, the venue is in the county where the individuals resided at the time of the commencement of the action. Code Civ.Proc. § 395. However, "Obviously, an existing obligation is performable at some place. If it is of such character that it is to be, or may be, performed in different counties no different situation is created than if it is to be performed at a particular place. The express condition of the statute is that unless there is a special contract in writing to the contrary the county in which the obligation is incurred is the venue of an action arising out of it." Armstrong v. Smith, 49 Cal.App.2d 528, 532, 122 P.2d 115, 117.

[6] It is necessary herein to examine the sufficiency of the allegations of the complaint to the effect that the contract was entered into in San Francisco. The complaint alleges in substance that plaintiff delivered furniture, etc., to defendants as a carrier for a reasonable reward at San Francisco, and that the goods were to be transported to Oregon. There is no averment in the affidavit of the defendant to the contrary. Under these allegations the contract was entered into in San Francisco, and upon that conclusion the action of the trial court must be upheld.

[7] The second cause of action may not defeat plaintiff's right to a trial in San Francisco. The allegations of paragraph IV in the first cause of action must be read in conjunction with paragraph II of the second cause of action. When read together the nature of the action on contract is not changed. It is an action for damages for a breach of contract which occurred as a result of appellant's negligence and not an action in tort. Kings Laboratories v. Yucaipa Val. F. Co., 18 Cal.App. 2d 47, 62 P.2d 1054; Peterson v. Sherman, 68 Cal.App.2d 706, 157 P.2d 863. Under the allegations in each count the complaint has been framed to show that plaintiff comes within an exception from the general provision that defendant is entitled to a trial in the county of his residence and plaintiff is entitled to a trial in the City and County of San Francisco. Neet v. Holmes, supra.

[8] Particularly in the closing brief appellant stresses that the "movement of goods in Interstate Commerce should be permitted to be brought only at the Defendant's residence or at destination." There is no suggestion that the case should be transferred to the United States District

Court as the proper jurisdictional court to try this case but rather that the place of venue should be governed by a bill of lading by reason of the fact that defendant is a common carrier under the jurisdiction of the Interstate Commerce Commission which designates tariffs, forms of bills of lading, etc. It is not claimed that the Interstate Commerce Act, 49 U.S.C.A. § 1 et seq., has any provision relative to venue in such a case as the one at bar. The bill of lading is not referred to in the complaint or in the affidavit of merits or in any record in this case. Appellant's theory that interstate commerce is involved in the present motion is erroneous.

The order appealed from is affirmed.

PETERS, P. J., and KNIGHT, J., concur.




74 Cal.App.2d 737

**PEOPLE v. FUENTES.**

**Cr. 641.**

District Court of Appeal, Fourth District, California.

May 28, 1946.

Hearing Denied June 24, 1946.

**1. Assault and battery ⇐48**

One knocking out another in unprovoked assault with fist, causing victim to fall and strike his head on rail of railway track, could be held criminally responsible for such foreseeable result of assault. Pen. Code, § 245.

**2. Assault and battery ⇐55**

An assault by means of force likely to produce great bodily injury may be made by use of hands or fists. Pen.Code, § 245.

**3. Assault and battery ⇐95**

What kind of assault is likely to produce great bodily injury is generally fact question for jury, but its conclusion must be supported by evidence to sustain conviction of assault by means of force likely to produce such injury. Pen.Code, § 245.

**4. Criminal law ⇐27**

Battery is punishable as misdemeanor but when force used in committing it is likely to produce great bodily injury, it becomes a felony, if penitentiary sentence is imposed. Pen.Code, §§ 242, 245.

**5. Assault and battery ⇐55**

Unconsciousness, as result of one blow to jaw with fist, is not ordinarily considered "great bodily injury" within statute penalizing assault by means of force likely to produce such injury, as victim usually recovers consciousness. Pen.Code, § 245.

See Words and Phrases, Permanent Edition, for all other definitions of "Great Bodily Injury".

**6. Assault and battery ⇐55**

A cut, not over 1¼ inches long, of undetermined depth, and not severe enough to require suturing, was not "great bodily injury" within statute penalizing assault by means of force likely to produce such injury. Pen.Code, § 245.

**7. Assault and battery ⇐48**

One making unprovoked assault on another by knocking him unconscious with blow of fist to jaw, causing him to fall and strike his head on rail of railway track, was guilty of battery, though victim did not sustain great bodily injury, as required to warrant conviction of assault by means of force likely to produce such injury. Pen.Code, §§ 242, 245.

**8. Criminal law ⇐1184, 1188**

Battery, being crime included in crime of assault by means of force likely to produce great bodily injury, conviction of such greater crime on evidence warranting conviction of battery only may be reduced by appellate court to conviction of battery, with direction to resentence defendant for such offense. Pen.Code, §§ 242, 245.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Frank Fuentes was convicted of assault by means of force likely to produce great bodily injury, and he appeals.

Judgment reduced to conviction of battery, with instructions.

Albert H. Ford, of Riverside, for appellant.

Robert W. Kenny, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This is an appeal from a judgment pronounced on defendant after he had been convicted by the trial judge, sitting without a jury, of committing an assault on the person of Joe Garcia "by any means of force likely to produce great bodily injury" as that crime is defined by section 245 of the Penal Code. He was sentenced to serve the term prescribed by law in the penitentiary. Defendant contends that the evidence shows him guilty of battery as defined in section 242 of the Penal Code but not of the crime of which he stands convicted.

Joe Garcia and defendant were both residents of the city of Banning in Riverside County. The evidence indicates that there had been trouble in Banning between Mexican Nationals and Americans of Mexican descent. Garcia and defendant were both citizens but some friends of Garcia had been associating with the Mexican Nationals.

On the evening of December 16, 1945, Garcia, his wife and two friends (the first name of one of them was Saturnino) had a few drinks of beer in some of the resorts in Banning. In one of them they met defendant who was in the company of some friends. Some words were exchanged between the two groups but nothing very serious occurred although some one in defendant's group claimed to have been threatened with a beer bottle, struck with a salt shaker and called a vile name.

Garcia and his group left and went to the home of Saturnino where they each drank a glass of wine. While they were there some one threw a rock through the window. Defendant and his friends denied doing this and no effort was made to attribute this act to any of them.

Garcia and his wife left the house of Saturnino and proceeded on their way home. They had to follow a path which crossed the Southern Pacific Railway. When they reached the tracks they saw defendant's friends there. Some one mentioned the name "Saturnino" and defendant came up and struck Garcia with his right fist. Garcia slumped to the ground with his head coming to rest on or against one of the railroad rails. He was knocked unconscious and his wife, assisted by two of the men, carried him the short distance to the gate of his home by which time he had regained consciousness. His wife then assisted him into the house. Garcia had a small laceration on the right side of his head about two-thirds of the way between the right ear and the crown of his head. A physician who examined him on December 18, 1945, described what he found as follows:

"The patient was brought in by his father-in-law, and he took the chair in the examination and treatment room, and indicated the treatment he desired—which was for an injury to the right side of his head. I examined it and found that he had a lacerated cut. The edges of the cut were not clean and sharp, but were rather rough and irregular, and there was a bloody crust covering the wound. There was some swelling around the cut, indicating that there was bruising as well as cutting—suggesting that the instrument was not sharp but was blunt.

"Q. How long was the cut? A. Between an inch and an inch and a quarter.

"Q. Could you tell how deep it was? A. No, because it was covered by this crust. It must have involved perhaps a considerable portion of the scalp, because of the fact that it bled as it did. It had bled freely, they told me, and there was some oozing—enough to make this bloody scab.

"Q. After your examination, what did you do? A. I treated it. There was not a great deal to do. It did not cut enough to make it necessary to remove that cut (crust) and put in stitches or clips, so I just cleaned it up, and applied some antiseptic, and let it go.

"Q. Were you able to form an opinion as to what sort of an instrument or object had caused the cut or injury? A. Something blunt and very hard.

"Q. Could that have been caused by a man's hand or fist? A. I do not think so. * * *

"Q. Could the injury have resulted from falling and coming in contact with something hard? A. Yes."

No one saw anything in defendant's hand when he struck Garcia. He and two witnesses testified that he had nothing in it. He also testified that he struck Garcia in the mouth or near the end of the lips which was corroborated by other witnesses. All witnesses agree that he struck Garcia with his right hand. Mrs. Garcia testified that it was a swinging blow passing over the shoulder.

One witness described in detail the positions of the actors when the blow was struck, and was not contradicted. Mrs. Garcia was standing close to her husband on his left, probably with their arms entwined. The witness was standing immediately in front of Garcia facing him and about one and one-half feet away. When the name "Saturnino" was spoken defendant came up on the right side of the witness and struck Garcia with his right fist. This would place defendant in front of Mrs. Garcia and slightly to Garcia's left. Defendant admitted striking the blow with all his force. If the testimony of any of the witnesses is to be believed it would place the blow landing on the left side of Garcia's head, according to Mrs. Garcia, or on the left side of his mouth or jaw according to the other witnesses. The abrasion was on the right side of Garcia's head. That it was not caused by the blow struck by defendant seems to be demonstrated.

It is the theory of the prosecution that defendant had a rock or other similar weapon in his hand when he struck Garcia, and that the cut and bruising was caused by such a weapon. Defendant's theory is that he struck Garcia in the mouth or on the jaw knocking him out; that when Garcia slumped to the ground his head struck the rail which caused the wound. The theory of the prosecution seems highly improbable because the blow was landed on the left side of his head or mouth and the cut was on the right side of his head. The same evidence strongly supports the theory of defendant while contradicting the theory of the People.

[1] The conclusion does not necessarily relieve defendant from punishment for the results of his unprovoked assault. That the blow might knock out Garcia causing him to fall and strike the rail was a result which was foreseeable for which defendant could be held responsible. People v. Score, 48 Cal.App.2d 495, 120 P.2d 62.

[2, 3] It is thoroughly settled in this State that an assault by means of "force likely to produce great bodily injury" (Sec. 245, Penal Code) may be made by the use of the hands or fists (People v. Bumbaugh, 48 Cal.App.2d 791, 120 P.2d 703, and cases cited) and that what kind of an assault is likely to produce great bodily injury is generally a question of fact to be determined by the jury. People v. Nudo, 38 Cal.App. 2d 381, 101 P.2d 162. However, the power of the jury in that respect is not unrestrained and its conclusion must be supported by the evidence.

[4] Battery "is any willful and unlawful use of force or violence upon the person of another" (Sec. 242, Penal Code), and is punishable as a misdemeanor. When the force used in committing the battery is "likely to produce great bodily injury" it becomes a felony if a penitentiary sentence is imposed as was done here. Sec. 245, Penal Code. That the legislature intended to define two separate and distinct crimes is clear from the use of two separate code sections and the different penalties for each. Of course the dividing line between the two is not always distinct but we do not believe that condition exists here.

[5] A blow to the jaw sufficient to knock out the recipient is not unusual in fistic encounters and such a result from one blow is not ordinarily considered a great bodily injury for it is usual for the victim to recover consciousness and the use of his normal faculties within a short time which Garcia did. This leaves the wound on the head to be considered. Under the facts of this case the measure of the likelihood of great bodily injury is the result produced by the blow and fall, for the

likelihood of great bodily injury from the blow is demonstrated by the injury actually inflicted.

[6] The abrasion on the head and the bruise surrounding it has been described in detail in the quoted testimony of the attending physician. There is no other description of it in the record. The cut was not over one and one-quarter inches long and of an undetermined depth. It was not severe enough to require suturing. It seems unreasonable to describe it as a great bodily injury.

[7, 8] This conclusion does not relieve defendant from the results of his admitted and unprovoked assault on Garcia. There can be no question that he is guilty of the crime of battery and that he should receive punishment therefor. As battery is a crime included in the one charged we may reduce the judgment and direct the resentence of defendant. People v. Kelley, 208 Cal. 387, 281 P. 609; People v. Cowan, 38 Cal.App.2d 231, 101 P.2d 125.

The crime for which defendant was found guilty and sentenced is reduced from assault by force likely to produce great bodily injury, as defined in section 245 of the Penal Code, to battery as defined in section 242 of the Penal Code, with instructions to the trial court to pronounce judgment on defendant for the lesser offense.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.




74 Cal.App.2d 800

**JORDAN v. SCHRIEBER et al.**

**Civ. 13042.**

District Court of Appeal, First District, Division 2, California.

June 5, 1946.

**1. Appeal and error ⇐882(3)**

Where cause was tried on assumption that deed was in evidence and that it was sufficient proof of defendants' title if plaintiff's claim of equitable redemption was rejected, plaintiff could not contend on appeal from order granting defendants a new trial that defendants had shown no title to the realty because record did not disclose that their tax deed was received in evidence.

**2. Appeal and error ⇐882(3)**

One who has tried his case in the trial court wholly or in part on a certain theory may not change that theory on appeal.

**3. Appeal and error ⇐979(2)**

Since granting of motion for new trial on ground of insufficiency of the evidence rests completely within trial judge's discretion, reviewing court will not interfere, though evidence was sufficient to support the judgment on the merits, unless a manifest and unmistakable abuse of discretion appears.

**4. Appeal and error ⇐979(2)**

Where a trial judge may reach a conclusion either way on hearing the evidence, a reviewing court cannot say that the trial judge has committed a manifest and unmistakable abuse of discretion in granting a new trial on the ground of insufficient evidence.

**5. Appeal and error ⇐979(2)**

Though District Court of Appeal was of opinion that evidence in suit to quiet title was sufficient to support judgment for plaintiff under doctrine of equitable redemption, it would not set aside order granting defendants a new trial on ground of insufficiency of the evidence, and would not reinstate judgment for plaintiff where the case was close and might have been decided either way.

**6. Appeal and error ⇐854(6)**

An order granting a new trial must be affirmed if it can be sustained on any ground.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Suit to quiet title to realty by Frank D. Jordan against F. J. Schrieber and Charles

E. Luckhardt, wherein plaintiff had judgment. From an order granting defendants a new trial, the plaintiff appeals.

Order affirmed.

Wm. R. Biaggi, of San Jose, for appellant.

Rankin, Oneal, Luckhardt & Hall, of San Jose, for respondents.

NOURSE, Presiding Justice.

The plaintiff sued to quiet title to certain property in Santa Clara County which the defendants claim by virtue of a tax deed. The plaintiff had judgment and the trial court granted defendants' motion for a new trial on the ground that the evidence was insufficient to justify the decision, that the decision was against law, and that error had occurred at the trial, by minute order on June 12, 1945, and by an order entered June 20 stating that it was granted on all grounds set forth and particularly on the ground of insufficiency of the evidence.

There have been three trials of this action to date: the first commenced on February 5, 1942, before Judge Syer, who died prior to rendering a decision; the second concluded on March 18, 1943, before Judge Foley, who decided the case in favor of these defendants and then granted a motion for a new trial; the third commenced on May 8, 1944, and concluded on April 24, 1945, before Judge Del Mutolo.

William P. Jordan, plaintiff's father, acquired the real property in dispute from the United States government under patent dated May 2, 1933. By patent dated in 1897 he acquired other real property adjoining that in dispute. This property was sold to the State for delinquent taxes in 1933. On April 23, 1940, W. P. Jordan died, but on May 1, 1939, he had transferred by grant deed both of these parcels to the plaintiff. This deed was not recorded. On the property in dispute taxes for 1935–1936 were not paid, and the property was included in the delinquent tax list published by the tax collector on June 5, 1936. This publication included a notice that unless taxes, penalties and costs were paid (amounting to $21.70) the property would be sold to the State on June 26, 1936. Current taxes were thereafter paid through 1940 by the plaintiff; the tax bills and receipts contained a notation that the property had been sold to the State in June, 1936, but the notation "sold for taxes" to the State was not placed on the assessment rolls after 1936, as required by Pol.Code, § 3680 then operative, and carried in effect into the revision in Revenue and Taxation Code, § 614.

On June 5, 1941, the tax collector forwarded a notice of tax sale to "William P. Jordan, 3855 Scott St., San Francisco," by registered mail. This notice stated that the property therein described, which had been sold to the State for delinquent taxes of 1935, would be sold on July 1, 1941, if not redeemed prior thereto. This notice was returned undelivered. It had been sent to the wrong address and the addressee had died long prior to that date.

W. P. Jordan wrote to the auditor on June 6, 1938, requesting the amount of the delinquent taxes and penalties which had accrued against the second piece of property, particularly describing it in his letter and referring to the 1933 sale to the State. The description did not cover the property now in dispute. In this letter he gave notice of change of address from 3835 Scott Street, San Francisco, to Livermore. In ensuing correspondence conducted by Frank D. Jordan, the son of W. P. Jordan, and his counsel, Herbert McDowell, a redemption program was arranged for the property so described under the so-called ten year installment plan. Installment payments commenced on June 24, 1938, and, after default, were renewed on April 20, 1940. On October 30, 1940, prior to a visit to the auditor's office related by the plaintiff, McDowell wrote to the auditor as follows: "I enclose certificate of installment payment of delinquent taxes and tax receipt 1939–1940 and memorandum statement. I would appreciate an estimate certificate on this ten year plan as my client wants to pay the same with this year's current 1940–1941 taxes, also as to what amount is now due on the memorandum statement as he wants to clear that up. * * * He can pay these amounts by December 1, 1940, so you could use that date in figuring interest etc. In other

words he wants to pay everything that is now due and I would appreciate it if you would also let me know when the next payment under the 10 year plan should be paid so that it will be kept in good standing." (The enclosures referred to are not attached to the letter; a certificate of installment payment of delinquent taxes dated April 20, 1940, introduced as a part of plaintiff's exhibit 11, refers to property other than that in dispute; a memorandum tax receipt for 1939–1940 introduced as part of plaintiff's exhibit 8, covers the property in dispute as well as other property owned by W. P. Jordan.) McDowell testified that the information which he and appellant requested from the auditor in their visit of October or November, 1940, was the same as that requested in their correspondence.

It was and is the theory of the plaintiff that prior to the tax sale there had been an equitable redemption of the property. In this connection he testified that in company with his attorney, McDowell, he called upon the county auditor to inquire what taxes were owing in October or November, 1940. He testified that they first went to the tax collector's office to find out what the situation was "* * * on this property, on all property * * *" and were sent to the auditor's office where the appellant sought "* * * a statement on all my property so I could pay them up to date. * * *" He testified that he was told that a statement would be mailed to him. McDowell was thereafter notified that $30.55 would be due on the next installment payment and that sum was paid by check dated December 4, 1940; all sums requested by the county auditor have been paid.

Evidence was received of the assessment rolls in the possession of the county auditor showing that for the year 1935 assessments of taxes to W. P. Jordan appeared on the same page—number 38065 covering the property in dispute, and number 38066 covering the adjoining property acquired through the patent of 1897. The rolls for 1941 were also introduced showing, on the same page, assessments on the same properties numbered 54191 and 54192. The rolls for intervening years were not offered, but these disclose the condition of the books at the times the inquiries referred to were made.

An amended complaint to quiet title was filed by the plaintiff on February 20, 1942. The defendants alleged in their answer that they had acquired the property by a deed from the tax collector dated July 1, 1941, a copy of which was annexed to the answer. The court found that the plaintiff is the owner in fee and entitled to the property described in the amended complaint; that the defendants have no right, title or interest in the property; that prior to the tax sale the plaintiff made and completed an equitable redemption of the property; that except as to the completed equitable redemption the tax proceedings and the tax deed were regular and valid in all respects, and entered a decree quieting title in favor of the plaintiff.

[1, 2] On this appeal from the order granting a new trial the appellant argues that the respondents have shown no title to the property since the record does not disclose that their tax deed was received in evidence. It appears that when the deed was offered, appellant made a preliminary objection to preserve his right to thereafter attack the validity of the deed, and stipulated that the court might reserve its ruling. Nothing further was done, but the cause was tried on the assumption that the deed was in evidence and that it was sufficient proof of respondents' title, if appellant's claim of equitable redemption was rejected. Appellant did not press for a ruling on his objection, but if we were to assume that the offer was rejected and that the judgment rested on that ground that would have been error sufficient in itself to support the order granting the new trial. But it is a settled rule of practice that a party who has tried his case in the trial court wholly or in part upon a certain theory may not change that theory on appeal. 2 Cal.Jur. p. 237.

On the evidence heretofore recited the trial court found that "the plaintiff made and completed an equitable redemption of the said real property." This was the real issue between the parties. Manifestly,

if the doctrine of equitable redemption prevails in this state, the testimony of all the witnesses, if believed by the trial court, was sufficient and competent evidence to sustain the finding. It is undisputed that the appellant and his counsel made enquiries of the proper county officers regarding *all* of appellant's properties for the purpose of paying all taxes due upon all his property in the county. It is true that the first letter addressed to the tax collector particularly described the second piece of property only, but it was not shown that when the enquiries were made several years later, orally and by correspondence, the officials then in office had knowledge of the earlier letter. But it is significant that, when appellant and his counsel visited the county offices to ascertain the amount of taxes due upon all appellant's property located in the county, the assessment rolls showed both parcels of property listed on the same page with the parcel here involved appearing immediately above the second parcel upon which it is conceded that redemption of all taxes was made. Thus for five years or more these county offices had both parcels listed to the same owner on the same page of the rolls under serial numbers the one immediately following the other.

[3, 4] Though we conclude that if the appeal were taken from the judgment we should hold that the evidence was sufficient to support the finding of an equitable redemption it does not follow that the order granting a new trial should be reversed. Jones v. Sturzenberg, 59 Cal.App. 350, 210 P. 835, and Laist v. Nichols, 139 Cal.App. 202, 33 P.2d 866 are the only authorities in this state cited as supporting the doctrine of equitable redemption. Authorities from other states—Conklin v. Cullen, 29 Mont. 38, 74 P. 72, and Menasha Wooden Ware Co. v. Harmon, 128 Wis. 177, 107 N.W. 299—impose a greater burden upon the tax payer to show that he was completely without fault and that his failure to pay the full tax was due wholly to the neglect of the public officers. But this is a question which should be argued and decided on an appeal from the judgment when the precise question of the application of the doctrine is the issue on the appeal. This results from a peculiar feature of the practice relating to an appeal from an order granting a new trial on the ground that the evidence is insufficient. The argument has been advanced that when the reviewing court concludes that the evidence is sufficient to support the judgment it should reverse the order granting the new trial and reinstate the judgment. But that practice is not approved in this state. Here the practice is that since the granting of the motion rests so completely within the discretion of the trial judge the reviewing court will not interfere unless a manifest and unmistakable abuse of discretion appears. See Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, 340, where numerous cases are cited. Here the question of discretion is scarcely debatable. Though we are satisfied that the evidence is sufficient to support the judgment it cannot be gainsaid that it is a "close" case which might have been decided either way. Where a trial judge may reach a conclusion either way on hearing the evidence (and two judges of the same county had differed in the same case upon substantially the same evidence) a reviewing court cannot say that one has committed "a manifest and unmistakable abuse of discretion" in granting a new trial on the ground of insufficient evidence.

[5] For the purpose of clarifying the foregoing we restate: If the appeal here were from a judgment based on a finding of equitable redemption we would hold that the evidence was sufficient to support the judgment under the treatment of the doctrine of equitable redemption found in Jones v. Sturzenberg, supra, but since the trial court which made that finding granted a new trial upon all the statutory grounds including the ground that the evidence was insufficient to support that finding we must hold under the rule of the Mazzotta case that the appellant has failed to show that the order granting the new trial was an unmistakable abuse of discretion.

[6] Since the order must be affirmed on the grounds stated it would serve no purpose to discuss appellant's grounds of attack upon respondents' title. The settled rule is that the order must be affirmed if

it can be sustained upon any ground. Campanella v. Campanella, 204 Cal. 515, 522, 269 P. 433; Mazzotta v. Los Angeles Ry. Corp., supra. Hence, anything which we should say in regard to these other grounds would be dicta and would merely embarrass the future trial of the case.

The order is affirmed.

GOODELL and DOOLING, JJ., concur.




74 Cal.App.2d 794

## GOUZEA v. PACIFIC GREYHOUND LINES et al.

Civ. 13017.

District Court of Appeal, First District, Division 2, California.

June 5, 1946.

Rehearing Denied July 5, 1946.

Hearing Denied Aug. 3, 1946.

**1. Appeal and error ⇐927(3)**

The propriety of an order of nonsuit must be determined on evidence favorable to appellant.

**2. Automobiles ⇐245(17)**

Evidence was insufficient to present question for jury as to whether movement of bus in pulling onto outer lane of four-lane highway after stopping off paved portion to take on passengers without giving of signal was made without "reasonable safety" as required by statute, so as to constitute negligence causing collision between automobile which turned into inner lane to pass bus and a motorcycle traveling in opposite direction, where driver of the automobile testified that she observed bus pull onto highway when approximately 1,000 feet to the rear, and that it was not necessary for her to pull into inner lane to avoid crashing into the bus. Vehicle Code, §§ 543, 544.

**3. Evidence ⇐118**

The trial court has some discretion with regard to whether statements come within res gestæ rule, but such discretion cannot be exercised when party makes no effort to come within the rule.

**4. Evidence ⇐118**

An inconsistent self-serving statement made by motorist respecting cause of accident made after a change from original statement lacked spontaneity and was not admissible under exception to the res gestæ rule.

**5. Appeal and error ⇐882(7)**

Where testimony of a highway officer regarding conversation he had with motorist after she had collided with motorcycle on which plaintiff was riding, in which she stated that defendants' bus pulled out in front of her, was offered as impeachment of motorist's testimony, plaintiff could not complain of trial judge's ruling so limiting officer's testimony instead of holding conversation admissible against defendants under "res gestæ" rule.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestæ".

**6. Evidence ⇐118**

The "res gestæ" rule is a salutary one when properly applied for purpose of bringing out the truth of the circumstances, but it is not to be extended to statements prepared after long deliberation which tend only to excuse fault of the speaker and to cast blame on an absent party.

**7. Evidence ⇐118**

Where testimony which is obviously hearsay is offered under the res gestæ rule, the proper foundation should be laid and trial judge should be so informed of theory under which it is offered that he may make an appropriate ruling.

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Appeal from Superior Court, San Francisco County; Lile T. Jacks, Judge.

Action by Eva Gouzea against the Pacific Greyhound Lines, Fred Lawrence, and others, for injuries arising from a collision of motor vehicles on the public highway. From a judgment of nonsuit as to two named defendants, the plaintiff appeals.

Affirmed.

Shirley, Robb & Saroyan, of San Francisco, for appellant.

Cooley, Crowley, Gaither & Dana, of San Francisco, for respondents.

NOURSE, Presiding Justice.

The plaintiff sued Mrs. Suzanne Ossiander, Peter Boncheff, Pacific Greyhound Lines, a corporation, and its employee Fred Lawrence for injuries arising from a collision of motor vehicles on the public highway. At the close of plaintiff's case the court granted a nonsuit as to Pacific Greyhound and Lawrence, and, upon stipulation of the parties for reasons not disclosed in the record, a mistrial was granted as to all other defendants. The plaintiff has appealed from the order granting the nonsuit.

Two grounds are advanced by appellant: (1) That the evidence of negligence was sufficient to take the case to the jury, and (2) that the trial court erred in restricting the testimony regarding a statement made by Mrs. Ossiander following the collision.

Viewing the evidence in the light most favorable to appellant, we find that it is singularly without substantial conflict in so far as it relates to the question of respondents' negligence. Appellant was riding on the rear seat of a motorcycle operated by James Wheeler, who is not a party to the action. They were travelling north on the main highway running from San Rafael to Petaluma. At a point about three miles north of San Rafael the highway was divided into three lanes with the outer lanes for ordinary traffic and the center lane for passing only. As the motorcycle approached this point it was preceded by two passenger cars being driven in the same direction in the outer north bound lane—a Nash driven by Mr. Falconer followed closely by a Buick driven by Mr. Boncheff. Wheeler turned into the middle lane to pass the Buick. At about the same time the Buick pulled into the middle lane to pass the Nash. Mrs. Ossiander was traveling south in a green DeSoto on the outer, or westerly lane, and at about the same time pulled into the middle lane ostensibly to pass the Greyhound bus. This bus had stopped to the west of the pavement at a designated stopping station for passengers and was moving slowly into the south bound lane. After all the north bound vehicles had passed the bus, and at a time when the Buick was even with the Nash, the driver of the Buick noticed the green car turning into the middle lane and he suddenly slowed his car. Wheeler was close behind the Buick and turned further into the center lane to avoid striking it. To avoid the approaching DeSoto, Wheeler turned to his right and was wedged between the Buick and the DeSoto. Appellant was thrown from the motorcycle and suffered severe injuries.

[1] The undisputed evidence as to the actions of the driver of the Greyhound bus is that after stopping off the highway to take on passengers it moved slowly at an angle on to the outer lane of the paved highway at a time when the DeSoto was from six to nine hundred feet in the rear and when there was no other traffic in that part of the highway. Only four witnesses testified as to the operations of the bus. The appellant testified that when the motorcycle was about 300 feet south of the bus, the bus was moving at a gradual angle southerly the front wheels coming on to the pavement. Wheeler testified that as he was 300 feet south of the culvert he first saw the bus and at the time he passed it "the front wheels were coming onto the highway, just about where the rear wheels were coming onto the paved portion." He also testified that it was entering the paved portion slowly and at a gradual angle, that "he did not cut short on the highway." When he first saw the green DeSoto it was twelve hundred feet to the north, "up near where the four lane highway is." This spot was shown to be 900 feet north of the culvert. The defendant Ossiander testified that she saw the bus enter the traffic lane when she was six hundred to a thousand feet to the rear. She continued in the outer lane observing the moving bus at all times until she was about two hundred feet to the rear when she swerved into the middle lane with the intention of passing it. It was this movement which caused the collision. All these witnesses

testified that they did not see the bus driver give an arm signal on starting. Lawrence, the fourth witness, testified in conflict with some of the witnesses but this conflict is unimportant and may be disregarded as well as other conflicting testimony which he gave since the propriety of the order of nonsuit must be determined on the evidence favorable to the appellant. Assuming that no starting signal was given the only person to whom it should have been given saw the bus start and saw it moving ahead of her in the regular traffic lane and would have learned nothing more if a signal had been given. All the other vehicles had passed the bus before the collisions occurred and the movement of the bus had no relation to the movements of any one of the vehicles which were going north.

It is appellant's contention that the movement of the bus on to the highway was not made with "reasonable safety" as required by sections 543 and 544 of the Vehicle Code and that from this an inference of negligence might arise. The argument is based upon this incorrect statement of the record: "When the bus pulled onto the highway and into the west lane the Ossiander DeSoto was only 70 to 100 feet to the rear of the bus." Sixteen specific references to the reporter's transcript are made no one of which remotely supports the statement. To the contrary, the undisputed evidence is that "when the bus pulled onto the highway" the Desoto was from six hundred to a thousand feet to the rear. It is also undisputed that Mrs. Ossiander pulled into the center lane, not to avoid crashing into the bus, but to increase her speed and pass it. Mrs. Ossiander testified that she first saw the bus moving slowly into the outer lane as she came around the curve of the hill approximately one thousand feet to the rear. She required no arm signal to tell her that the bus was doing just what she observed with her eyes.

[2] There is a marked distinction between the facts of this case and Pewitt v. Riley, 27 Cal.2d ——; 163 P.2d 873. In the latter case defendant, at 2:25 A.M., suddenly and without warning started to move his truck and trailer across a main highway and completely blocked the three lanes of traffic. Plaintiff was driving a tractor and trailer south around a curve and down grade and did not observe the movement of defendant's truck until it was too late to stop. Here all the witnesses were in accord that, after Mrs. Ossiander observed the bus in movement upon the western lane she had ample time to slow her speed and continue her course behind it. There is here no possible inference of negligence which could be deduced from the evidence of the operations of the bus and the nonsuit was properly granted as to these respondents.

Little need be said as to the second ground urged by appellant—that the declarations made by Mrs. Ossiander were admissible under the res gestae rule. Appellant first refers to the testimony of Wheeler that immediately following the collision she came to him and said: "I am terribly sorry, that bus run in front of me." Appellant states that, "This testimony * * * was not objected to by respondents nor did they make any motion to strike it from the record." The reporter's transcript discloses that as the witness Wheeler was under examination the following occurred:

"Q. (by counsel for appellant) Did you recognize the lady driving that green DeSoto? A. No, sir, I did not. Afterwards I took the motorcycle off to the side of the road and I laid it down; and I laid down beside it. A woman came over and she said, 'I am terribly sorry, that bus run in front of me.'

"Mr. Hoge: I ask that that go out.

"Mr. Shirley: My only question at the moment is: Q. did you ever eventually find out that Mrs. Ossiander was driving the southbound DeSoto? A. Yes. Q. and you did talk to her later on? A. Yes."

[3] Counsel thus consented that the irresponsive answer should go out and made no effort to introduce the testimony under the res gestae rule. As stated in Lane v. Pacific Greyhound Lines, 26 A.C. 483, 489 and Showalter v. Western Pacific R. Co., 16 Cal.2d 460, 465, 469, 106 P.2d 895, the

trial court has some discretion with regard to whether such declarations come within the rule, but this discretion cannot be exercised when the party makes no effort to come within the rule. Counsel for appellant thereafter concurred in the ruling that this statement was hearsay as to all parties other than Mrs. Ossiander and the question and answer were repeated with that limitation.

Thereafter counsel for appellant interrogated the highway officer regarding a conversation he had with Mrs. Ossiander after the collision. Relying upon the rule of the Showalter and Lane cases counsel argues that this conversation was admissible under the res gestae rule. But the record presents a different situation than that of the cited cases. The testimony was not offered as a spontaneous utterance or as a part of the res gestae. It was offered as impeachment of Mrs. Ossiander and was so limited by the ruling of the trial judge. Counsel for appellant made an offer to prove that "Mrs. Ossiander made certain inconsistent statements; that she first told the officer, in response to his question, 'What happened,' 'I was in the east lane all of the time. The motorcycle came over and hit me'—'I was in the west lane all of the time and the motorcycle came over and hit me.' We will show that the officer had heard that she had turned into the middle lane, so he said, 'Well, if that is correct, why did you swing into the middle lane?' So then she changed her testimony and said, 'Well, I had to swerve into the middle lane because the bus pulled out in front of me.' That admission is against her interest." In limiting the testimony to Mrs. Ossiander the trial judge stated to counsel: "Well, I would like to have you make more broad your grounds to it. In other words, lay the foundation * * * so I can see just exactly how to rule on it under that case." This was not done. Thereafter the officer was permitted to repeat the statement which he took from Mrs. Ossiander concerning the collision. The time this statement was made is not clear. The accident occurred at 2:10 P.M. The officer arrived at the scene soon after. He first testified that he took Mrs. Ossiander's statement about twenty minutes after the ambulance left. He then referred to his notes made at the time which showed that the statement was made at 3:10 P.M. Another witness testified that he heard the statement made to the officer about twenty minutes after the ambulance left. The witnesses were uncertain as to when the ambulance left, but estimates were given that it was from fifteen to twenty minutes after the accident. During this time, and before the statement was made to the officer, Mrs. Ossiander had had several conversations with others involved in the collisions and arguments were indulged in relating to the fault or negligence of the several parties. The statement as repeated by the highway officer reads: "The first story she told me, she was in the south bound lane on the west side of the highway; that the motorcycle had come over into the lane. I asked her how the accident could happen if she was in the sounthbound lane. And after talking to her for a time she said that as the bus started off of the highway she pulled over into the center lane. I asked her then if the center lane was clear. She said it was, but as she got into it she saw a car venture out into the middle lane. As the car ventured out, the motorcycle came around the red car and she swerved back into the southbound lane."

[4-7] In the foregoing we find not a spontaneous statement, but a cooly prepared self-serving declaration made after full opportunity to study the circumstances of the collision. It was a statement forced out of Mrs. Ossiander by the officer after she had first insisted that she had not left the outside lane, and it was not a spontaneous statement but an attempted explanation of a story which she felt compelled to change. An inconsistent statement made after a change from the original statement lacks on its face the element of spontaneity which is the foundation of the res gestae exception. The second story was obviously not made under the emotional excitement of the accident. If counsel had plainly stated to the trial judge that he was seeking admission of the statement as to all defendants as a part of the res gestae it might not have been an abuse of discretion

to admit it when made under those circumstances. But it is apparent from reading the record that counsel did not make his position clear. The res gestae rule is a salutary one when properly applied for the purpose of bringing out the truth of the circumstances, but it is not to be extended to statements prepared after long deliberation which tend only to excuse the fault of the speaker and to cast blame on an absent party. But in any event, when testimony which is obviously hearsay is offered under the res gestae rule the proper foundation should be laid and the trial judge should be so informed of the theory under which it is offered that he may make an appropriate ruling.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; CARTER, J., dissenting.




74 Cal.App.2d 806

**BROCK v. SOUTHERN PAC. CO. et al.**

**Civ. 13148.**

District Court of Appeal, First District, Division 2, California.

June 5, 1946.

**Hearing Denied Aug. 1, 1946.**

**1. Appeal and error ⇐371**

Where notice of appeal and notice to clerk to prepare transcript were given under rules of appeal relating to clerk's transcript, the failure to comply with the clerk's request to deposit the fees rendered the notices ineffective for any purpose. Rules on Appeal, rules 2, 4(a, c), 5(a, c).

**2. Appeal and error ⇐607(1)**

Where notice of appeal and notice to clerk to prepare transcript were given under rules of appeal regarding clerk's transcript, orders of court extending time and stipulation of counsel carried appellant's time to prepare and file transcript down to March 15, and on March 15 plaintiff filed a new notice of election to proceed by settled statement and on March 15 procured an order granting him 30 days to prepare and file his partial transcript and statement on appeal, the order of March 15 was not made within a valid extention of time and was beyond jurisdiction of court. Rules on Appeal, rules 2, 4(a, c), 5(a, c), 7(b), 45(b).

**3. Appeal and error ⇐607(1)**

The purpose of limitation requiring notice of election to proceed by settled statement to be given within 10 days after filing notice of appeal is to enable the parties to prepare the condensed statement of the oral proceedings while the evidence is fresh in memories of counsel. Rules on Appeal, rule 7(b).

**4. Appeal and error ⇐607(1)**

Where appellant gave notice of appeal and notice to clerk to prepare transcript under rules of appeal relating to clerk's transcript and timely obtained extensions of time, but five months after filing of notice of appeal, appellant gave notice of election to proceed by settled statement, appellant was not entitled to be relieved of default on theory that appellee had led appellant to believe that his time within which to prepare his record on appeal remained open and legal and that he was not in default. Rules on Appeal, rules 2, 4 (a, c), 5(a, c), 7(b), 45(b), 53(b).

**5. Appeal and error ⇐607(1)**

Under rules on appeal giving appellant 10 days after his notice of appeal has been filed within which he may give notice of election to proceed by settled statement, the time limitation is reasonable. Rules on Appeal, rule 7(b).

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Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Action by Bert Brock against the Southern Pacific Company for personal injuries consolidated with action by Bert Brock against Dr. H. Moore and others for malpractice. The jury returned a verdict for all defendants. From an adverse judgment, the plaintiff appeals. On defendants' motion to dismiss appeal and on plaintiff's motion for relief from default.

Defendants' motion granted and plaintiff's motion denied.

Ernest E. Emmons, of San Francisco, for appellant.

A. B. Dunne, and Dunne & Dunne, all of San Francisco, for respondents Southern Pac. Co., Dr. C. A. Walker, Dr. Fred H. Lawrence and Dr. Lees.

NOURSE, Presiding Justice.

Two motions are presented—one by respondents to dismiss the appeal, the other by appellant to be relieved from his default.

Plaintiff brought two actions against the corporation for personal injuries and against the respondent physicians for alleged malpractice. The first action was filed on September 25, 1940, the second on August 30, 1941. The two actions were consolidated for trial, and on August 20, 1945, they went to trial to a jury as one suit for damages. On September 5, 1945, the jury returned a verdict for all defendants. The plaintiff appeared in propria persona and, upon a showing in pauperis, was permitted to conduct the trial at the expense of the county.

On September 11, 1945, notice of entry of judgment was given and in due time plaintiff gave notice of intention to move for a new trial and notice to set aside the verdict. These motions were denied and on October 15, 1945 plaintiff filed his notice of appeal. This was followed on October 25 with plaintiff's "Notice to Clerk to Prepare Transcript and Notice Designating Papers and Records." This notice to the clerk requested a complete transcript of all the proceedings including the "whole reporter's transcript" of the testimony of designated witnesses, all the instructions to the jury "from the defendants' side of the case" and "a whole complete record of trial." The notice was obviously given under Rules 4(a) and 5(a) of the Rules on Appeal. On October 29th there was mailed to plaintiff "Clerk's Estimate of Costs of Preparing Transcript on Appeal."

Plaintiff failed to deposit with the clerk a sum equal to the estimated costs or to procure a waiver from the reporter as provided in Rule 4(c) and this failure occurred after his motion to be permitted to prosecute the appeal in forma pauperis had been denied on October 10th. On November 5, 1945, and December 3, 1945, plaintiff procured successive orders of the superior court extending his time thirty days each "to prepare and file transcript and statements on appeal" from the judgment, the order denying a new trial, and the order denying a transcript at county cost. On January 3, 1946, February 1st and February 28th plaintiff filed stipulations from respondents extending his time for the same purpose to March 15, 1946. On March 15th plaintiff filed a new notice "of Election to Proceed by Settled Statement" in accordance with Rule 7(b), and on March 15th procured an order of the superior court granting him thirty days to "Prepare and file his Partial Transcript and Statement on Appeal." In these proceedings plaintiff was represented by counsel.

[1, 2] The motion to dismiss the appeal presents these simple considerations. The notice of appeal and the notice to the clerk to prepare the transcript were given under Rules 2 and 5. The failure to comply with the clerk's request to deposit the fees rendered these notices ineffective "for any purpose." Rule 5(c). The first two orders of the superior court extending this time, and the stipulations of counsel carried appellant's time to prepare and file a transcript prepared under Rule 5 down to the 15th day of March, 1946. At that date the power of the superior court to grant further extension was exhausted for two reasons—(1) under Rule 45(b) the superior court may grant an extension only "prior to the expiration of such time or any valid extension thereof." (2) Such extensions "shall not exceed 90 days in the aggregate" (Idem.) When therefore the superior court on March 15, 1946, purported to grant appellant thirty days to "Prepare and file his Partial Transcript and Statement on Appeal" the order related to a "settled statement in lieu of both transcripts" in accordance with appellant's notice of election to so proceed given on March 15, 1946, and was not made at a time "prior to the expiration of such time"

as required by Rule 45(b) since the notice of election to pursue that method of appeal had not been given "within 10 days after filing the notice of appeal" as required by Rule 7(b), hence the order of March 15, 1946, was not made within a period of a valid extension of that time and was beyond the jurisdiction of the court.

[3, 4] The appellant has made a motion to be relieved of this default under Rule 53(b). The only debatable ground suggested in the motion is that the default was caused by the failure and neglect of defendants and respondents in leading plaintiff and appellant to believe that his time within which to prepare his record on appeal remained open and legal and that he was not in default. The ground urged is not supported by the record. Appellant initiated his appeal under the method authorized in Rules 4 and 5. He obtained orders of court and stipulations granting him extensions of time to prepare his record under that method only. Five months after his notice of appeal was filed he gave notice of an election to proceed by settled statement under Rule 7(b). This is a distinct method differing widely from that provided in Rules 4 and 5. One of its important features is that the notice must be filed within ten days after filing of the notice of appeal. The obvious purpose of this time limitation is to enable the parties to prepare the "condensed statement of the oral proceedings" while the evidence is fresh in the memories of counsel. The whole purpose of the limitation would be defeated if the appellant were permitted several months after the trial to elect that procedure and require the respondent to settle a statement of the oral proceedings. There is nothing in the record which shows that respondents led appellant to believe that they would waive the time limit; there is nothing to show that the second method was contemplated by either party until long after the time had expired. It is apparent that the motion for relief from default rests on the single ground that five months after the time had expired under the rule the appellant conceived the idea that he would prefer to proceed under a different method than that on which the orders and stipulations were based. A change of method after the time fixed in the rule is not sanctioned. A similar situation was presented to this court in Russi v. Bank of America, Cal.App., 158 P.2d 252, 253, where we said the appellant had "elected the particular form of record called for and is not entitled to commence all over again to prepare an entirely different form of record in the absence of some such unusual circumstance as the complete inability to obtain the record originally sought. See Averill v. Lincoln, 24 Cal.2d 761, 151 P.2d 119. It would be improper, and unfair to the respondent as well as a plain disregard of the rules, to permit an appellant long after his time has expired to give notices for a type of record which he voluntarily chose not to request within the time allowed. The rules prescribe mandatory times for the notices calling for a particular record, and after the time has expired the party is in default and can be relieved only upon a showing of good cause."

[5] The Rules on Appeal give an appellant ten days after his notice of appeal has been filed within which he may give notice of his election to proceed by settled statement. We cannot say that the time is unreasonable and that appellant should have five months within which to make his election as to which method he should pursue on a showing of nothing more than that, after having selected one method and procured numerous extensions of time for that purpose, he now finds another method more convenient.

The motion to dismiss the appeal is granted. The motion for relief from default is denied.

GOODELL and DOOLING, JJ., concur.

74 Cal.App.2d 629

## GARLAND et al. v. HIRSH et al.

Civ. 15098.

District Court of Appeal, Second District, Division 1, California.

May 27, 1946.

1. Evidence ⇐595, 596(1)

A jury need not accept as true all direct evidence offered in opposition to an inference, but if direct evidence to the contrary is not clear, positive, uncontradicted and is not free from doubt, jury may reject it.

2. Evidence ⇐595
Trial ⇐139(1)

Where a jury can reasonably infer from primary facts established that the material fact attempted to be proved exists, a party has introduced sufficient evidence to entitle him to have the jury decide the issue, but jury is not compelled to draw the inference even in absence of contrary evidence and may refuse to do so. Code Civ.Proc. §§ 1832, 1958, 1960.

3. Trial ⇐139(1)

Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference should be drawn in any given case is a question of fact for jury. Code Civ. Proc. §§ 1832, 1958, 1960.

4. Evidence ⇐588, 594

The jury is the sole judge of credibility of witnesses and is free to disbelieve them even though they are uncontradicted if there is any rational ground for doing so. Code Civ.Proc. §§ 1847, 2061, subd. 3.

5. Witnesses ⇐363(1)

The jury in passing on credibility of a witness may consider his interest in result of the case. Code Civ.Proc. §§ 1847, 2061, subd. 3.

6. Automobiles ⇐245(14)

In action for injuries in collision between two automobiles at street intersection where semaphore began operating at 7 a. m., wherein there was evidence that collision was reported to the police department at 7:02 a. m., and that one of injured occupants noticed that signals were not in operation, about half a block from intersection, whether signals commenced operating so shortly before collision that ordinarily prudent person could not rely upon them, warranting a finding that defendant motorist was not negligent was for jury.

7. Trial ⇐203(1)

A party is entitled to have jury instructed as to his theory of the case if facts warrant such instruction.

8. Automobiles ⇐246(47)

In action for injuries in collision between automobiles at street intersection, wherein jury was entitled to find that signals at intersection had been in operation for less than six seconds before the accident, instruction informing jurors what the law in such case would be with respect to right of way, etc., was properly given.

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Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Jack Alfred Garland, Iola Woods, Rose Ritter and Merle Ritter against Isador Hirsh to recover for damages and injuries sustained in a collision of automobiles. From a judgment for defendant, the plaintiffs other than first named plaintiff appeal.

Affirmed.

Robert M. Miller, of Los Angeles, for appellants.

Parker, Stanbury & Reese, of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from a judgment on the verdict of the jury in favor of defendant Hirsh, arising out of an action for the recovery of damages to property of plaintiff Garland and for personal injuries sustained by plaintiffs Iola Woods and Rose Ritter in a collision between the automobiles of said defendant Hirsh and the plaintiff Garland. Plaintiff Merle Ritter joined in the action because as the husband of Rose Ritter he was person-

ally liable for her hospital and medical bills incurred as result of her injuries.

The appeal is presented upon a settled statement from which it appears that the appellants were not charged with contributory negligence and seek a review of the judgment upon two grounds: (1) insufficiency of the evidence to justify the verdict; and (2) error in giving defendant's instruction No. 7.

According to the settled statement, the first point may be narrowed to the contention that the automobile of plaintiff Garland, in which appellants Rose Ritter and Iola Woods were passengers, was traveling in a northerly direction on Los Angeles Street in the city of Los Angeles, "and entered the intersection of Twelfth Street at the time when the semaphore signals were in operation and 'go' for north and southbound traffic. The respondent was traveling easterly on Twelfth Street and entered said intersection at a time when appellants claim that the signals were 'stop' for east and westbound traffic."

It also appears that respondent, "in his opening argument, stated his defense to be, among other things, that the signals, if operating, commenced operating simultaneously with the entry of the automobiles into the intersection or so shortly before that they did not conclusively decide the case." The narrative of the evidence set out in the statement is limited to the above points, to-wit:

It was stipulated that Twelfth Street is 40 feet wide at its intersection with Los Angeles Street, which is 54 feet wide; that the semaphore signals at that intersection and at Pico and Los Angeles Street are on the same circuit and are both operated by the same automatic switch; that on May 24, 1944, said signals were set to go into operation at 7 a. m., and that Pico Street is the next intersection south of Twelfth Street, approximately 450 feet distant therefrom.

The plaintiff Garland testified that he picked up three passengers on the morning of May 24, 1944, including Rose Ritter and Iola Woods; that Rose Ritter sat beside him in the front seat and Iola Woods sat in the rear seat with the other passenger; that he traveled north on Los Angeles Street to its intersection with Pico Boulevard; that the signals were "stop" at Pico and that he waited for them to turn to "go", whereupon he proceeded northerly toward Twelfth Street; that he traveled this route every day and knew that he must and did drive his car at 10 or 15 miles per hour in order to wait for the signals at Twelfth Street to change to "go"; that when he was 75 or 100 feet south of the intersection of Twelfth Street, he first noticed respondent Hirsh's car about 150 feet west of Los Angeles Street on Twelfth Street traveling 45 to 50 miles per hour; that he next saw the signal on the southwest corner of the intersection change from "go" to "stop" for east and westbound traffic; that he therefore assumed that respondent would heed the signal and he took his eyes from said signal and respondent's automobile and watched the signal on the northwest corner of said intersection; that the last-mentioned signal changed to "go" for north and southbound traffic when he was 25 or 30 feet south of the intersection, whereupon he speeded up to 20 miles an hour; that the next time he saw respondent's automobile was when Rose Ritter shouted "Jack", at which time he was entering the intersection; that he applied his brakes and skidded his wheels and came to a stop when his left front fender collided with the right front fender of respondent's car; that the accident occurred at 7:04 a. m. on May 24, 1944; that he was a garment worker and with Rose Ritter and Iola Woods was employed at a manufacturing establishment at 9th and Los Angeles Streets. Said witness further testified that he was traveling in the lane near the center of the street and was approximately 14 feet into the intersection at the time the collision occurred; that respondent was traveling 45 to 50 miles per hour and did not slow down or swerve from his course at any time before the impact; that after the impact respondent's car swung across Twelfth Street to the northerly curb then cut sharply back in a southerly direction across the south curb of Twelfth Street

and upon the lawn of a church about 50 feet east of Los Angeles Street; that after the accident he noticed the respondent was dazed and stumbling around, but he did not smell liquor or get the impression that respondent had been drinking.

Mrs. Francis Vallerio testified that she alighted from a street car at Twelfth and Main Streets and looked at her watch which showed the time to be 7:02 a. m.; that she was due at 7:30 a. m. at 750 East Twelfth Street and she proceeded to walk easterly; that the signals at Twelfth and Los Angeles Streets were in operation and she crossed Los Angeles Street with the "go" signal for east and west traffic; that when she was about 35 feet from east of Los Angeles Street she looked back and saw Della Smith standing on the corner of Twelfth and Los Angeles Streets facing easterly; that when she observed Della Smith she waited for her; that she did not notice the signals at that instant and thereupon the automobiles of plaintiff and respondent collided; that the respondent's car ran into the plaintiff's car and not vice versa, the front of the Hirsh car and the side of the Garland car being the parts involved; that the Garland car was turned slightly to the east by the impact and that the Hirsh car careened to the left then turned sharply to the right and came to rest on the church lawn approximately 50 feet east of said intersection; that the Garland car entered the intersection first; that the Hirsh car was traveling about 40 miles per hour; that the observations she made were made over her left shoulder, as she walked eastward; that she did not give her name to the police officer; that Mr. Hirsh was dazed and she tried to open the door of his automobile but that it stuck and some man came and helped him out of the car.

Della Smith, a garment worker employed at the same place as Mrs. Vallerio, testified that she was walking easterly on Twelfth Street intending to cross Los Angeles Street; that when she arrived at the southwest corner of said intersection, she noticed that the signals were "go" for north and south traffic; that she continued to watch the signals and they remained the same; after three or four seconds she observed the collision; that she did not observe the cars until they were almost at the point of impact; that she did not drive but estimated the speed of the Hirsh car to be "very fast", about 45 miles per hour, and the speed of the Garland car to be about 20 miles, when she first saw him at the time of the impact he was almost stopped; that the front of the Hirsh car ran into the side of the Garland car at about the hub and that the Garland car entered the intersection first.

Mr. William Wittman testified that he was driving north on Los Angeles Street; that his route took him across Pico Street at Los Angeles Street; that he had not thought about the signals at Pico until several months after the accident when some person telephoned him and asked what he recalled in that regard. Said witness further testified that he usually approached the intersection of Twelfth and Los Angeles from the north arriving there at "very nearly" or "shortly after" 7 a. m. On the morning of the collision he took a route "which he travels about twice a month and takes a little longer", thus he estimated the time of the collision to be between 7:10 and 7:20 a. m.; that the route he took on that morning approached said intersection from the south; that it was his recollection that he noticed the Garland car at Pico; that the signal was "stop" for north and southbound traffic at Pico; that he stopped and noticed the Garland car at that time; that when the signal at Pico turned to "go" for north and south traffic, both he and Garland proceeded north; that he drove to the right and slightly behind Garland; that he had his mother with him whom he intended to and did leave out of his car at the southeast corner of Twelfth and Los Angeles Street and that he intended to turn the corner; that he did not notice or recall how the signals were at that intersection at the time of the collision, but immediately after he noticed that all of the signals on that corner were in operation; that he saw the collision and estimated the speed of both cars at 25 miles per hour and the point of impact to be about the center of the intersection; that

the Hirsh car entered the intersection ahead of the Garland car.

Mrs. Rose Ritter testified that she first observed respondent Hirsh's car when it was practically in the intersection and that she yelled "Jack"; that plaintiff Garland applied his brakes immediately; that she suffered lacerations and had a miscarriage as a result of the collision; the evidence that she suffered a miscarriage consisted of testimony that she was pregnant at the time of the collision and while in the hospital a nurse had noticed that "a small piece of tissue passed" on June 21st; that the nurse did not show this to the doctor and no doctor saw it, but acting on said information, appellant's doctor curetted her the next day; that this curettement would have terminated the pregnancy in and of itself. The small piece of tissue was thrown away by the nurse and was not handled or inspected. Mrs. Ritter testified that she had been hemorrhaging for several days and on June 21st she passed a piece of tissue and called the nurse's attention to it; that she paid no consideration for her ride with plaintiff Garland.

Iola Woods testified that she did not see anything that happened before the collision; that she was struck on the head and was dazed by the impact and was hospitalized for what was claimed to be a severe brain concussion. The emergency hospital records showed that she walked in and out, and remained there for nine minutes. No evidence of concussion was discovered there. Her physician, upon seeing her approximately an hour later, made a note in his records that she had a small laceration on the forehead, but he did not make any entry or record of any concussion. Said plaintiff was permitted to leave her physician's office on foot. She testified that she went to work the next morning and felt dizzy, dazed and sick to her stomach and was sent back to see the doctor by Jack Garland. The doctor examined her and sent her to a hospital. Said witness testified that she remembered talking to the police after the collision at the Georgia Street Receiving Hospital, but did not remember what was said. She did not affirm or deny that she told the police officers at that time "When we were about a half block from the intersection, I noticed the signals and I am sure they were not in operation, but I don't know how they were when we entered the intersection."

Police Officer Fudge was called as a witness by the defendant. He testified that he and his partner arrived at the scene of the accident at 7:04 a. m.; that the defendant told him, "I don't know what happened to me. All I remember is I was on my way to work and I remember going east on Twelfth Street and I crossed Main Street, and then I remember turning right or south on San Pedro, I think. My head hurts quite a bit." The officer testified that San Pedro Street was on beyond and east of Los Angeles Street; that the defendant was in a very dazed condition. Said witness also testified that he talked to appellants Iola Woods and Rose Ritter at the Georgia Street Receiving Hospital within half an hour after the accident and made notes and reports of what they told him; that Iola Woods told him, "When we were about a half block from the intersection, I noticed the signals and I am sure they were not in operation, but I don't know how they were when we entered the intersection." Rose Ritter told him, "I think both parties were traveling about the same rate of speed prior to the accident"; that each plaintiff appeared to be perfectly rational and aware of what she was saying; there was no evidence that either of them was dazed. Said officer also testified that marks on the street showed that the impact occurred 28 feet east of the west curb of Los Angeles Street and 14 feet north of the south curb of Twelfth Street.

Captain Durham of the Los Angeles Police Department was called by the defendant and testified that the records of the police department show that at 7:02 a. m. the police received a telephone call reporting the collision at Twelfth and Los Angeles Streets. The original records were produced and it was testified that the time thereon is entered automatically by an electric clock. The said record was contained in a bound volume in which

entries were in chronological order by the minute they were received. The record showed that the call went out to police radio car No. 11, occupied by Officers Fudge and Hille, at 7:03 a. m.

A physician called by plaintiffs, a Dr. Rinckenberger, testified that it was a common occurrence for one who has been struck on the head and dazed as a result of a blow to suffer an amnesia which destroys his recollection of events immediately preceding the occurrence, perhaps for a few seconds, perhaps for a much longer period.

Respondent Hirsh testified that he suffered a concussion from the collision and did not remember anything that happened. He sustained a blow upon the head and was put to bed at the emergency hospital. The records of said hospital showed that he suffered a concussion. Said respondent introduced photographs of his automobile taken after the accident and identified by the witnesses Fudge and Hille, showing that the damage to his car was confined to the right side thereof, and that no part of the front end thereof was damaged other than the extreme right-hand tip of his right front fender.

It is here contended that since "the evidence disclosed no negligence" on the part of appellants or the driver of the automobile with whom they were riding as passengers, "it was reversible error for the jury to bring in a verdict for the respondent, where the only competent evidence in the case disclosed that the respondent drove his automobile through a semaphore signal turned to and remaining at 'stop' during the time" respondent traveled the last 150 feet before his automobile entered the intersection. In this connection, appellants argue that they established by the direct and positive testimony of three disinterested witnesses that the signals were in operation for a considerable time before the collision; and that the evidence introduced by respondent in support of his theory of the case, i.e., that the signals commenced operating so shortly before the collision that an ordinarily prudent person could not rely upon them,—created "no more than an inference" which was dispelled by the direct and positive evidence produced by appellants. Respondent relied upon (1) the stipulation that the signals were set to go into operation at 7 a. m.; (2) the testimony that the collision was reported to the police department at 7:02 a. m., according to the time stamped on the report by an automatic electric clock; and (3) the testimony of one of the police officers that appellant Iola Woods stated to him that "When we were about half a block from the intersection, I noticed the signals and I am sure they were not in operation, but I don't know how they were when we entered the intersection."

[1] An examination of the settled statement, a recital of which is hereinbefore set out, discloses that much of the evidence introduced by appellants and relied upon by them was impeached and contradicted in many important particulars, and was not of the clear and convincing type required to overcome even an inference as a matter of law. As was stated in Huddy v. Chronicle Publishing Co., 15 Cal.2d 554, 568, 103 P.2d 421, 428: "It is not the rule that a jury must accept as true all direct evidence offered in opposition to an inference. If the direct evidence to the contrary is not clear, positive, uncontradicted, and is not free from doubt, the jury is entitled to reject it." See, also Tsirlis v. Standard Oil Co., 32 Cal.App.2d 469, 476, 90 P.2d 128.

[2-5] Again in Blank v. Coffin, 20 Cal. 2d 457, 460, 126 P.2d 868, 870, is found the following pertinent language:

"An inference is a conclusion as to the existence of a material fact that a jury may properly draw from the existence of certain primary facts. Cal. Code Civ. Proc. §§ 1958, 1960, 1832; see cases cited in 10 Cal.Jur. 736—738, § 59. It is not always possible for a party to a lawsuit to introduce evidence directly bearing upon the existence of a fact that he is attempting to prove. The evidence available to him may serve only to establish the existence of certain primary facts that are logically connected with the material fact. If a jury can reasonably infer from these primary facts that the material fact exists, the party has introduced sufficient

evidence to entitle him to have the jury decide the issue. The jury is not compelled to draw the inference, however, in the absence of contrary evidence and may refuse to do so. Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury. See cases cited in 10 Cal.Jur. 738, 739, § 60. * * * The jury, however, is the sole judge of the credibility of the witnesses (Cal. Code of Civ.Proc., § 1847; see cases cited in 27 Cal.Jur. 182, § 156) and is free to disbelieve them even though they are uncontradicted if there is any rational ground for doing so. Hinkle v. Southern Pacific Co., 12 Cal.2d 691, 87 P.2d 349; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Burke v. Bank of America, etc., Ass'n, 34 Cal.App.2d 594, 94 P.2d 58; People v. La Fleur, 42 Cal.App.2d 50, 108 P.2d 99. See cases collected in 27 Cal.Jur. 184, sec. 156; 8 A.L.R. 796. In most cases, therefore, the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does exist on the basis of the inference. Bushnell v. Yoshika Tashiro, supra, [115 Cal.App. 563, 2 P.2d 550]; Market Street R. Co. v. George, 116 Cal.App. 572, 576, 3 P.2d 41; Day v. General Petroleum Corp., 32 Cal.App.2d 220, 89 P.2d 718.

"There are many reasons why a jury may refuse to believe a witness. Section 1847 of the Code of Civil Procedure provides: 'A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.' Section 2061, subd. 3 of the Code of Civil Procedure provides: 'That a witness false in one part of his testimony is to be distrusted in others.' In passing on the credibility of a witness, the jury is entitled to consider his interest in the result of the case. See cases collected in 27 Cal.Jur. 180, § 154."

[6] In the instant case, the testimony presented a series of questions of fact, and it was incumbent upon the jury to make an honest effort to arrive at the truth and to discard testimony which for valid reasons impressed them as untrustworthy.

It is also urged by appellants that the court committed prejudicial error in giving defendant's instruction numbered 7 to the jury:

"If you find that the automatic traffic signals were operating at the time of the accident but that they began to operate so shortly before the accident that reasonably prudent persons approaching the intersection would not rely thereon, you should take such fact into consideration in judging the conduct of the drivers in this case. Solely for the purpose of aiding your deliberations, should you decide that the circumstances were such that reasonably prudent persons in the positions of the drivers in this case would give heed to the right of way rule where traffic signals are not in operation, the court states it to you as follows:

" 'The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway.

" 'When two vehicles enter an intersection from different highways at the same time the driver of the vehicle on the left shall yield the right of way to the driver of the vehicle on the right.' "

[7] It is settled law that a party is entitled to have the jury instructed as to his theory of the case, if the facts warrant such instruction. Morrow v. Mendleson, 15 Cal.App.2d 15, 21, 58 P.2d 1302.

[8] Since the jury in the instant cause was entitled to find that the signals had been in operation for less than six seconds before the accident, it was proper for the trial court to inform the jurors what the law in such a case would be.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

**MAGUIRE et al. v. LEES et al.**

**Civ. 7238.**

**Sac. 5755.**

District Court of Appeal, Third District, California.

May 27, 1946.

**Rehearing Denied June 21, 1946.**

**Hearing Denied July 24, 1946.**

**1. Appeal and error ⇐1008(3)**

The trial court must resolve doubtful language in contract and determine effect of subsequent agreement ratifying it, and appellate court will not disturb decision of trial court where instruments considered in light of facts are susceptible of interpretation placed upon them.

**2. Contracts ⇐170(1)**

The practical construction given to a contract by parties, and their conduct under it, are persuasive in construing such contract.

**3. Mines and minerals ⇐64**

A lessee's interest in ten-year mining lease with option to purchase was assignable especially where lease itself contemplated that it might be assigned. Civ.Code, § 1044; Public Resources Code, § 2356.

**4. Assignments ⇐82**

A stipulation against nonassignment of a contract may be waived by conduct of the parties.

**5. Mines and minerals ⇐64**

Evidence sustained finding that lessors of a mine waived requirement that lessee's assignees should execute a writing agreeing to be bound by terms of lease. Civ. Code, § 1044; Public Resources Code, § 2356.

**6. Mines and minerals ⇐64**

The condition of mining lease that lease might be assigned provided assignees should agree to be bound by terms of lease was not necessarily applicable to a partial assignment.

**7. Mines and minerals ⇐97**

Assignees of 60 per cent. interest in mining lease were not precluded from becoming mining partners within statute on ground that assignees did not become owners of a mine, since it is not necessary to existence of mining partnership that property which is to be operated be owned in fee by the partners. Public Resources Code, §§ 2351, 2352.

**8. Mines and minerals ⇐64**

Where lessee assigned a 60 per cent. interest in mining property and lessee and assignees thereafter engaged as mining partners, lessee's subsequent quitclaim deed to lessors merely conveyed such interest as lessee had at date of quitclaim leaving assignees' interest unaffected. Public Resources Code, §§ 2351, 2352, 2355, 2356, 2359, 2360.

**9. Mines and minerals ⇐68(2), 100**

Evidence that mining lessee's assignee ordered a temporary suspension of mine operations because of government order suspending all nonessential gold mining operations during war and that lessors agreed to suspension failed to establish that assignee wrongfully ordered discontinuance of operations so as to effect a forfeiture of assignees' interests and termination of partnership with lessee. Public Resources Code, §§ 2354, 2356; Civ.Code, § 1044.

**10. Appeal and error ⇐907(5)**

Where appellants did not specify such exhibits as they desired included in the record, appellate court could not say that findings of fact which appellants claimed were without support in evidence were unsustained by record that was before trial court, and if findings needed any additional support it would be presumed that omitted evidence supported them. Rules on Appeal, rule 5.

**11. Licenses ⇐18½**

Assignment of 60 per cent. interest in mining lease was not a sale of "securities" under Corporate Securities Act, so as to require permit from Corporation Commissioner for such assignment. Gen.Laws, Act 3814, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Securities".

**12. Appeal and error ⇐173(2)**

Lessors appealing from judgment quieting title to mine interest in lessee's assignees could not claim that interests as-

signed were securities which could not be assigned without permit from Corporation Commissioner, where such point was not made an issue in pleadings or in the evidence. Gen.Laws, Act 3814, § 2.

**13. Appeal and error ⇐219(2)**
**Trial ⇐397(3)**

Appellants could not claim error in failure to make a finding upon a point where such point was not an issue and no finding on the subject was requested.

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Appeal from Superior Court, Nevada County; Raymond McIntosh, Judge.

Action by Phoebe Edna Maguire and another against Charles Edward Lees and another to quiet title to mining property wherein defendants filed a cross-complaint bringing in as new parties defendant Sidney R. Miller, Larry Lawson and Harrison Cassell. From a judgment for the cross-complainants, plaintiffs and J. E. Lannan, as administrator of the estate of Harrison Cassell, deceased, appeal.

Affirmed.

H. Ward Sheldon, of Nevada City, for appellants Maguire and others.

Nathan Newby and Newby, Holder & Newby, all of Los Angeles, for appellant Lannan.

James Snell and Lynne Kelly, both of Grass Valley, for respondents.

ADAMS, Presiding Justice.

This is an appeal from a judgment in favor of defendants (cross-complainants) in an action instituted by Bernard Maguire and Phoebe Edna Maguire against Charles Edward Lees and his daughter, Antoinette Lees Howard, to quiet title to certain mining property in Nevada County. Defendants filed an answer and a cross-complaint bringing in as new parties defendant, Sidney R. Miller, Larry Lawson, and Harrison Cassell. In substance the answer and cross-complaint alleged that on March 16, 1942, the Maguires had entered into an agreement with Miller (hereinafter referred to as Exhibit A) to lease to him the mining property in controversy for a period of ten years, with option to purchase; that on April 14, 1942, Miller assigned and conveyed to Lees and Mrs. Howard a 60% interest in said lease and his rights thereunder, which assignment (hereinafter referred to as Exhibit B) was subsequently, and on August 14, 1942, modified in certain respects by a writing (hereinafter referred to as Exhibit C); that after said assignment defendants performed all things required to be done under Exhibit A and engaged in mining operations on the property as mining partners with Miller and Lawson, all with the knowledge of cross-defendants, and expended large sums of money in the working of said mine; that on or about the 15th day of April, 1943, Miller, without the knowledge of defendants, pretended to surrender his lease of the premises to plaintiffs, but did not surrender possession of the property; that from and after April 30, 1943, cross-defendants prevented cross-complainants from entering upon the premises, contending that the latter had no interest therein. It was further alleged that cross-complainants were the owners of an undivided 60% interest in the leasehold estate created by Exhibit A, and it was prayed for a decree to that effect and that cross-complainants' said rights be quieted as against cross-defendants.

Cassell, answering the cross-complaint, asserted that on April 9, 1943, the Maguires had executed a lease of the premises to him, and that he had been in exclusive possession thereof since said date and had prevented the cross-complainants from entering thereon. Annexed to his answer was a copy of a quitclaim deed executed by Miller on April 9, 1943, by the terms of which Miller purported to "release, remise and quitclaim" to the Maguires "all his right, title and interest in and to" the said mining claim, and "all his right, title and interest in and to" the agreement of lease of March 16, 1942. Said document was also executed by the Maguires, who agreed therein to accept the surrender, to waive the provisions of Exhibit A relating to payment of royalties accrued or to accrue, and to release Miller from all liability pursuant to section 16 of said lease.

Miller and Lawson answered the cross-complaint and among admissions contained

therein admitted that cross-complainants had expended the sum of $7500 during the development of the property. They, however, disclaimed any interest in the property.

The Maguires in answer to the cross-complaint admitted numerous allegations thereof, but denied that they knew that Lees and Howard and Lawson and Miller were copartners in the working of the mine, or that cross-complainants have or had, "by virtue of the sixty per cent (60%) interest in and to the rights granted by Exhibit A or otherwise, the right to the possession of said lands and improvements and/or to conduct mining operations thereon." Also they denied that cross-complainants acquired any interest in the lands referred to, and denied that the leasehold interest created by the agreement with Miller remained in effect.

Upon the issues created by the pleadings the cause was heard by the court sitting without a jury, and at the conclusion findings were filed, the significant portions of which are as follows: That after the making of the agreement between the Maguires and Miller, the latter and Lawson, as copartners, took possession of the property; that by the agreement of April 14, 1942, Miller assigned and conveyed to Lees and Mrs. Howard a 60% interest in the lease "together with a like interest in and to all rights, interests and privileges, in said real property, then vested in" Miller; that plaintiffs knew at all times that said instrument had been executed and knew the contents thereof, and that, "with the knowledge and consent" of plaintiffs, Lees and Mrs. Howard took possession "in common with" Miller and Lawson, as "mining partners." The execution of the modification of August 14, 1942 (Exhibit C), was also found, and it was further found that plaintiffs knew on that date that it had been executed and knew the contents thereof. It was further found that the cross-complainants had fully performed all things required to be done under the lease, that they were the owners of an estate for years in said lands, and were entitled to possession thereof; that on April 9, 1943, plaintiffs and cross-defendants knew that cross-complainants had expended large sums of money in operating the said mine. Regarding the purported lease to Cassell it was found that at the time of its execution Cassell knew that cross-complainants claimed to be the owners of a 60% interest in the lease and the right to possession of the premises, and took his lease with knowledge or notice of all facts set forth in the findings. Regarding section 16 of Exhibit A, which provided terms upon which the lease might be terminated by the lessors, it was found that no notice such as was therein provided for had ever been given by the lessors. As for the quitclaim deed of Miller it was found that same did not surrender, or purport to surrender, any rights of cross-complainants in the property. The amount expended by cross-complainants was found to be $7500, expended in driving drifts, tunnels and adits, and constructing shops, cabins and other buildings, which expenditures had enhanced the value of the property $10,000; and it was concluded that at the time of Miller's surrender said cross-complainants had a partnership lien under Division 2, chapter 5, section 2354, of the Public Resources Code for the sum of $7500, upon all of the property and assets of said mining partnership. The provisions of section 20 of Exhibit A, which provided the terms under which the lease might be assigned, were found to have been waived by the Maguires.

A judgment for cross-complainants followed, adjudging that they were the owners of an estate for years in the property and were entitled to possession thereof, and that, as against their said interests, neither plaintiffs nor Cassell's administrator Lannan—who had in the meantime been substituted after Cassell's death—had any right, title, estate or interest in the premises.

On this appeal appellants contend that by the assignments of April 14th and August 14th (Exhibits B and C), cross-complainants acquired no interest in the lease (Exhibit A); that Miller's purported surrender of the lease on April 9, 1943, terminated any rights Lees and Mrs. Howard had therein; and that the court's finding that plaintiffs had waived compliance with the provisions of paragraph 20 of Exhibit A, its finding of a partnership lien, and

other findings referred to, are without support in the evidence.

The assignment of April 14th (Exhibit B) was in the form of a letter to Lees which was prepared by cross-defendant Miller himself, and signed by him and by Lees and Lawson. It reads as follows:

"Pursuant to our recent conversations and in confirmation of our mutual understandings concerning my proposal to you respecting the operation of the Mammoth Mine, on which I hold a working lease and option to purchase, I am pleased to set out here the details of our plan for commencing work and developing the property.

"As you know, I obtained the lease and option on March 16, 1942, from Phoebe Edna Maguire and Bernard Maguire, of Sierra County, California, where the mine is located, and as you will see from the lease, we have until July 1, 1942, to commence operations which must be continuous at the rate of one shift per day for the life of the lease, or until I should exercise the option to purchase the property.

"I will give you a copy of the lease before leaving for the mine—my partner, Larry Lawson and I believe we should start work as soon as possible as this is a fine time of year to work in that region.

"As we have agreed, $5,000.00 should be sufficient to conclude the development work necessary to bring the property into production and for that sum I will assign and *do now assign* to you and your associate, Mrs. Robert S. Howard, of Bel-Air, California, *sixty per cent (60%) interest of the lease and option*—Thirty percent (30%) to you and Thirty percent (30%) to Mrs. Howard.

"In the event $5,000.00 is not sufficient to bring the property into production as discussed by us, it is understood and agreed that you will provide an additional $2500.00 working capital which shall be repaid to you from the proceeds of the earnings from Fifteen percent (15%) *of our Forty percent (40%) holdings of the lease and option*, the payment of which shall be made commencing with the first earnings and continued until the whole sum of $2500.00 is paid back.

"Your signature below will signify your approval of the above and will constitute a contract between us." (Italics added.)

Exhibit C provided:

"That the said parties of the first part, for and in consideration of the sum of Five Thousand Dollars, deposited by the parties of the said second part in the Bank of America on April 17, 1942, to the credit of the parties of the first part, and to be used in the development of the Mammoth Springs Mine Lease, the receipt of which is acknowledged by the parties of the first part, has granted and do grant unto the parties of the second part and their heirs and assigns, that participation in the above mentioned lease and in any water rights that may be acquired to exploit said lease, as provided for in our original contract, dated April 14, 1942 and which this indenture now supersedes.

"It is expressly agreed and understood that in case the above mentioned deposit fails to reach its objective, which is the ancient river channel passing through the Mammoth Springs Mine Lease, then the parties of the second part agree to furnish additional capital as required, to be used according to their instructions to reach the objective specified, and for which expenditures the parties of the first part agree to furnish good and sufficient vouchers.

"And in consideration of the foregoing clause for additional financing, it is agreed and understood by the parties of the first part, that in the event profits accrue to the Lease from the operation of the enterprise, 15% of such profits will be made available to the parties of the second part until they have been reimbursed for their investment; the remaining profits to be prorated between the contracting parties according to their participation in the Lease."

As hereinabove stated, the trial court found that the assignment of April 14th conveyed to Lees and Mrs. Howard a 60% interest in Exhibit A, together with a like interest in and to all rights, interests and privileges in the real property then vested in Miller.

[1] That it is the province of a trial court to resolve doubtful language in a

contract and to determine the effect of a subsequent agreement ratifying it, and that an appellate court will not disturb the decision of the trial court where the instruments, considered in the light of the facts, are susceptible of the interpretation placed upon them, was held in Tide Water Associated Oil Co. v. Curtin, 41 Cal.App.2d 884, 895, 896, 107 P.2d 945. Also see In re Estate of Northcutt, 16 Cal.2d 683, 690, 691, 107 P.2d 607; O'Hare v. Peacock Dairies, Inc., 26 Cal.App.2d 345, 354, 79 P.2d 433; In re Estate of Boyd, 24 Cal.App.2d 287, 290, 74 P.2d 1049; Neff v. Mutual Life Insurance Co., 48 Cal.App.2d 110, 112, 119 P.2d 404; McNeny v. Touchstone, 7 Cal.2d 429, 435, 60 P.2d 986; Richards v. Pacific Southwest Discount Corp., 44 Cal.App.2d 551, 560, 112 P.2d 698.

[2] In arriving at its decision it was proper for the trial court to consider the conduct of the parties under the assignment, as it is a well-established principle that the practical construction given to a contract by the parties, and their conduct under it, are persuasive in determining the construction to be put upon the instrument. Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 481, 19 P.2d 785; Rosenberg v. George A. Moore, 194 Cal. 392, 403, 229 P. 34; Commercial Discount Co. v. Cowen, 18 Cal.2d 610, 615, 116 P.2d 599; Burns v. Peters, 5 Cal.2d 619, 623, 55 P.2d 1182; Katz v. People's Finance, etc., Co., 101 Cal.App. 552, 558, 281 P. 1097. And the record before us shows not only the construction given by the trial court, but the construction put upon the instrument by Miller, Lawson and Lees, to wit, that it constituted a conveyance to Lees and Mrs. Howard of a 60% interest in the leasehold interest which Miller had acquired by his lease from the Maguires, and that Lees and Mrs. Howard became mining partners with Miller and Lawson.

[3] The interest of Miller in the lease was clearly assignable. (Civ.Code, sec. 1044; 6 C.J.S., Assignments, § 8, page 1054; Public Resources Code, sec. 2356; 3 Cal.Jur., p. 253; 36 Am.Jur., p. 318; same, pp. 395, 396.) The lease itself contemplated that it might be assigned, since it provided in section 20: "It is expressly understood and agreed, that this lease and option may be assigned by the Lessee, provided, however, that prior to such assignment becoming effective such assignee or assignees shall have agreed in writing to be bound by and subject to every term and condition of this agreement and to perform every covenant and obligation herein specified to be kept and performed by the Lessee, and to assume and pay all demands, obligations, payments herein, and perform all the terms and conditions hereof, whatsoever the same may be, created by this agreement on the part of the Lessee herein, all to the same extent and effect as if the said assignee or assignees had been originally named in this agreement as the Lessee or Lessees." Also, section 22 provided that the agreement should inure to the benefit of the parties and their "assigns."

[4, 5] Appellants argue that the assignment, if it constituted such, did not become effective because Lees and Mrs. Howard did not agree in writing to be bound by the conditions of the lease. Except in so far as the execution of Exhibits B and C are concerned it does not appear that Lees and Mrs. Howard executed any writing agreeing to be so bound; but the trial court found that this requirement was waived by the lessors, and there is ample evidence to sustain an inference to that effect. A stipulation against nonassignment of a contract may be waived by the conduct of the parties. (3 Cal.Jur., p. 240.) It is conceded by all parties that Lees and Mrs. Howard advanced a total of $7500 which was expended in pursuance of the terms of the lease, and it is not contended that the terms of same were not met except in minor details. The Maguires never objected to the assignment, and that they had knowledge that the assignees had an interest in the lease is apparent from the evidence as a whole. Bernard Maguire was living in a cabin at the mine; he was a witness to Exhibit C, and Mr. Lees testified that he had frequent conversations with Maguire about his rights in the property; that he told him he had a 60% interest in the lease and was furnishing all of the money; and that in June, 1942, he

had a conversation with Mrs. Maguire and Lawson in which the latter stated to Mrs. Maguire that Lees was one of the partners in the mine and was putting up the money to do the work, and that Lees then told her he had a controlling interest. He also testified that he discussed the assignment of August 14th, Exhibit C, with Maguire who read it and said he would be happy to sign it—that they discussed it all of one day.

[6] Furthermore, the condition of the lease regarding assignment did not necessarily apply to a partial assignment. See Spangler v. Spangler, 11 Cal.App. 321, 323, 104 P. 995; Adelstein v. Greenberg, 77 Cal.App. 548, 553, 247 P. 520.

Also, the provisions of section 20 were not made the ground of any forfeiture of the interests of the lessees, nor was any termination of the lease ever declared under its terms, which expressly provided, in section 15, that the lease could be terminated by the lessors for any claimed default *only* upon the giving of notice with specifications, after which the default should have continued unabated for thirty days. It is not even contended that any such notice was ever given by the Maguires.

If any doubt existed as to the effect of the instrument of April 14th as conveying a 60% interest in the leasehold, same is dispelled by that of August 14th (Exhibit C), which recited that Miller and Lawson, in consideration of $5000 deposited to their credit by Lees and Mrs. Howard, to be used in developing the Mammoth Springs Mine Lease, "has granted and do grant unto the parties of the second part * * * that participation in the above mentioned lease * * * as provided for in our original contract dated April 14, 1942 * * *." This instrument was signed by Miller and Lawson, and was witnessed by plaintiff Bernard Maguire; and Lawson testified that a copy of same was signed by Lees.

[7] Appellants contend, however, that even conceding that Lees and Mrs. Howard acquired an interest in the leasehold by virtue of Exhibits B and C, they nevertheless did not become mining partners with Miller and Lawson. Sections 2351 and 2352 of the Public Resources Code provide that a mining partnership exists when two or more persons own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom and actually engage in working the claim; that an express agreement to become partners is not necessary, and that the relation arises from the ownership of shares or interests in the mine and working it for the purpose of extracting minerals therefrom.

Appellants contend, however, that Lees and Mrs. Howard did not become *owners* of a mine within the meaning of those statutes, and that they do not apply. There is no merit in this contention. In Harper v. Sloan, 177 Cal. 174, at page 179, 169 P. 1043, 181 P. 775, the court said, that it is not necessary to the existence of a mining partnership that the property which is to be operated be owned in fee by the partners; and it was there held that an instrument made by Harper, a lessee of a mine, conveying to Sloan and another a two-thirds interest in a contract which had given him possession and a right to purchase, constituted the three mining partners. Also see Treat v. Murdock, 8 Cal. 2d 316, 320, 65 P.2d 881; Del Giorgio v. Powers, 27 Cal.App.2d 668, 678, 81 P.2d 1006; Eriksson v. Wise, 56 Cal.App.2d 574, 581, 132 P.2d 905; 17 Cal.Jur. 440, sec. 106; 3 Lindley on Mines, 3d Ed., sec. 798, p. 1963.

The testimony shows that the mine was worked by the partners, Lees himself performing some labor. Furthermore, that Miller and Lawson recognized Lees and Mrs. Howard as their mining partners appears in numerous places in the evidence. In fact, Miller testified that he understood that he, Lawson and Lees were partners in the mining operations. Also appellants, in an appendix to their opening brief, set forth what purports to be a letter from Miller to Lees dated November 1, 1942, in which Lees is referred to as a "partner," and a letter from Lees to Miller of November 3, 1942, in which Miller and Lawson are recognized as "co-partners."

[8] Appellants' efforts to show that Lees and Mrs. Howard did not become mining partners with Miller and Lawson are obviously made for the purpose of supporting their contention that Miller's quitclaim and surrender of the original lease had the effect of canceling same and that "all subsidiary rights of the cross-complainants (if any) were also cancelled in so far as plaintiffs are concerned." No such results followed. Even conceding the right of Miller to surrender to plaintiffs such right, title and interest as he had, he was powerless to convey the interest which had been acquired by Lees and Mrs. Howard, without their authority. Section 2359 of the Public Resources Code provides that no member of a mining partnership can, by a contract in writing, bind the partnership, except by express authority derived from the members thereof. Section 2360 lodges in the members owning a majority of the interests in a mining partnership the power to bind it in the conduct of its business; section 2355 provides that the mining ground owned and worked by partners in mining is partnership property, and section 2356 provides that one of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership, the purchaser, from the date of the purchase becoming a member thereof. The effect of Miller's quitclaim given without the knowledge or consent of Lees and Mrs. Howard was therefore to convey to the Maguires only such interest as he himself had at the date of the quitclaim, leaving the 60% interest of Lees and Mrs. Howard unaffected.

[9] Appellants tacitly admit this in that they attempted to show at the trial—and argue before this court—that Lees wrongfully ordered discontinuance of operations at the mine in October, 1942, and thereby not only effected a forfeiture of the interests of Mrs. Howard and himself and terminated the partnership, but effected also a forfeiture of Exhibit A. To show that a discontinuance of work at the mine was ordered by Lees, appellants rely upon a letter written by Lees to Miller on October 28, 1942. A portion only of this letter appears in the record before us, and though that portion indicates that Lees ordered a limitation of the operations that were to be carried on for the time being he did not entirely suspend them, and that resumption of operations was contemplated. Mr. Lees testified that he was influenced in this respect by the government order of October 8, 1942, suspending all non-essential gold mining operations, which he had been informed and believed was applicable to their operations. While there is some question as to whether this order did apply to same, the trial court found that Lees believed in good faith that it did, and that "so believing, and with the knowledge and consent of the said plaintiffs," defendants and Miller and Lawson ceased work and shut down the mine on November 6, 1942. It also found that such cessation was not intended to be permanent but only for the duration of the war or until further order of the War Production Board.

There is evidence that a letter was written to Miller by the Maguires agreeing to suspension of operations until the government allowed gold mining to continue; and at the trial Mrs. Maguire testified that on April 8, 1943, which was the day before the lease to Cassell was executed, she did not consider that Miller was in default on his lease, that on November 6 or 7, 1942, she and Mr. Maguire extended Miller's time to perform under the lease, and presumed from information gained from the papers and radio that all non-essential mines would be shut down. Also, Miller testified that he secured from the Maguires a memorandum dated November 30, 1942, authorizing suspension of operations to protect him in the lease—that he wrote the memorandum and the Maguires signed it; and that he told the Maguires that they had done enough shifts pursuant to the requirements of Exhibit A, to last two years.

It may be said at this point, regarding appellants' contentions that the evidence is insufficient to support certain findings, that the record before us does not contain all of the evidence that was before the trial court. For instance, the deposition of Mrs. Howard by stipulation of the parties, was

omitted therefrom. Also, while the record shows that a voluminous correspondence was carried on between the various parties after April 1, 1942, particularly between Miller, Lawson and Lees, and that at least fifty letters were introduced, appellants did not make such exhibits a part of their record on appeal, and only occasional excerpts from some of them were read into the record. Also proceedings in some action instituted by Mrs. Maguire, a map referred to as the Uren map, the deposition of Mrs. Maguire, the Maguires' lease to Cassell of April 9, 1943, and two sketches (apparently showing work done in the tunnel), though introduced in evidence, were omitted from the record before us, as was the memorandum which Miller secured from the Maguires authorizing suspension.

[10] Under Rule 5 of the Rules on Appeal, which rules became effective July 1, 1943, and were in effect when this appeal was taken in January, 1945, it was incumbent upon appellants to specify such exhibits as they desired included in the record; and appellants' notice in this case failed in this respect. In this state of the record we cannot say that the findings of fact which appellants claim are without support in the evidence are unsustained by the record that was before the trial court. If the findings need any additional support it will be presumed that the omitted evidence supports them. Hughes v. De Mund, 7 Cal.2d 504, 506, 61 P.2d 455; Loewenberg v. Schneider, 14 Cal.2d 305, 93 P.2d 1014; First National Bank of Oroville v. Aldridge, 33 Cal.App.2d 485, 487, 92 P.2d 674; Swaney v. Black, 26 Cal.App. 2d 314, 316, 79 P.2d 176; Fares v. Morrison, 54 Cal.App.2d 773, 775, 129 P.2d 735; Klein v. Maddox, 59 Cal.App.2d 141, 144, 138 P.2d 28; 4 C.J.S., Appeal and Error, § 1172, pages 1675, 1677.

It is also asserted by appellants that the moneys advanced by Lees and Mrs. Howard were wasted and did not enhance the value of the property, and that this was due to the blunders by Lees in directing the extension of the tunnel contrary to the views of Miller and Lawson, so that it did not reach the desired objective. But the findings of the trial court in this behalf find ample support in the testimony of Lees. The objective of the parties in extending the tunnel was the old river channel, which Miller himself admitted was reached. Whether it reached the center of the channel or only the rim of it was not demonstrated.

[11, 12] Appellants also urge that the interests assigned to Lees and Mrs. Howard were "securities" under the Corporate Securities Act (2 Deering's Gen.Laws, Act 3814, sec. 2), and, as such, not assignable without a permit from the Corporation Commissioner, which was not given. But the assignment in this case was not such security. See In re Lamb, 61 Cal.App. 321, 215 P. 109; Austin v. Hallmark Oil Co., 21 Cal.2d 718, 727, 134 P.2d 777; People v. Steele, 2 Cal.App.2d 370, 374, 36 P. 2d 40. At any event, appellants are in no position to urge this point. It is not made an issue in the pleadings, nor is our attention directed to any evidence on the point.

[13] Appellants also urge that the trial court erred in failing to find what their rights are if Lees and Howard are owners of a 60% interest in the lease. Again this was not an issue in the case, and it does not appear that any finding on the subject was requested.

Regarding the lien of Lees and Mrs. Howard, appellants contend that Lees and Mrs. Howard could not claim such a lien "on the mining claim" and at the same time claim a 60% interest in the lease. This contention finds answer in section 2354 of the Public Resources Code which provides that each member of a mining partnership has a lien on the partnership property for money advanced by him for its use; and the lien declared by the judgment was not on the "mining claim" but upon "the property and assets of the mining partnership formerly composed of" Miller, Lawson, Lees and Mrs. Howard, including the rights transferred by the lease (Exhibit A).

Appellants also advance some other contentions, including one that the motion for a new trial and a motion to vacate the judgment under section 663 of the Code of Civil Procedure were improperly denied.

The grounds for those motions are the same that are urged as grounds for reversal, and for the reasons hereinabove stated were properly denied.

The judgment is affirmed.

THOMPSON and PEEK, JJ., concur.




**STUMP et al. v. CORNELL CONST. CO. et al.***
**Civ. 15110.**

District Court of Appeal, Second District, Division 1, California.

May 24, 1946.

**Hearing Granted July 18, 1946.**

**1. Dedication ⇐15, 20(2)**

The vital principle of dedication is the intention to dedicate, and, whenever this is unequivocally manifested, the dedication has been made so far as owner of soil is concerned, but the intention to dedicate is not shown merely by the fact that owner permissively allows public to use a way.

**2. Dedication ⇐29**

Where map and other facts with reference to a subdivision show only an offer to dedicate alley, a subsequent conveyance without reservation amounts to a revocation of offer unless purchaser has notice of some facts which would estop grantor from revoking.

**3. Dedication ⇐31**

Where a map and other facts with reference to a subdivision show only an offer to dedicate alley, an acceptance, either by public user or formal resolution of acceptance, is essential to a completed dedication.

**4. Vendor and purchaser ⇐229(2)**

A municipal ordinance that is related to the title of land and actually affects, or purports to affect, such title, does not constitute record notice unless recorded according to law.

**5. Easements ⇐1**

An "easement" is an interest in land and directly related to the title.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement".

**6. Vendor and purchaser ⇐229(2)**

Ordinances that relate to police power and limit use of lands, such as zoning ordinances, do not affect title to land and hence need not be recorded.

**7. Dedication ⇐19(2), 35(2)**

The words "future alley", as used in subdivision map and in resolution accepting streets and alleys dedicated by such map and in city ordinance purporting to govern dedication, are merely descriptive and of no significance with respect to the creation of an easement for alley purposes. Business and Professions Code, §§ 11500–11628.

See Words and Phrases, Permanent Edition, for all other definitions of "Future Alley".

**8. Dedication ⇐19(1)**

In determining whether a strip of land indicated on subdivision map as a "future alley" was dedicated as an easement for alley purposes, the subdivision map act has no application and the case is governed by the law of easements and the law of gifts. Business and Professions Code, §§ 11500–11628.

**9. Dedication ⇐1**

The word "dedicate" means to give or offer to give.

See Words and Phrases, Permanent Edition, for all other definitions of "Dedicate".

**10. Dedication ⇐31, 37**

A dedication ripens into an easement only when it is either formally or impliedly accepted, the latter of which occurs when property is used by public for such a length of time, in the circumstances, as will conclusively establish an intention to accept dedication.

**11. Dedication ⇐31**

Neither a municipality nor any political subdivision, corporation, or individual is

* Subsequent opinion 175 P.2d 510.

obligated to accept property without consent.

**12. Dedication ⇐12**

Only one who has a vested estate in servient tenement has power to dedicate an easement by proper conveyance. Civ.Code, § 804.

**13. Dedication ⇐29**

Where subdivision map indicated dedication of avenue, street, and boulevard shown on map, as well as strips of land designated as "future street" and "future alley", but city rejected dedication with respect to future alley, and thereafter subdivider sold land without reservation, offer was extinguished and city's subsequent formal acceptance of dedication of alley was ineffective. Civ.Code, § 804; Business and Professions Code, § 11611.

**14. Quieting title ⇐7(1)**

Where city rejected dedication of easement for alley purposes appearing in subdivision map and plaintiff thereafter acquired land involved with no record notice of an easement and city subsequently, by resolution, attempted to accept original offer of dedication, plaintiff was entitled to a judgment quieting his title to the purported alley. Business and Professions Code, §§ 11500–11628; Civ.Code, § 804.

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Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Lowell S. Stump and Laura H. Stump against Cornell Construction Company and the City of Los Angeles to quiet title to a purported right of way of an alley at the rear of plaintiff's property. From a judgment for defendant city, plaintiffs appeal.

Reversed with directions.

M. C. Schrager, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., and Bourke Jones and Roger Arnebergh, Asst. City Attys., all of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from a judgment for defendant in an action to quiet title.

The action involves a purported right of way of an alley at the rear of plaintiff's property. The City of Los Angeles is the only interested party defendant. The answer sets up the record of events in full, which were stipulated to be correct and upon which the court found for defendant City of Los Angeles. The pertinent events, in their chronological order, are as follows: On or about April 17, 1941, the Cornell Construction Co. filed with the City of Los Angeles a tentative map of a proposed subdivision which proposed subdivision included property now owned by plaintiff; on May 9, 1941, the City Planning Commissioners sent a communication to the City Planning Committee of the City Council which recited, "The Board of Planning Commissioners approved this Tract on May 8, 1941, upon the following conditions," among which was the following: "5, that a future alley 20 feet in width be shown at the rear of the lots fronting on Colfax Avenue"; on or about May 15, 1941, the Planning Committee of the City Council reported to the City Council that the proposed subdivision be tentatively approved subject to the conditions set forth in the above mentioned report of the City Planning Commission; on May 22, 1941 the City Council adopted the report of the Planning Committee of the Council; on June 20, 1941, said Cornell Construction Company submitted to the city a final map of a subdivision covering a portion of the proposed subdivision shown in the tentative map theretofore filed, and which includes plaintiff's property; on August 7, 1941, the Cornell Construction Company recorded in the office of the County Recorder of the County of Los Angeles a "Declaration of establishment of conditions and restrictions," pertaining to the subdivision in question. On August 14, 1941, said final map was approved by the City Council and recorded in the office of the County Recorder on said last mentioned date; on or about December 26, 1941, the Cornell Construction Co. deeded the lot now owned by plaintiff to Edwin Freund which deed was recorded March 6, 1942; on November 30, 1942, said Edwin Freund deeded said lot to plaintiff; on August 4, 1944, the complaint in the within action was filed; on August 22, 1944, the

City Council of the City of Los Angeles adopted the following resolution, the pertinent part of which is as follows,

"Whereas, that certain 20-foot strip of land, being part of Lots 1 to 15 inclusive, Tract No. 12838, recorded in Book 245, page 35 of Maps, Records of Los Angeles County, and parts of Lots 1 to 16 inclusive, Tract No. 13069, recorded in Book 254, page 37 of Maps, Records of said County, and designated a "future alley" thereon, was dedicated for public use for alley purposes by said tracts, the dedication to be completed at such time as the Council shall accept the same for public alley purposes; and

"Whereas, the acceptance of dedication and the opening of said strip of land as a public alley at this time is necessary to the public interest and convenience;

"Now therefore be it resolved, that the City of Los Angeles hereby accepts the above mentioned 20-foot strip of land as a public alley;"

On September 21, 1944, the answer of the City of Los Angeles in the within action was filed.

The resolution of the city council, quoted above, purports to accept a "20-foot strip of land as a public alley" which, "designated as a 'future alley' thereon, was dedicated for public use for alley purposes." The only evidence of a "dedication," or any dedication, that appears on the map referred to in the resolution, is in words and figures as follows,

"We hereby certify that we are the owners of or interested in the land included within the subdivision shown on the annexed map, and that we are the only persons whose consent is necessary to pass a clear title to said land and we consent to the making and recordation of said map and subdivision as shown within the colored border lines, and hereby dedicate to the public use the Avenue, Street and Boulevard shown on said map within said subdivision and hereby dedicate to public use for street and alley purposes, those certain strips of land designated as 'Future Street' and 'Future Alley' shown on said map within said subdivision, reserving to ourselves for use of ourselves and successive owners of the respective lots shown on said map fronting on said strips, any and all ordinary uses of said land except the erection or construction of buildings thereon *until such time as the legislative body shall accept the same* for a public street and public alley and also hereby dedicate to the City of Los Angeles perpetual easements for public utility and storm drain purposes in the strips of land so designated on said map." (Italics added.)

The map, as noted above, was filed August 14, 1941.

The deeds which describe the property in question as "Lot 7 of Tract 12838, as per map recorded in book 245, page 35 of Maps, in the office of the recorder of Los Angeles County, California," also contain the following:

"This deed is made subject to each and every covenant, condition and restriction and easement, contained in that certain Declaration of Conditions and Restrictions executed by the Cornell Construction Co., and recorded in Book 18618, Page 312 Official Records and are expressly imposed on the herein described property as if set forth in full."

The trial court found for the defendant, City of Los Angeles, and judgment was entered accordingly.

It is contended by appellant, in substance, that the language "dedicate to public use * * * until such time as the legislative body shall accept the same" is neither in fact nor in law an actual dedication but is merely an offer of dedication. It is argued, in that connection, that before such an offer becomes effective it must be accepted; that such acceptance must be by use for the purpose intended over a sufficiently long period of time to indicate an acceptance, or, by a formal act of acceptance by the proper authorities according to law. Quoting from appellant's brief, "Since the 'offer of dedication' was made by the Cornell Construction Co., they have sold off all of the lots in this tract. The owners have used this property and have acted in other ways inconsistent with the use for which it is now claimed the land was dedicated. *It has never been used for alley purposes.* In the reconveyance made to

these present owners the easement was not recognized." It is argued further that "the City of Los Angeles did not consider the 'offer of dedication' a 'complete dedication,' else why was it necessary for the Council to pass a 'Resolution' on August 22, 1944, stating in part: '* * * the dedication to be completed at such time as the Council SHALL ACCEPT the same for public alley purposes * * *.' "In the present case, the *actual* acceptance was not made until *three* years after the offer was made, and after other parties became owners of the land whose consent was not obtained. There can be no *implied* acceptance because the City (the public) did not use the 'alley'—in fact, it was used by the plaintiffs and adverse to the use of an alley *for more than three years.* A dedication without acceptance, is in law, merely an offer to dedicate, *and such offer does not impose* any burdens nor confer and rights, unless there is an acceptance. THE RULE THEREFORE IS, THAT ACCEPTANCE ON THE PART OF THE PUBLIC IS NECESSARY TO A VALID DEDICATION OF LAND AS A HIGHWAY." (Emphasis included.)

[1-3] The authorities are numerous in support of the general principles on which appellant relies. In Harding v. Jasper, 1859, 14 Cal. 642, "the main question in dispute on the trial was the question of fact whether this land in controversy had been dedicated to the public as a highway." In that connection, the court declared: "The vital principle of the dedication, is the intention to dedicate; and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made." The court cited Stacey v. Miller, 14 Mo. 478, 55 Am. Dec. 112, wherein "it was held that the bare fact that a farmer opens a lane through his farm, and allows the public to use it for fifteen years, does not authorize the inference of a dedication to the public. The intent to dedicate must be obvious." The court continued further, quoting from Badeau v. Mead, 14 Barb. N.Y. 328, 339, with approval, "The doctrine of dedication has been carried quite far enough, and ought not to be extended. Persons who have from mere kindness, suffered others to enjoy privileges in their lands, have been eventually coerced into parting with them entirely, without compensation, and to yield up as rights what they had previously suffered or allowed as favors, and the simple expression of an intention, has often been distorted into a positive promise, and occasionally to those who have no distinct interest in its performance. Our title to our lands is too important to be lightly lost, upon slight presumptions. Before the owner should be deprived of his property, his intention to part with it should be clearly and unequivocally expressed. And for greater certainty it would be better, far better, that to be effective, it should be evinced by writing, rather than by doubtful conduct or still more doubtful declarations." In City of Manhattan Beach v. Cortelyou, 1938, 10 Cal.2d 653, 660, 76 P.2d 483, 486, appears the following: "To constitute a dedication of land for public use there must be an offer by the owner to appropriate it for such purpose, and the intention so to do must be clearly and unequivocally manifested. This is the vital principle of dedication. It was stated in the early case of Harding v. Jasper, 14 Cal. 642, 648, and has been consistently followed since." Many decisions uphold this doctrine in a variety of situations to which it applies. For example in Schmitt v. City & County of San Francisco, 100 Cal. 302 at 308, 34 P. 961, 963, with regard to the subject of dedication and acceptance, appears the following: "If, at the time Hayes conveyed to Hawley, he had a right to revoke the dedication or offer to dedicate the land in controversy, there can be no doubt that conveyance had that effect. The description made no reference to the alleged street, but conveyed it as part of the tract sold. If the map and other facts show an offer to dedicate only, a conveyance without reservation must amount to a revocation, unless the purchaser had notice of some fact which would estop the grantor from revoking. It is a proposal to donate, and, if the proposed donor transfers the property before it has passed to the donee to

another, it is no longer his to give." See also Myers v. City of Oceanside, 7 Cal. App. 87, at page 92, 93 P. 686; People v. Reed, 81 Cal. 70, 22 P. 474, 15 Am.St.Rep. 22; Niles v. City of Los Angeles, 125 Cal. 572, 58 P. 190; Hayward v. Manzer, 70 Cal. 476, 13 P. 141; Forsyth v. Dunnagan, 94 Cal. 438, 441, 29 P. 770; City of Santa Clara v. Ivancovich, 47 Cal.App.2d 502, 118 P.2d 303; Lyons v. Schwartz, 40 Cal. App.2d 60, 104 P.2d 383; City of Laguna Beach v. Consolidated Mortgage Co., 68 Cal.App.2d 38, 155 P.2d 844. And in Brown v. Bachelder, 214 Cal. 753, 7 P.2d 1027, 1029, the Supreme Court, referring to a Tract Map, declared: "In answer to this contention the record fails to establish an acceptance of the offer to dedicate made by the filing of the map * * * upon which said strip was delineated as a street, either by official acceptance or use of the same by the public. An acceptance, either by public user or formal resolution of acceptance is essential to a completed dedication."

Respondent disputes the application of the doctrine hereinbefore considered and the decisions cited by appellant in support thereof. It is contended by respondent that, "Two issues are involved in this case: First, was there a compliance by the subdivider and the City of Los Angeles with the terms of the Subdivision Act and the local ordinance authorized thereby; second, did the appellants acquire title subject to the easement of record?" and that "both of these questions must be answered in the affirmative."

Respondent relies entirely on the California Subdivision Map Act (Stats. 1937, page 1863; formerly Deering's Act 6500; now Sections 11500 to 11628 of the Business and Professions Code). Its provisions are cited and quoted extensively in respondent's brief, from which it is argued that, "It therefore clearly appears that the dedication of the alley was proper and in conformity with the provisions of the Subdivision Map Act of the State of California and of the local ordinance of the City of Los Angeles." The subject of dedication is considered at length, but about the only reference to an easement, except as noted above in respondents' reference to the issues involved, is as follows, "In our case, the subdivision was made pursuant to the provisions of the Subdivision Map Act; the City of Los Angeles approved the map prior to its being recorded; and the deed referred to the map and thereby recognized the easement shown on the map." It is alleged in the answer that the City of Los Angeles is the owner of an easement over the plaintiff's land.

It is important to note at this point, that on the duly recorded subdivision map herein referred to appears the following pertinent certification; "I hereby certify that the City Council of the City of Los Angeles approved the attached map and accepted on behalf of the public all of the streets, roads, alleys, highways and easements shown on said map *except those strips marked 'future street' and 'future alley'* provided that nothing herein contained shall be construed as acceptance of any improvements made in or upon any street, road, highway or easement shown on this map." (Italics added.) The foregoing certification is signed by some one as "city clerk." The strip marked "future alley" which the city affirmatively did not accept at the time the map was approved, is what respondent now contends constituted an easement at the time the lot, over which it extends, was purchased by appellant.

The subdivision ordinance, which, it is contended by respondent, was "enacted pursuant to Section 1 of the Subdivision Map Act," is, in part, as follows:

"(12). In lieu of the dedication of any street or alley, a future street or alley dedication may be permitted and shall be made in the following language:

"'We hereby dedicate for public use for street or alley purposes (as the case may be), that certain strip of land designated as future street or future alley as shown on said map within said subdivision, reserving to ourselves for the use of ourselves and successive owners of the respective lots adjoining the future street or alley shown on said map any and all ordi-

nary uses of said land except the erection or construction of buildings thereon, *until such time as the legislative body shall accept the same for street or alley purposes.*'" (Italics added.)

[4-6] It is at once evident that the procedure demanded by this ordinance was adopted by, or consented to, by the subdivider, the Cornell Construction Co., on the final map when submitted for approval. It also appears evident that the city, by such procedure, seeks to acquire advantages in connection with such developments without relating burdens or disadvantages. The problems of potential lot owners in the subdivision apparently are not taken into account so far as the city is concerned. But whatever the ordinance contemplated, it should be emphasized in that regard that a municipal ordinance that is related to the title of land and actually affects, or purports to affect such title, does not constitute record notice unless recorded according to law. And, as noted elsewhere herein, an easement is an interest in land and directly related to the title. Incidentally, ordinances that relate to police power and limit the use of land, such as zoning ordinances, do not affect the title to land, hence are not involved in the questions here considered.

[7] The pleadings raised but one question and presented but one issue, namely, was there an easement for alley purposes across and over the rear of the lot in question, of which appellant had record notice at the time it was acquired? If there was, then the evidence sustains the findings; if there was not, then there is no evidence to sustain the findings. Before disposing of this question, it should be noted that the use of the words, "future alley", in the ordinance and upon the map as well, are of no significance; they are merely descriptive.

[8-10] The Subdivision Map Act has no application to the issue here presented. The law of easements and the law of gifts is controlling; the law of easements predominantly, but the law of gifts to a certain extent, because a dedication is, in a sense, a gift. The confusion on the subject of dedication, referred to in some of the decisions, is more apparent than real. It appears to be the outgrowth of a confusion of terms; the term dedication is sometimes used as a synonym of easement. The word dedicate simply means to give or offer to give. A dedication ripens into an easement, which is an interest in land, only when it is formally accepted or impliedly accepted. It is implied when, as the authorities uniformly hold, use of the property by the public for such a length of time, in the circumstances, as will conclusively establish an intention to accept the dedication. County of Inyo v. Given, 183 Cal. 415, 191 P. 688, 690, summarizes the law as follows: "Considering a dedication as a voluntary transfer of an interest in land, it partakes both of the nature of a grant and of a gift, and is governed by the fundamental principles which control such transactions. Hence a dedication, like a contract, consists of an offer and acceptance, and it is settled law that a dedication is not binding until acceptance, proof of which must be unequivocal. 18 Corpus Juris, [Dedication, § 67], p. 72; [26 C.J.S., Dedication, § 34]. The acceptance may be actual or implied. It is actual when formal acceptance is made by the proper authorities, and implied, when a use has been made of the property by the public for such a length of time as will evidence an intention to accept the dedication. Elliott v. McIntosh [41 Cal.App. 763], 183 P. 692. Two things, however, are necessary to complete dedication, an offer and acceptance. A dedication without acceptance is, in law, merely an offer to dedicate, and such offer does not impose any burdens nor confer any rights, unless there is an acceptance. The rule therefore is that acceptance on the part of the public is necessary to a valid dedication of land as a highway, 1 Elliott on Roads and Streets, § 122; 8 Rul.Cas.Law, p. 898. * * * As before stated, so far as the public is concerned, there must be an acceptance to complete an offer of dedication. Dedication is the joint effect of an offer by the owner to dedicate land and an acceptance of such offer. There can be no dedication without the participation of both. City of Anaheim v. Langenberger, 134 Cal. 608, 610, 66 P. 855. Contrary to the doctrine announced

in the LeBreton case (San Leandro v. Le Breton, 72 Cal. 170, 13 P. 405), the mere making of sales of lots with reference to a map does not, therefore, constitute an irrevocable dedication to the public. As between an owner of land and the public, this act alone is not sufficient to constitute dedication. An acceptance must be had either by user or by some formal act. See note, 57 Am.St.Rep. 753. So far, therefore, as the Le Breton opinion can be construed as militating against the rule, it should have no weight. People v. Reed, supra. The rule that such act simply constitutes an offer to dedicate which does not become effectual until acceptance is reflected in a long line of cases in this state", citing cases. See also People v. Rio Nido Co., Inc., 29 Cal.App.2d 486, 85 P.2d 461, and City of Santa Clara v. Ivancovich, 47 Cal.App.2d 502, 118 P.2d 303.

[11-13] There was nothing in the Subdivision Map Act, at the time the events herein considered occurred, that suggests any changes in the well established law relating to dedications, gifts and easements. And the legislature, in 1943, added Section 11611 which requires the governing body of a city, at the time a subdivision map is approved, to "accept or reject any or all offers of dedication." Neither a municipality nor any political subdivision, corporation nor individual, is obliged to accept property without consent. It is well settled that only "one who has a vested estate in the servient tenement," has the power to dedicate an easement by proper conveyance. Civil Code, Sec. 804. Here the Cornell Construction Company dedicated the easement and the dedication or offer, as such, was sufficient. The City of Los Angeles, however, not only did not accept it but, in effect, affirmatively rejected it. Meanwhile the grantor sold the land and manifestly thereafter had nothing to offer. The offer, so far as the Cornell Construction Co. was concerned, was extinguished. Hence, when the City of Los Angeles finally went through the formality of accepting an offer, there was no offer to accept.

[14] When appellant acquired title to the land in question, it was so acquired with no record notice of an easement for alley purposes. Indeed, as a matter of fact and as a matter of law, no such easement existed and the record herein is destitute of any evidence to support the court's finding in that regard.

For the foregoing reasons, the judgment is reversed with directions to enter judgment for plaintiff, appellant to recover costs.

YORK, P. J., and WHITE, J., concur.






74 Cal.App.2d 742

## MADDERN v. CITY AND COUNTY OF SAN FRANCISCO.

No. 12960.

District Court of Appeal, First District, Division 1, California.

May 29, 1946.

Hearing Denied July 24, 1946.

1. Appeal and error ⇐1011(1)

Where the evidence is conflicting, an appellate tribunal may not substitute its judgment for that of the trial court.

2. Municipal corporations ⇐791(2)

There is no hard and fast rule as to the amount of time that must elapse before city may be charged with constructive notice of a dangerous and defective condition of a public street. St.1923, p. 675.

3. Municipal corporations ⇐791(2)

"Long continued neglect", as "considerable length of time" or an "unreasonable length of time", are matters which must be determined in accordance with all the facts and circumstances of the particular case in determining whether city had constructive notice of a dangerous or defective condition of public street. St.1923, p. 675.

4. Appeal and error ⇐996

When reasonable minds may differ regarding whether defective conditions of public streets have existed for a sufficient length of time under the particular circumstances to charge a city with constructive knowledge thereof, the conclusion of the

jury thereon may not be interfered with on appeal. St.1923, p. 675.

**5. Automobiles ⇐306(5)**

In action under the Public Liability Act of 1923 by motorist against city for damages to person and automobile sustained when pavement collapsed and automobile sank into depression, evidence sustained implied findings of the jury that dangerous and defective condition of street had existed for a sufficient length of time to constitute constructive notice to the city and that the city had a reasonable time to remedy the condition or protect the public against it. St. 1923, p. 675.

**6. Appeal and error ⇐1170(7)**

In action under the Public Liability Act of 1923 by motorist against city when pavement collapsed and automobile sank into depression, admitting evidence that there was a replacement by the city of sewer pipe in the entire block six months subsequent to the accident was not ground for reversal under the circumstances. St.1923, p. 675; Code Civ.Proc. § 2055; Const. art. 6, § 4½.

**7. Municipal corporations ⇐745, 847**

A city is not liable for the mere negligence of its employees, but where a city maintains a property in defective condition, knowing it to be in such condition, it is guilty of one form of negligence. St.1923, p. 675.

**8. Trial ⇐295(1)**

Instructions are to be considered as a whole in determining whether the giving of certain general instructions upon negligence is prejudicial error.

**9. Trial ⇐296(3)**

In action under the Public Liability Act of 1923 by motorist against city for damages from collapse of pavement, where general instructions upon negligence were preceded by the advice that instructions were to be considered collectively, and were followed by correct instructions as to liability of a city under the Public Liability Act, giving of the general instructions as to negligence was not prejudicial error. St. 1923, p. 675.

**10. Automobiles ⇐309(2)**

In action under the Public Liability Act of 1923 by motorist against city for damages from collapse of pavement, instruction that there was no hard and fast rule as to the character or extent of defect in street required in order to hold a city liable and that each case must stand upon its own particular facts was proper. St.1923, p. 675.

**11. Automobiles ⇐309(3)**

In action under the Public Liability Act of 1923 by motorist against city for damages from collapse of pavement, instruction that a city is liable for damages proximately resulting from a defective condition in one of its streets, even without city's actual knowledge or notice of the condition, where a presumption of constructive notice has been created from the existence of a defective condition for an unreasonable length of time, was proper. St. 1923, p. 675.

**12. Automobiles ⇐309(3)**

In action under the Public Liability Act of 1923 by motorist against city for damages from collapse of pavement, instruction that a city is presumed to have notice of the existence of street defects which are conspicuous and that in order to apply the doctrine of constructive knowledge, the jury must believe that defect was so apparent that the proper city officials should have observed alleged defect, was proper. St.1923, p. 675.

**13. Appeal and error ⇐1004(1)**

An appellate court may not interpose its judgment as to proper amount of damages for personal injuries, unless it appears that recovery was so excessive as to shock sense of justice and raise presumption that amount was arrived at as result of passion and prejudice rather than upon a fair and honest consideration of the facts.

**14. Damages ⇐130(2)**

$3,585 damages which included $500 for damages to automobile, $130 as medical bill and $200 for loss of salary, leaving $2,755 as general damages for personal injuries which caused pain in elbow 14 months after accident and left motorist jittery and unable to sleep at night, was not excessive.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by R. H. Maddern against the City and County of San Francisco under the Public Liability Act of 1923, to recover for personal injuries and damages to automobile. Judgment for plaintiff, and defendant appeals.

Affirmed.

John J. O'Toole, City Atty., and Sylvain D. Leipsic, Deputy City Atty., both of San Francisco, for appellant.

William A. White, of San Francisco (Edward E. Heavey, of San Francisco, of counsel), for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff brought this action under the Public Liability Act of 1923, Stats.1923, p. 675, to recover damages for personal injuries to himself and damages to his automobile, sustained when, while driving on Bush Street between Franklin Street and Van Ness Avenue in San Francisco, the pavement collapsed and his car sunk into the depression. The action was tried before a jury, and a verdict rendered in plaintiff's favor for $3585. From the judgment entered pursuant thereto the defendant city has appealed.

The accident happened about 10:30 in the evening of January 7, 1944. Plaintiff was driving alone in his car, and when he was about three-quarters of the way down the block from Franklin Street toward Van Ness Avenue his car began to lurch toward the left and then toward the right; and when it came to a stop the back end was resting in a large depression, the front end was a little above street level, and the car was at about a 45-degree angle. Plaintiff climbed out of the car, remained five or ten minutes, left to make a telephone call and returned to the scene, declined the services of an ambulance, and remained about an hour before going home. He had been thrown to the floor of the car by the impact and suffered from bruises and nervous shock. The size of the depression into which the car had sunk was variously estimated at from 65 to 80 feet long, 10 to 12 feet wide, and 8 to 10 feet deep. It is not disputed that the pavement collapsed into this depression while plaintiff was driving over it. The slope in grade of Bush Street from Franklin Street toward Van Ness Avenue is 5½ per cent. The sewer, located in the middle of the street, is approximately 8 feet below the surface of the street and drops at a descent parallel to the street. There was one cement or concrete sewer pipe 15 inches in diameter. Between the pipe and the pavement, and supporting the latter was a sandy soil which is common to this area. There was an asphalt concrete wearing surface for the pavement of two inches thickness; its concrete base was around six inches.

As grounds for reversal of the judgment defendant contends: 1. That the evidence does not establish any element of knowledge upon the part of the city or notice to the city. 2. The trial court erred in admitting into evidence that there was a replacement by the city of pipe in the whole block six months subsequent to the accident. 3. The court erred in its instructions to the jury. And 4. The damages are grossly excessive. We shall discuss these contentions in the order of their statement.

The portion of the Public Liability Act pertinent here reads as follows: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, * * * and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer, or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway * * * and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

It is not contended by plaintiff that there was any evidence of actual notice to the defendant city or actual knowledge on its part, but defendant relies upon constructive notice.

Before discussing the contention of defendant that the evidence is insufficient to establish constructive notice on the part of the city, we shall briefly summarize the evidence.

Reuben Nybakken, witness for the plaintiff, testified that he worked for the James F. Waters Co., automobile agency located on the southwest corner of Bush and Van Ness, and had been so employed for some time prior to January 7, 1944, the date of the collapse of the street and consequent injury to plaintiff. He recalled the incident herein involved. The collapse occurred on Bush Street, some relatively short distance west of Van Ness Avenue, and in the approximate center of that street. Nybakken lived directly across the street from his place of employment—his residence being an apartment house on the northwest corner of Bush and Van Ness. He crossed Bush Street (at the place where the collapse occurred) every day to go to lunch. He and other of the employees of James F. Waters Co. usually went to the Little Fawn Restaurant, located on the northwest corner of Bush and Van Ness. In crossing Bush Street for lunch he "noticed the street was cracked, started at the intersection and back up Bush Street towards Franklin was cracked twenty or thirty feet, I would say." He first noticed that crack about "four or five days" prior to its collapse on January 7, 1944. The crack ran lengthwise with Bush Street, and he said that it was about 1½ inches wide and that he could look down into it about 2 feet and see concrete. On more particular questioning concerning the extension of the crack from the intersection or the Van Ness property line, he said that it started at the Van Ness property line and ran about 30 feet west on Bush towards Franklin Street. He did not report the fact of having seen the crack to anyone in the City Hall whose duty it would be to maintain the streets.

Norman E. Taber, witness for plaintiff, also worked in the James F. Waters Co., and was likewise in the habit of going to the Little Fawn Restaurant. While crossing Bush to go to the restaurant he had noticed a crack in the street "two or three days" prior to the collapse of the street. It was a small "break in a paved street," running lengthwise with Bush Street, about midway between the two sidewalks. It began west of Van Ness, and was "twenty or thirty" feet long. Over the period of time (prior to the collapse) that the witness had observed the crack it increased to a width of about "three inches." He looked down into the crack for a distance of about one foot, and he saw what appeared to have been asphalt. Taber never reported having seen the crack in the street to anyone in the City Hall who might remedy the defect.

Plaintiff examined Emile Muheim, Superintendent of the San Francisco Bureau of Street and Sewer Repair, under section 2055 of the Code of Civil Procedure. The witness held that position during all the times concerned in this action. He testified that: "There are something like 325 street sweepers that are instructed to watch the streets and curbs, manhole covers, cesspool covers, etc., and get in communication with the proper authorities. There are six men, I believe, in the traffic bureau, in the City Engineer's office, it is part of their duty. There are also five inspectors." He said that he was, on the evening of January 7, 1944, called to the scene of the street collapse herein involved by his general foreman. Because of the great amount of sand washed away under the pavement of the situs of the break, he concluded that the sewer pipe had a break in it through which the sub-pavement sand had escaped. The easternmost tip of the hole in the street was about "ten or twelve feet west of the west property line of Van Ness Avenue." That 10 or 12 foot area was likewise somewhat undermined, and the witness directed people who were standing on that undermined asphalt to move away lest it should also collapse. The end (eastern) of the hole—that is, the asphalt pavement—was supporting the front of plaintiff's auto, and Muheim said he saw no cracks in the street easterly from the front of plaintiff's car to the property line of Van Ness Avenue. The undermined area east of the easternmost tip of the hole in the pavement ex-

tended about 6 or 7 feet toward Van Ness. He said that if there would have been a crack in the street for several days prior to the collapse, it would have assumed the shape of an inverted "V"—resulting in a depression on the surface of the street, and that there would be no opening (as plaintiff's witnesses Taber and Nybakken had testified) which could have been looked down into by someone standing on the street.

His opinion was that there had been a bursting of the concrete sewer pipe at the bottom thereof somewhere near the place where the collapse occurred, and that the sand which reposed between the surface (supporting the pavement) and the (8 foot deep) pipe had seeped through such break in the pipe and washed away. He said that such could have taken place in about 8 hours and would not have shown on the surface of the street. It does not appear in the record that Muheim indicated any particular place as being that in which this "pipe burst" had occurred, nor does he say that he saw any break in the pipe beneath the undermined area east of the easternmost tip of the hole caused by the collapse, and over which the pavement remained intact. There was a 5½ per cent downhill grade on Bush Street from Franklin to Van Ness, and the sewer pipe was installed at the approximate same grading.

There was read into the record the deposition of defense witness P. R. Kelly, Assistant Superintendent of the San Francisco Bureau of Sewer Repair. He was general foreman of that agency at the time of the incident herein involved. He was familiar with the collapse of the street at Bush and Van Ness of January 7, 1944, having been called to the scene the night of the collapse of that street. The cave-in was about 8 feet deep (exposing to view the top of the pipe), 60 feet long and 12 feet wide. His inspection showed that several lengths of pipe had collapsed, but he said "It may have been due to the pavement dropping on to it. There was no way of determining that." About 20 or 30 feet of the pipe was collapsed, and the rest (apparently in that 60 foot long area) was "disarranged." He did not say that any breaks appeared in that portion of the pipe which lay in the undermined area (testified to by Muheim) east of the easternmost tip of the hole proper into which plaintiff's car had dropped, and over which (further testified to by Muheim) the pavement remained intact. He said that there was about 8 feet between the hole and the western property line of Van Ness Avenue. The pavement proper consisted of 2 inches of asphalt surfacing and beneath that a 6 inch base of concrete. His theory was (as was Muheim's) that the sand between the surface and the sewer pipe had been washed away through a hole in the pipe, and that the surface collapsed in virtue of the supporting sand bed being displaced and washed away. He said that the whole process of undermining could have happened in a space of 2 hours. He determined that the process must have been speedy because there was no "scum" evident on the underside of the pavement that had collapsed.

The defense presented two employees of James F. Waters Co., William Hyland and James W. Gilmore, both of whom testified that they too had been in the habit of crossing Bush Street to go to the restaurant for lunch, and both said that they had never seen, prior to January 7, 1944, the crack in the street testified to by plaintiff's witnesses Taber and Nybakken.

The conflicts arising from the above evidence are manifest. It should be noted that neither Hyland nor Gilmore (defendant's witnesses) said that they had noted that no cracks existed on Bush Street from 2 to 5 days prior to January 7, 1944, but both only said that they had not noted any such cracks. Both of plaintiff's witnesses were very conclusive concerning their perception of such cracks from 2 to 5 days prior to the evening that the pavement collapsed.

Immediately after the collapse of the street in January, 1944, new pipe was installed at the location of the cave-in to the extent of 84 feet, but plaintiff also introduced evidence showing that on July 13, 1943 (6 months prior to the cave-in), the city had replaced ten feet of the concrete pipe at a point some 113 feet westerly of the January, 1944, break, with a differ-

ent type of pipe; and, over defendant's objection, plaintiff introduced evidence to show that in June, 1944, the city replaced the entire sewer in the block with the same type of pipe they had used in replacing the ten-foot section in July, 1943.

[1] Defendant argues that the evidence of plaintiff is unconvincing and attempts to demonstrate from the remainder of the record that the testimony of plaintiff's witnesses that the cracks were in the pavement several days before the accident cannot be believed. However, under the familiar and well-settled rule that where the evidence is conflicting, an appellate tribunal may not substitute its judgment for that of the trial court, we must hold that the jury was not as a matter of law unjustified in its implied conclusion that such cracks did exist on Bush Street for a period of four or five days prior to the accident, and the question that we have to decide is whether or not, under all the facts and circumstances of this case, the evidence is sufficient to charge the defendant city with constructive notice.

Appellant argues that even disregarding the weaknesses in respondent's evidence, it fails to show constructive notice on the part of the city because it does not show "long continued neglect." It argues that to show constructive notice a "substantial" interval of time must elapse between the first evidence of a defect and the accident. Appellant cites many cases wherein language is used to the effect that to constitute constructive notice the defect must be "long continued and patent," that there must be "long continued neglect," and that the dangerous condition must have existed for "an unreasonable length of time" or "a considerable length of time." Appellant argues that, under the rules of these cases, the four or five-day period which elapsed from the time respondent's witnesses first noticed the crack until the cave-in occurred was not a sufficient length of time to hold that the city had constructive notice of the dangerous and defective condition. In this regard it relies strongly on the case of Dineen v. San Francisco, 38 Cal.App.2d 486, 101 P.2d 736, 739, wherein this court said: "Appellant next contends that constructive notice is sufficient under some circumstances to impose liability under the Public Liability Act. This is undoubtedly the law. Dawson v. Tulare Union High School, 98 Cal.App. 138, 276 P. 424; Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.2d 643; Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118. Under these cases long-continued existence of a patent defective condition may establish constructive notice thereof. These cases go no further, however, than to hold that if the evidence shows that the dangerous condition is long continued and patent the governmental agency cannot successfully contend that it was not aware of it. In the present case it is contended that the defect is one which would have been discovered had the respondent exercised reasonable care in inspecting the seats. The cases do not support such an extension of the rule. * * * There is no direct or indirect evidence from which the jury could have inferred that the condition had existed for a long enough period that defendant would have had an opportunity to repair it, or that a reasonable inspection would have disclosed it."

Appellant also quotes from Nicholson v. City of Los Angeles, 5 Cal.2d 361, at pages 363, 365, 54 P.2d 725, 726; in which it is said:

"This statute constitutes a modification of the rule of non-liability of municipalities for acts performed in a governmental capacity, and recovery thereunder is only possible where all the requirements conditioning the city's liability are supplied. It is not enough to show a dangerous condition of the property. 'The municipality must have had notice and have failed to exercise its opportunity to remedy the condition. The theory of the act seems to be that liability is imposed not alone for the dangerous condition, but for the failure to remedy it, upon knowledge or notice thereof. The elements of knowledge or notice are logically essential to show culpability in failure to ready the condition, and proof of one or the other is necessary to recovery.' Watson v. City of Alameda, 219 Cal. 331, 26 P.2d 286, 287. See, also, Crone v. City of El Cajon, 133 Cal.App. 624, 24 P.2d 846, and Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.2d 768. * * *

"Constructive notice ordinarily involves, as an essential element, actual notice of facts or circumstances which are sufficient to put a prudent person on inquiry as to the existence of the fact with respect to which he is charged with constructive notice. It is so provided in our Code definition. Civ.Code, § 19. In Wilkerson v. Thorp, 128 Cal. 221, 60 P. 679, 681, which is illustrative of this principle, it was held that knowledge of the existence of a lease did not charge with constructive notice of unusual provisions contained therein, although it constituted constructive notice of provisions customarily contained in leases. It is there said: 'Constructive notice is a knowledge of such facts, that the party possessing such knowledge is conclusively presumed to know other things besides the facts which have been proven to have come to his knowledge. The information or knowledge of facts possessed by a party must be such that he is conclusively presumed to have notice of the main fact to which the constructive notice is invoked.' Consequently there must be shown, in order to charge the city with constructive notice under these principles, some element of conspicuousness or notoriety so as to put the city authorities upon inquiry as to the existence of the defect or condition and its dangerous character. It is equally clear, we think, that, where the city is charged with constructive notice on the basis of a duty to inspect, it must be made to appear that a reasonable inspection would have disclosed the defect or dangerous condition; that is, that, had there been no neglect of duty, there would have been actual knowledge on the part of the city officers."

Plaintiff argues that defendant has misconceived the definition of "constructive notice" and quotes the following language of our Supreme Court in the recent case of Fackrell v. City of San Diego, 26 Cal. 2d 196, at page 206, 157 P.2d 625, 630, 158 A.L.R. 773: "Actual notice of a defect or dangerous condition is not required. Constructive notice satisfies the statute. (Laurenzi v. Vranizan (1945) [25 Cal.2d 806, 812], 155 P.2d 633; Dawson v. Tulare Union High School (1929), 98 Cal.App. 138, 142, 276 P. 424; Hook v. City of Sacramento (1931), 118 Cal.App. 547, 553, 5 P.2d 643; Bennett v. Kings County, (1932), 124 Cal.App. 147, 153, 12 P.2d 47.) Constructive notice is defined by section 19 of the Civil Code as that knowledge of circumstances 'sufficient to put a prudent man upon inquiry as to a particular fact' where 'by prosecuting such inquiry, he might have learned such fact.' The rules governing constructive notice require reasonable diligence in making inspections for the discovery of unsafe or defective conditions. (Laurenzi v. Vranizan (1945), supra [25 Cal.2d pages 811-812, 155 P.2d 633]; Nicholson v. City of Los Angeles (1936), 5 Cal.2d 361, 364, 365, 54 P.2d 725.)"

Plaintiff also cites Wise v. City of Los Angeles, 9 Cal.App.2d 364, at page 366, 49 P.2d 1122, 50 P.2d 1079, where the court said: "Defendant relies for reversal of the judgment on three propositions * * * Third. The existence of a defective condition in a public street for the period of four or five days does not as a matter of law constitute constructive notice to the municipality and a reasonable time to remedy the condition under the Public Liability Act of 1923, Statutes of 1923, page 675, Act 5619, Deering's General Laws, volume 2, page 3052. * * * Turning to defendant's final proposition, it is a question of fact for the trial court to determine whether the dangerous condition in the public street had existed for a sufficient length of time to constitute constructive notice, and also whether a reasonable time to remedy the condition had existed." (Italics omitted.)

In Sheldon v. City of Los Angeles, 55 Cal.App.2d 690, at page 693, 131 P.2d 874, 876, it is said: "A municipality is liable for damages resulting from a defective condition existing in one of its sidewalks in the absence of actual knowledge or notice of the dangerous condition, where a presumption of constructive notice has been created from the existence of the dangerous condition for an unreasonable length of time. (Wise v. City of Los Angeles, 9 Cal.App.2d 364, 366, 49 P.2d 1122, 50 P.2d 1079.) * * * In Wise v. City of Los Angeles, supra, the existence of a defect for four or five days was held to be sub-

stantial evidence to sustain a finding that defendant municipality in such case had constructive notice of the defect."

And in the recent case of Kirack v. City of Eureka, Cal.App., 158 P.2d 270, page 273, the court said: "When reasonable minds may differ regarding the question as to whether defective conditions which have existed for sufficient time, under the particular circumstances of a case, will charge a municipality with constructive knowledge thereof, the conclusions of the jury in that regard may not be interfered with on appeal. George v. City of Los Angeles, 51 Cal.App.2d 311, 315, 124 P.2d 872; Smith v. County of San Mateo, 62 Cal.App.2d 122, 128, 144 P.2d 33; Silva v. County of Fresno, 63 Cal.App.2d 253, 260, 146 P.2d 520; Balkwill v. City of Stockton, 50 Cal.App.2d 661, 667, 123 P.2d 596; Johnson v. County of Fresno, 67 Cal.App.2d 116, 153 P.2d 557; Fackrell v. City of San Diego, 26 Cal.2d 196, 157 P.2d 625 [158 A.L.R. 773]; 43 C.J. 1026 sec. 1804bb; 7 McQuillin's Mun.Corp., 2d Ed., 246 sec. 3004."

[2-4] While it is true, as argued by defendant, that in practically all of the cases cited, a longer time than four or five days elapsed between the first evidence of a defect and the accident, we believe it is likewise true that there is no hard and fast rule as to the amount of time that must elapse before a court or jury will be justified in holding that a defendant had constructive notice of the dangerous and defective condition. What amounts to "long continued neglect," "a considerable length of time" or "an unreasonable length of time" are matters which must be determined in accordance with all the facts and circumstances of the particular case under consideration. What might be "long continued neglect" or "an unreasonable length of time" in one case might not be so in another, and we believe that under the authorities the true rule for an appellate tribunal to follow is that when reasonable minds may differ regarding the question as to whether defective conditions have existed for a sufficient length of time under the particular circumstances of a case to charge a municipality with constructive knowledge thereof, the conclusion of the jury in that regard may not be interfered with on appeal.

[5] Applying the rule to the instant case, we are unable to agree with the contention of defendant that it must be held as a matter of law that the implied findings of the jury that the dangerous and defective condition had existed for a sufficient length of time to constitute constructive notice to the city and that the city had a reasonable time to remedy the condition or protect the public against it, lack substantial support in the record.

[6] Defendant next contends that the trial court erred in admitting evidence that there was a replacement by the defendant city of the sewer pipe in the entire block six months subsequent to the accident, and that such error was highly prejudicial to defendant.

The record shows that Emile Muheim, Superintendent of the Bureau of Street and Sewer Repair of defendant city was called by plaintiff and interrogated under section 2055 of the Code of Civil Procedure. He testified, without objection, to the fact that in July, 1943, a portion of the sewer in the middle of the block had been replaced; that in January, 1944, following the accident here involved, 84 feet of new sewer pipe was installed from the property line of Van Ness Avenue westerly; and that the distance between the ends of where the new pipe was laid was 113 feet. Counsel for plaintiff then asked the following question: "Q. Mr. Muheim, isn't it a fact that in June, 1944, the defendant City and County of San Francisco replaced the sewer from Van Ness to Franklin?" No objection was interposed, and the witness answered, "That is correct." Then counsel for plaintiff asked: "Q. And in the replacing of that entire sewer from Franklin to Van Ness, it replaced the type of sewer pipe that was in there from the old cement pipe to vitrified clay pipe?" Counsel for defendant then asked that the previous answer be stricken and objected to the question on the ground that anything subsequent to the accident "with reference to correction, et cetera, is not proper evidence." The jury was then excluded and the matter argued by counsel and the court indicated that he

would overrule the objection. The question was read to the witness and the objection of counsel for defendant was overruled, but there was no ruling, nor any request for a ruling, on the motion to strike out the answer to the previous question. Counsel for defendant in objecting to any further question along the same line stated: "* * * I will qualify it in this way, that to anything that might be done within a short period of time after January 7, 1944, my objection as I understand the law would not be well taken. But so far as a period of three or four months or six months, I object to that type of testimony."

Defendant relies chiefly upon the case of Laurenzi v. Vranizan, 25 Cal.2d 806, 155 P.2d 633, 637. In that case the defendant city's motion for a nonsuit was granted in an action for injuries sustained by a pedestrian on a sidewalk. The Supreme Court reversed the judgment entered on the order granting the motions for nonsuit as to counts 1 and 2 upon the ground that the evidence was sufficient to submit the issue as to the city's liability to the jury, and in its opinion stated that the ruling of the trial court excluding evidence of subsequent repairs was proper and added the following language quoted by defendant: "* * * the evidence of subsequent repairs would tend only to prove knowledge after the accident and not the prior knowledge which the Public Liability Act requires. Helling v. Schindler, 145 Cal. 303, 312, 78 P. 710; Meyer v. San Francisco, 9 Cal.App.2d 361, 364, 49 P.2d 893; Gorman v. County of Sacramento, 92 Cal.App. 656, 665, 268 P. 1083."

Under the authorities cited it would seem to be the law in California that evidence of subsequent repairs or changes is not admissible to prove prior negligence. However, we do not believe that, upon the record here, there was any prejudice resulting to defendant in permitting the superintendent of sewers to testify that the city had replaced the concrete pipe in the remainder of the block with vitrified clay pipe after he had already testified that he had replaced a portion of the sewer in the middle of the block in July, 1943, and 84 feet from the westerly line of Van Ness Avenue in January, 1944, following the accident. Furthermore, as already pointed out, the witness had already given an answer stating that the defendant city had replaced the sewer in the entire block in June, 1944, before the question was asked to which objection was made. As we will point out hereafter, the jury was correctly instructed that as to the issue of the liability of defendant under the Public Liability Act, and bearing in mind that, under section 4½ of Article VI of our state Constitution, "No judgment shall be set aside, or new trial granted, in any case, on the ground of * * * improper admission or rejection of evidence, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice," we do not believe that the overruling of defendant's objection to said evidence, even if error, justifies a reversal of the judgment.

[7-9] Defendant also contends the trial court committed serious and prejudicial error in giving certain general instructions upon the question of negligence. Defendant quotes the following language from Watson v. City of Alameda, 219 Cal. 331, 333, 26 P.2d 286, 287: "The municipality is not, under this statute, liable in the same manner as a private corporation, for negligence of its employees; nor is it enough to show a dangerous condition of property. The municipality must have had notice and have failed to exercise its opportunity to remedy the condition."

While it is true that a municipality is not liable for the mere negligence of its employees, yet it is also true, as stated by defendant in its closing brief, "that where a city maintains a property in defective condition, knowing it to be in such defective condition, it is guilty of one form of negligence." Before giving the general instructions as to negligence, none of which stated that plaintiff was entitled to recover from defendant upon proof that defendant or its employees were negligent, the court instructed the jury as follows: "Now I am going to give you a couple of instructions, ladies and gentlemen, on the subject of negligence, but negligence as involved in this case is attached very definitely to instructions that I will give you afterwards.

Of course you have already been instructed to consider all the instructions, that is, collectively and interchangeably—not interchangeably so much as to the extent that one has any reference to the other, and that applies particularly to the instructions I am now about to give you on the subject of negligence."

Thereafter the court correctly instructed the jury as to the liability of a municipality under the Public Liability Act. The instructions given by a trial court must be considered as a whole and we are convinced that in the instant case, taking the instructions as a whole, the jury must have understood that the instructions defining negligence were related to and qualified by the subsequent instructions relating to the Public Liability Act.

[10-12] Defendant contends further that the following instructions given by the trial court and relating to the Public Liability Act are erroneous: "You are further instructed that there is no hard and fast rule that can be laid down in cases of this kind as to the character or extent of the defect in the street in order to hold a city liable but each case must stand upon its own particular facts and it is a question of fact for you to determine whether a defect in the street is of such a nature as to render the city liable in accordance with the instructions which the Court gives to you." "You are further instructed that a municipality is liable for damages proximately resulting from a defective condition in one of its streets, in the absence of actual knowledge or notice of the defective condition where a presumption of constructive notice has been created from the condition of a defective condition for an unreasonable length of time. You are, therefore, instructed that it is your duty to determine from the testimony in this case whether or not a defective condition existed in Bush Street, and if you find one existed, whether such defective condition existed for a sufficient length of time to constitute constructive notice, and also whether a reasonable time to remedy such condition had elapsed prior to January 7, 1944. That was the date of the accident." "You are further instructed that a municipality is presumed to have notice of the existence of defects which are conspicuous." "In order to apply the doctrine of constructive knowledge you must believe that the defect was so apparent that the proper city officials should have observed said alleged defect."

Defendant cites no authorities to support its argument upon this point, and we believe that under the authorities hereinbefore set forth, the instructions complained of correctly state the law.

[13] Defendant's final contention is that the damages awarded plaintiff are grossly excessive. The general rule upon the point is well stated in Bellman v. San Francisco H. S. Dist., 11 Cal.2d 576, 81 P. 2d 894, 899, as follows: "Before an appellate court may interpose its judgment as to the sum which will compensate a plaintiff for personal injuries, it must appear that the recovery is so excessive, when compared with a sum reasonably warranted by the evidence showing the nature and extent of the injuries received, as to shock the sense of justice and raise the presumption that the amount was arrived at as the result of passion and prejudice rather than upon a fair and honest consideration of the facts."

[14] The verdict of the jury was in the sum of $3585, $500 of which was for damages to plaintiff's automobile. Plaintiff's medical bill was approximately $130 and he lost $200 in salary during the time he was unable to work. This would leave as general damages the sum of $2755.

Plaintiff testified that in March, 1945, some 14 months after the accident, he still felt pain in his elbow which was injured by hitting against the door of his automobile at the time of the accident. He also testified that his side was "banged" against the door very hard, and while it did not break his ribs, he suffered strong muscular aches and pains. He testified also, among other things, that prior to the accident he had always been healthy, but that ever since the accident he had been "jittery" and "can't sleep at night." The statement of plaintiff's doctor confirms his testimony.

Taking all of the evidence on the question of damages into consideration, we cannot say that the amount of the verdict in this case was so large as to shock the sense

of justice and raise the presumption that the amount awarded was the result of passion or prejudice.

In view of the foregoing the judgment is affirmed.

PETERS, P. J., and WARD, J., concur.




74 Cal.App.2d 720

**VEDDER PETROLEUM CORPORATION, Limited, v. LAMBERT LANDS CO., (RING OIL CO., Limited, Intervener).**

Civ. 3506.

District Court of Appeal, Fourth District, California.

May 28, 1946.

**1. Mines and minerals ⇐79(3)**

In apportioning costs of dehydrating oil between lessor and lessee, some part of the general overhead and field expenses should be charged to dehydration, which is a minor but necessary part of producing and shipping oil.

**2. Evidence ⇐98, 601(1)**

Where the cost of an operation is in issue and it clearly appears that the only evidence of that cost is erroneous and contains many improper elements, but where there is no evidence of the extent of the error or of the amount or value of the improper elements included, the evidence is insufficient to support a finding as to the cost, and a mere reduction of amount claimed, without any basis for the amount of the reduction appearing in the evidence, is equally deficient in evidentiary support, and the burden of proof has not been met.

**3. Mines and minerals ⇐79(7)**

In apportioning costs of dehydrating oil between lessor and lessee, evidence was insufficient to support finding that cost of dehydration was 4.15 cents per barrel.

**4. Mines and minerals ⇐79(7)**

In lessee's action against lessor to recover proportionate cost of dehydrating oil in connection with the making of royalty payments under oil lease, an allegation that during the preceding two months the cost of dehydration was 6 cents per barrel was not an allegation that dehydrating had not been carried on prior to the period referred to, and did not limit recovery to the beginning of such two months' period where prayer of petition was for declaratory relief, for specific sum claimed due, and for further relief.

**5. Mines and minerals ⇐79(3)**

Where oil lease gave lessor the right to take royalty in kind or in cash, lessee must dehydrate all the oil unless the lessor takes cash royalty, but need not dehydrate lessor's portion of the oil if lessor takes royalty in kind.

GRIFFIN, J., dissenting.

Appeals from Superior Court, Kern County; Robert B. Lambert, Judge.

Action for declaratory relief and to recover the proportionate cost of dehydrating certain oil in connection with the making of royalty payments under an oil lease, by Vedder Petroleum Corporation, Limited, against Lambert Lands Company. The Ring Oil Company, Limited, intervened. From the judgment, the defendant and the intervener appeal.

Reversed and remanded for a new trial.

Sullivan, Roche, Johnson & Farraher, of San Francisco, for appellant and respondent Lambert Lands Company.

Arthur C. Fisher, of Los Angeles, for appellant and respondent Ring Oil Co.

BARNARD, Presiding Justice.

This is an action for declaratory relief and to recover the proportionate cost of dehydrating certain oil in connection with the making of royalty payments under an oil lease.

The action was brought by Vedder Petroleum Corporation, Ltd., the lessee, against Lambert Lands Co., the lessor. The

Ring Oil Company, Ltd., which has succeeded to all of the rights of the Vedder Petroleum Corporation, Ltd., intervened in the action and will be referred to as the lessee. The lease provided for monthly payments to the lessor of a fixed part of the value of all oil produced from wells on the leased premises or, at the option of the lessee, for a similar division of the oil in kind. This option has never been exercised as yet and the main controversy here relates to oil which has been dehydrated and sold by the lessee.

It appears that in order to ship this oil it was necessary to heat it to a temperature of 160° to 170° before it entered the pipe line, whether or not the oil was dehydrated. Also, that this oil had to be dehydrated, a process which reduced its water content to below 3%, in order to make it acceptable for delivery into the pipe line of the purchaser. This process, which was followed, was not only necessary but resulted in a higher price being received for the oil. Heating is also necessary in the process of dehydration, this requiring a temperature of 150° to 210°, depending upon the condition of the oil. In this case, the same heating was used for both purposes, dehydration and shipping, a somewhat higher quantity of heat being used than would have been necessary for the shipping alone. Between June 1, 1937, and March 31, 1938, this dehydrating was done by merely heating the oil in the regular shipping tanks and adding a chemical known as "tretolite". A part of the water was thus removed and the oil was shipped while still hot enough to enter the pipe line. In April, 1938, an electrical dehydrating machine, which will be referred to as a "dehydrator," was installed together with a separate heating unit. The dehydrator, which was connected between the heater and the shipping tanks, separated the water from the oil and the oil then passed into the shipping tanks and thence into the pipe line while still hot enough for that purpose.

This action was begun about three months after the dehydrator was installed. The lessee had theretofore claimed the right to deduct from the royalty payments to the lessor, as its share of the cost of dehydration, a sum representing 6¢ a barrel on the royalty share of the oil produced. By stipulation, the question of the right of the lessee to make such a charge was first tried. A judgment to the effect that the lessor was not liable for any part of such cost was reversed. Vedder Pet. Corp. v. Lambert, etc., Co., 50 Cal.App.2d 102, 122 P.2d 600.

A second trial was then had, mainly on the issue as to the actual cost of this dehydration and the resulting charge to the lessor. It appears that the "Bowles" lease, the one here in question, was one of some eight or ten leases operated by the lessee in that field, which is known as the "Mt. Poso" field, and that this lessee also operates a number of leases in the Los Angeles area. The lessee introduced in evidence a chart, prepared by an accountant in its Los Angeles office, purporting to show the per barrel cost of dehydration based upon the total claimed costs and the number of barrels of oil produced. This shows certain claimed costs on a monthly basis for the period in question, and was used as a basis for figuring the claimed average per barrel cost of dehydration. Under the head "Overhead Costs Mt. Poso Field", a per barrel charge, in fractional cents, is shown for each of the following items: General Superintendent, Production Superintendent, Labor, Compensation and Liability Insurance, Social Security Taxes, and General Field Expense. These result in an average charge of 2.811¢ per barrel for overhead costs in that field. Under the head of "Bowles Plant Costs" similar charges are made for royalty on dehydrator, power and light, depreciation, repairs to equipment, property taxes, fuel oil, and two other items, making a total average charge in connection with the Bowles plant itself of 2.334¢ per barrel. Under the head of "General Overhead" a charge is made for expenses in the Los Angeles office of the lessee averaging 2.326¢ per barrel. Combining these three elements makes a total charge of 7.471¢ per barrel, which the lessee sought to establish as the cost of dehydration on the lease in question, with a corresponding charge against the lessor based upon its royalty proportion of the oil produced.

The lessee sought to prove that the total cost of dehydration per barrel did not exceed 1½¢. The court apparently followed the cost system relied on by the lessee, but reduced the charge per barrel, in fractional cents, on all of the respective items, with one exception, and found that the cost of dehydrating this oil was 4.15¢ per barrel and that a corresponding amount was due from the lessor to the lessee. Judgment was entered accordingly, from which both the lessor and the lessee have appealed.

Each appellant attacks the court's finding and conclusion that the cost of this dehydration was 4.15¢ per barrel. The lessee, with almost no reference to the evidence, argues that the cost accounting method adopted by it was a proper and well-recognized one; that it properly included a part of the administrative and overhead charges, including taxes, repairs, maintenance and other expenses, as a part of the cost of dehydration; and that the judgment should therefore be reversed with instructions to enter judgment for the amount requested by it. On the other hand, the lessor argues that it is only the extra expense directly attributable to dehydration which is to be shared by the lessor; that since the same men who were necessary to handle and heat the oil for shipping, in the absence of dehydration, could and did also operate the dehydrator there was little, if any, added expense on account of dehydration; and that the lessor should not be called upon to pay any part of the general overhead since the executives and superintendents received nothing additional because of the dehydrating operations. The lessor also, with rather complete reference to the record, contends that the evidence is entirely insufficient to support the court's finding and conclusion with respect to the cost of the dehydration.

[1] The contentions of neither appellant in this regard can be fully sustained. The general overhead and the general field expenses were necessary elements in the operations carried on by the lessee in producing and shipping oil, of which the process of dehydration was a relatively minor but necessary part. No good reason appears why some part of this necessary general expense should not be charged to dehydration, which was a part of the operations being carried on. On the other hand, it clearly appears that in the charges as originally made by the lessee many matters are improperly included, or included in a proportion which is entirely unsupported by any evidence found in the record. Many such instances are pointed out by the lessor, supported by references to the record, and no attempt is made by the lessee to point out any evidence to the contrary.

It is unnecessary to review in detail all of the items entering into the cost of dehydration, in which the evidence is insufficient to support the allowance made. It appears that shortly after this controversy started the designation of most of the employees who were working on this lease was changed on their time cards from "pumpers" or "firemen" to "dehydrator operators," although there was comparatively little change in their duties. No account was kept on the lessee's books of the cost of dehydration and the only mention of dehydration in those books, aside from the time cards above referred to, was a record of the 1¢ per barrel royalty paid to the company from which the dehydrator was secured. No contention is made by either side that this 1¢ a barrel is not a proper dehydration charge. The accountant who made up the chart, which was used as the basis of the claim made, testified that in making the charges he took the time cards and, with such information as he could obtain from the superintendent in the field and the bookkeeper on this lease, he apportioned such part of the labor to dehydration as he thought best, and that he followed similar proportions in charging part of the general field expense and general office overhead to dehydration. The superintendent in the field and the bookkeeper on the lease were also called. Each of these three witnesses disclaimed personal knowledge of what the employees were doing, or of what part of their time was spent on dehydration, and each expressed the belief that the essential information must be gotten from one of the others. In brief, there was no evidence showing the actual or approximate amount of time spent by the employees on this lease in connection with de-

hydration, as distinguished from the other work of producing and shipping the oil.

It further conclusively appears that these witnesses regarded all of the labor and expense of heating the oil as a part of the dehydration operations, regardless of the fact that most of the heating would have been necessary in the absence of any dehydration. Also, that they considered nearly all of the expense of handling, heating and shipping the oil, from the time it left the mouth of the well until it entered the pipe lines of the purchaser, as a part of the dehydration expense. The accountant who prepared the chart expressed his theory generally, in charging items to dehydration expense, that "oil is not oil until it gets through the dehydrator." He testified that in making the allocation he made no attempt to distinguish between the cost of dehydrating and the cost of shipping. In speaking of three or four employees who were formerly called pumpers he said: "It was considered that the greater amount of their work was handling the oil, and consequently, the other two or three so-called pumpers after this time was allocated to dehydration." At another time he stated that three employees were attending to "production" so he charged them to dehydration. Also, that when drilling was in progress he divided the pay of firemen between drilling and "production," and then allocated all of the production part to dehydration. The testimony of the other two witnesses for the lessee is much to the same effect. The superintendent in that field testified that they often had drillers whom they wanted to keep on the payroll when there was no drilling to be done, and that these drillers might be carried on the payroll as dehydrators. The bookkeeper on this lease testified that in September, 1939, when the designation of four men on the time cards was changed from pumpers to dehydrator operators, their duties were in no way changed; that heating, dehydrating and shipping is a continuous operation; that a man taking care of a dehydrator also takes care of the heater; and that the dehydrator operator also takes care of the shipping of the oil. It further appears that in allocating a part of the general field expenses and general office overhead to dehydration, in making up the charges as claimed by the lessee, proportions were taken either arbitrarily or based upon the division of the labor expense above referred to, and with an entire absence of evidence to indicate, even generally, any proper relation between the matter of dehydration and the other operations carried on in producing, preparing for shipment and shipping oil.

Briefly summarized, the evidence shows that in making its charges the lessee took about 80% of all costs of its operation and production on this lease and of its general expense in this field, including all of the expense of heating and shipping and many other matters which would have been necessary without dehydration, and including many items such as taxes, repairs and depreciation on articles which either had nothing to do with dehydration or were only partly used therein. About 50% of the overhead expense in the Los Angeles office, including salaries, attorney's fees and donations, was then added to the cost of dehydration. Among other such items was about $85,000 a year paid as salaries to the Ring brothers, who owned all of the stock of the lessee. About these proportions of the respective items were charged as the cost of dehydration in spite of all of the other operations of the lessee, and without any evidence showing what part of the expense for the various items included was properly attributable to dehydration, as distinguished from other necessary operations in the production and shipping of oil, including the heating of the oil which would have been necessary in any event.

While the lessor, through cross examination of the lessee's witnesses, very clearly brought out the fact that the charges claimed by the lessee were based upon improper elements, and while it thus appears that the charges as contended for by the lessee are erroneous and without evidentiary support, the lessor produced no reliable evidence indicating the actual cost of dehydration. An expert witness for the lessor testified that in his opinion the cost of dehydration would not exceed 1½¢ per barrel, including the royalty of 1¢ per barrel paid to the company which furnished the dehydrator. This evidence was of little value because this witness later admitted

that he had failed to consider necessary repairs to the heater which he said should be included, that he had omitted the value of the oil used to furnish the heating necessary for dehydration, and that he considered that no part of the cost of operating the heater had anything to do with dehydration.

[2, 3] While the court apparently recognized that each item of the lessee's charges, with the exception of the 1¢ per barrel royalty on the dehydrator about which there is no dispute, contained improper elements or wrong proportions it seems to have made definite reductions on these various items without any evidence to indicate what the actual facts were. The court filed a memorandum stating that he arrived at 4.15¢ per barrel, as the cost of dehydration, by allowing certain amounts, in fractional cents per barrel, to each of the items referred to in the chart used by the lessee. The allowances per barrel thus made are, on most of the items, about 50% of the cost per barrel claimed by the lessee, with varying percentages on the other items. As a whole, the court allowed slightly more than one half of the total cost claimed by the lessee as being the cost of the dehydration. While the result arrived at may not be far from the actual cost, whether it is or not cannot be determined from the evidence. The fact remains that just as there is nothing in the evidence to in any way indicate what part of the charges claimed by the lessee were properly attributable to dehydration, as distinguished from other necessary operations in producing and shipping oil, so there is nothing in the evidence to in any way indicate that any particular percentage of the claimed cost on any item, or on all of the items, is properly chargable to dehydration as distinguished from the other operations. Under the evidence, the fixing of any definite figure as the cost of dehydration, or the taking of any definite proportion of the cost as claimed for the various items, must be based upon a mere conjecture or guess. Not even any reasonable evidence of a maximum or a minimum cost appears in the record. There is nothing to support either the specific deductions made by the court on the respective items or the average total deduction thus made. Where the cost of an operation is in issue and where it clearly appears that the only evidence of that cost is erroneous and contains many improper elements, but where there is no evidence of the extent of the error or of the amount or value of the improper elements included, the evidence is not sufficient to support a finding as to the cost. In such a case a mere reduction of the amount claimed, without any basis for the amount of the reduction appearing in the evidence, is equally deficient in evidentiary support, and the burden of proof has not been met. There being nothing in the evidence here to support either the specific deductions made by the court on the respective items or the average reduction made, the finding as to the per barrel cost of dehydration is not supported by the evidence.

[4] The lessor makes the further contention that the judgment charges it with the cost of dehydration on oil produced from June 1, 1937, whereas the lessee's pleadings only ask for such cost from May 8, 1938. This is based upon the claim that there is an allegation in the original complaint, and repeated in the lessee's complaint in intervention, that "the oil had been subjected to dehydration for two months immediately prior to the filing of the complaint," and the fact that the original complaint was filed on July 8, 1938. The allegation in question, following one that it was necessary to dehydrate the oil, was "that for the past two months it has been subjected to such a process at a cost of approximately 6¢ per barrel." This is an allegation that during the preceding two months the cost of dehydration was 6¢ per barrel, but is not an allegation that dehydrating had not been carried on prior to the period referred to. The prayer was for declaratory relief, for a specific sum claimed to be due, and for further relief. The pleadings and prayers were sufficient to cover the entire period from and after June 1, 1937

On its appeal, the lessee further contends that in one finding of fact and conclusion of law the trial court attempted to reverse the decision of this court on the former appeal. The finding reads:

"Under the terms of said lease it was and is the duty of Intervenor to dehydrate such of Defendant's royalty oil as contained in emulsion an excess of 3% of water, sand and other foreign substances, in the event that Intervenor dehydrates its share of said oil."

This finding was repeated, in effect, in the conclusions of law, but was not specifically carried into the judgment.

It is argued that on the former appeal (Vedder Pet. Corp. v. Lambert, etc., Co., 50 Cal.App.2d 102, 122 P.2d 600, 605) this court determined "that lessee was not obligated to dehydrate lessor's oil under any circumstances." This argument is based on some of the language found in the third from the last paragraph of the opinion on that appeal, in a discussion of the clause in the lease which permitted the lessor, at its option, to take its royalty share in kind. It was there stated that the lessor could not require the lessee to clean the oil before delivery of its royalty share in kind. By way of argument, with respect to the duty of the lessee to bear the expense of dehydrating the lessor's royalty share of the oil it was said: "If the duty to clean the oil is absent when the royalty oil is delivered in kind, it is also absent when the proportionate share of the value of such royalty oil is to be paid in cash." Not only does it clearly appear from the context that the language last quoted was intended to refer to the duty to clean the oil, free from the expense of dehydration, but any contrary meaning would not only have been opposed to the sole decision made on that appeal but would have been purely dicta. As appears on the face of that decision the only issue presented on that appeal was as to whether the lessee had a right to deduct the cost of dehydrating wet oil before accounting to the lessor for its cash royalty.

[5] Moreover, so long as the right to elect to take the royalty in kind is not exercised there is no way for the lessee to account to the lessor for its share of the proceeds of the sale of oil except by dividing such proceeds, when received, in the proper proportion. The lessor's share is then a part of the whole and there can then be no division by regarding a part of the oil as belonging to the lessor and refusing to dehydrate that portion. We find nothing wrong with the finding complained of except that it might well contain a provision to the effect that it was not the duty of the lessee to dehydrate the lessor's portion of the oil at such times as the lessor is taking its royalty share in kind.

The judgment is reversed and the cause is remanded for a new trial.

MARKS, J., concurs.

GRIFFIN, Justice (dissenting).

I dissent to the conclusion reached in the majority opinion that the "evidence is not sufficient to support a finding as to the cost" of dehydration chargeable to the lessor. Without repeating the evidence bearing on the question of such costs, it is clear to me that witnesses for the lessee did introduce into evidence, for the consideration of the court, numerous items which were not proper elements of cost against the lessor or were unreasonable. It is quite apparent that lessee was "putting forth its best foot". Apparently, it was not intentionally underestimating the percentage cost of dehydration and was "out to see" that the lessee would not, under any possibility lose any money based upon the percentages estimated by its experts who calculated the cost at approximately 7½ cents per barrel. On the other hand, the lessor was equally anxious to make it appear that the cost of dehydration was only incidental to the operation. It estimated the cost of such operation at 1½ cents per barrel, including the one-cent royalty on the dehydrator. From the evidence it appears that lessor omitted many items which were directly or indirectly chargeable as a proportionate part of the cost of dehydration. This estimate was as unreasonable as was the estimate made by the lessee. The trial court found itself in the same position in which I find myself after studying this volume of figures and reports offered by each party. Somewhere between these figures would be found, in my estimation, a more reasonable percentage of cost. I would not, on this appeal, want to substitute my estimate for that of the

witnesses who testified, or for that of the trial judge who patiently listened to the volumes of evidence. He finally took the estimated cost sheets prepared by the lessee and examined them, individually, as to each item. Instead of accepting the testimony of the accountants as to the percentage of the entire cost attributable to the cost of dehydration, it allowed varying percentages, averaging 4.15 cents per barrel, which amount was less than that estimated by the accountant for lessee, but in excess of that testified to by the accountant for the lessor.

Bearing upon the reasonableness of the court's finding, it should be here noted that lessee was arbitrarily deducting, from the royalty payments, the sum of 6 cents per barrel as the cost of dehydration prior to the decision reported in Vedder Petroleum Corp. v. Lambert, etc., Co., 50 Cal.App.2d 102, 122 P.2d 600. In November, 1939, one Anderson, accountant for the Ring Oil Company, prepared a chart of costs of dehydration based on the November figures. He arrived at a cost of 2.712 cents per barrel. One of the Ring brothers added another list of items which brought the cost up to 4.334 cents per barrel. This is fairly close to the average cost per barrel fixed by the trial court for the entire period.

It is true that there is no direct testimony that the exact percentage allowed by the trial court for dehydration aggregated 60 per cent of the claimed combined expenses for all of the operation. However, there was some testimony in regard to certain segregation of labor costs that were made. For instance, Mr. Rae testified that no record was kept of the time spent by the men on dehydration but when four men were employed in production "three men gave their entire time to dehydration." It is not my understanding of the law that before the trial judge can adopt a percentage, somewhere between that adopted by the lessee and that adopted by the lessor, there must have been some witness testify to that exact percentage that was attributable to the cost of dehydration before it can be said that the percentage adopted by the trial court is supported by the evidence. The written finding in this action did not specify the manner in which the ultimate finding was reached, but merely recited in general that "the cost of dehydrating that portion of defendant's oil requiring dehydration and produced from the premises described * * * for the period from June 1st, 1937 to May 31, 1944 * * * was equivalent to the sum of 4.15 cents per barrel * * * which * * * is determined to be the fair, equitable, average cost per barrel to be charged defendant." Judgment was entered accordingly. It is apparently the memoranda opinion of the trial judge in the instant action that is under attack. In that memorandum he specifies 13 segregated items of costs and the percentage he allowed for such items.

The court exercised its judgment and made these varying deductions on the different items which appeared too high and he allowed a little more than one-half of the amounts claimed. There is nothing to show that the correct amount could be exactly determined. Under the evidence produced, it was necessary to approximate various proportions and overlapping elements of the cost of production. Therefore, any estimate of an exact figure would be, more or less, an opinion of the estimater. The trial court's estimate, based upon the evidence produced, has evidentiary support, and does not appear to be unreasonable.

Findings must receive such construction as will uphold, rather than defeat, the judgment predicated thereon. And whenever, from facts found, other facts may be inferred which will support the judgment of the trial court, such inference will be deemed to have been made by the trial court. Tower v. Wilson, 45 Cal.App. 123, 188 P. 87.

74 Cal.App.2d 652

## BERRY v. CHAPLIN.

Civ. 15135.

District Court of Appeal, Second District, Division 2, California.

May 27, 1946.

Hearing Denied July 24, 1946.

**1. Stipulations ⇐3**

Guardian ad litem of unborn illegitimate child and guardian's attorney were without power to enter into and court was without power to approve stipulation by which child, after it was born, was to be given blood tests and by which, if tests disclosed that defendant was not the actual father, filiation proceedings against defendant would be dismissed with prejudice, in absence of any evidence that such stipulation was for the best interests of child. Civ. Code, § 196a; Code Civ.Proc. §§ 1837, 1978.

**2. Bastards ⇐33**

The power of a guardian ad litem in a filiation proceeding is not unlimited but guardian is an officer of the court appointing him and is the agent of such court with limited powers. Civ.Code, § 196a.

**3. Infants ⇐84**

A minor, who must of necessity appear by his guardian ad litem, is not bound by admissions of guardian which mean the sacrifice or giving away of minor's property.

**4. Infants ⇐84, 90**

The relationship between a guardian ad litem or attorney whom he employs and the infant litigant is not the same as that between attorney and adult client, and it is duty of guardian and attorney to protect rights of infant, and it is duty of court to see that such rights are protected, and to that end court may set aside or disregard concessions of guardian which have not been judicially approved and which are shown to court to have been improvidently made.

**5. Infants ⇐84**

Any acts or concessions by guardian ad litem that apparently waive or surrender any material rights of infant litigant, such as the right to a trial, should be set aside unless they are shown to be beneficial, or, in any event, not prejudicial to rights of infant.

**6. Bastards ⇐75**

In a filiation proceeding commenced on behalf of unborn illegitimate child, neither guardian ad litem nor her attorney, nor both, had power to consent to a judgment depriving infant of its right to claim support from defendant without opportunity of a trial at which all available evidence could be introduced for consideration by jury, not merely such evidence as parties considered proper for determination of issue involved. Civ.Code, §§ 196a, 231.

**7. Stipulations ⇐14(7)**

A stipulation that only such evidence as shall be agreed upon by the parties shall be admissible will not be allowed to control action of court in reception of other evidence or to determine effect to be given it.

**8. Stipulations ⇐3**

Courts will not permit course of justice to be controlled or conduct of an action to be circumscribed in such manner as to defeat the ends of justice.

**9. Stipulations ⇐3**

Parties cannot arrogate judicial functions to themselves, nor can they agree to oust court of jurisdiction given to it by law to admit all evidence applicable to a cause and to render judgment accordingly or deprive court of its jurisdiction to admit competent circumstantial evidence by an agreement requiring direct and positive proof of a fact.

**10. Stipulations ⇐3**

A stipulation that a cause be submitted upon unsworn report of an expert and that such report should be conclusive will not be tolerated.

**11. Stipulations ⇐3**

Stipulation before birth of illegitimate child, with respect to blood test to be performed which had effect of resting final judgment and determination of rights of infant solely upon unverified report of two physicians, was improper as an attempt to deprive court of power to receive evidence concerning paternity of child other than report of physicians and as an attempt to

make conclusive that which is not legally conclusive. Civ.Code, §§ 196a, 231; Code Civ.Proc. §§ 1837, 1978.

**12. Stipulations ⇐3**

Stipulation in filiation proceedings, entered into before birth of infant child, relating to blood test to be taken and providing for a dismissal with prejudice of action against alleged father if report of two physicians indicated that blood test did not show paternity, could not be given validity as a compromise of a minor's claim where no verified petition was filed, no hearing had, and no evidence taken. Civ.Code, §§ 196a, 231; Probate Code, § 1431.

**13. Stipulations ⇐13**

Where stipulation in filiation proceeding pertaining to blood tests and purported order approving stipulation were of no effect, there was no necessity that an application be made on behalf of illegitimate infant plaintiff for relief therefrom. Civ. Code, §§ 196a, 231; Code Civ. Proc. §§ 1837, 1978.

**14. Bastards ⇐92**

In filiation proceeding, whether testimony of mother of illegitimate child is entitled to full credit is for jury and trial judge.

**15. Bastards ⇐65**

Testimony of mother of illegitimate child that she and defendant had four acts of sexual intercourse at or about the date when in the ordinary course of nature child must have been conceived was sufficient to constitute a prima facie case in filiation proceeding and to sustain verdict for infant plaintiff although acts were denied by defendant. Civ. Code, §§ 196a, 231; Code Civ. Proc. §§ 1833, 1844, 1847.

**16. Bastards ⇐65**

In filiation proceeding by illegitimate child against alleged father, prima facie case made out by testimony of mother as to intercourse with defendant at or about date when in the ordinary course of nature plaintiff must have been conceived was not destroyed by contradictory testimony of an admission to witness by mother that she was married and was going to have a baby by her husband. Code Civ. Proc. § 1833.

**17. Bastards ⇐65**

Admission by defendant, in filiation proceeding, that he had illicit relations with plaintiff's mother prior to March of a designated year, was not contradictory of mother's testimony that plaintiff was conceived by defendant in December of that year, but, in fact, tended to show probability of a repetition of illicit relations in December.

**18. Evidence ⇐584(1)**

When prima facie evidence of a fact has been introduced, its effect is not destroyed by introduction of contradictory evidence and it stands as proof until both contradicted and overcome by other evidence. Code Civ.Proc. § 1833.

**19. Bastards ⇐70**

In filiation proceeding even though complete or satisfactory proof is made of sexual acts by mother with a man other than defendant on other occasions, it is still exclusive function of jury to determine whether defendant is father of child by virtue of his act on date testified to by mother. Civ.Code, §§ 196a, 231.

**20. Bastards ⇐54**

In filiation proceeding, although burden of proof did not rest on defendant to prove that he was not father of child, in his attempt to show that mother had had illicit relations with other men, it was incumbent upon him to show that such relations were had at or about the time when in ordinary course of nature child must have been conceived and that at such time there existed both desire and opportunity on the part of mother and a man other than defendant to have had improper relations. Civ.Code, §§ 196a, 231.

**21. Bastards ⇐92**

Jury in filiation proceeding having heard all of the testimony, including extensive cross-examination of each witness by opposing counsel and having made its determination, verdict would not be disturbed. Civ.Code, §§ 196a, 231.

**22. Bastards ⇐92**

In filiation proceeding even though facts related by mother concerning occasion of sexual intercourse with defendant were not such as might be expected and

incident as described was unique and extraordinary, in light of fact that jury, presumably composed of experienced persons, believed her statements, appellate court would not say that testimony was incredible. Civ.Code, §§ 196a, 231.

**23. Appeal and error ⇐989**

When a verdict is attacked as being unsupported by the evidence, power of appellate court is limited to a determination of whether there is any substantial evidence, contradicted or uncontradicted, that will support the conclusion of jury.

**24. Bastards ⇐55, 65**

In filiation proceeding, the application of law of heredity that the agglutinogens A and B cannot appear in the blood of a child unless present in the blood of one or both parents to blood test showing defendant with blood group O, type MN, mother with group A, type N, and plaintiff with group B, type N, is evidence, but not conclusive evidence, that defendant is not father of plaintiff and is to be considered with all of the other evidence. Code Civ. Proc. § 1978.

**25. Bastards ⇐55**

The blood test as legal evidence of paternity is "expert opinion" because the conclusions reached by examiner are based upon medical research and involve questions of chemistry and biology with which a layman is unfamiliar.

See Words and Phrases, Permanent Edition, for all other definitions of "Expert Opinion".

**26. Evidence ⇐570**

Expert testimony is to be given the weight to which it appears in each case to be justly entitled.

**27. Bastards ⇐65**

The infallibility of results of blood tests for paternity depends upon skill employed in making them, the tests being subject to error from lack of training of serologist, use of commercial sera, and failure to make a counter test.

**28. Evidence ⇐574**

When scientific testimony and evidence as to facts conflict, the relative weight of evidence is to be determined by trier of facts.

**29. Bastards ⇐63**

In filiation proceeding, order directing defendant to stand in front of jury in close proximity to mother, who was holding infant plaintiff in her arms, in order that jurors might study and compare physical features of plaintiff with those of defendant, was not error.

**30. Bastards ⇐71**

Instruction that no evidence is made conclusive unless so declared by the Code of Civil Procedure and that the Code does not declare blood tests to determine parentage to be conclusive, and that hence jury was not bound by such medical opinions, correctly stated the law and was not erroneous as emphasizing or detracting from evidence of any character introduced at trial. Code Civ.Proc. § 1978.

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Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Filiation proceeding by Carol Ann Berry, an infant, by A. H. Risse, her guardian ad litem, against Charles Spencer Chaplin, which proceeding was originally commenced before plaintiff's birth by plaintiff's grandmother as guardian ad litem. From certain adverse portions of the judgment, defendant appeals.

Affirmed.

See also 169 P.2d 453.

Wright & Millikan, Loyd Wright, Charles E. Millikan, and S. Earl Wright, all of Los Angeles, for appellant.

Joseph Scott, Cuthbert J. Scott, A. H. Risse, and J. Howard Ziemann, all of Los Angeles, for respondent.

WILSON, Justice.

This is a filiation proceeding commenced under sections 196a and 231 of the Civil Code by the grandmother of plaintiff as guardian ad litem prior to plaintiff's birth in which a judgment was prayed that defendant be declared to be the father of plaintiff, and that he be required to pay for medical care during pregnancy and

birth for the mother of plaintiff, and for the support of plaintiff after birth, together with attorneys' fees and costs.

Following the commencement of the action a stipulation was signed by the guardian ad litem and the attorneys then representing her and plaintiff, and by defendant and his attorneys, which recites the claim of Joan Berry, the mother of the prospective child, that she was then with child begotten by defendant on or about December 20, 1942, and the denial of defendant that he was the father of said child. The stipulation, the details of which will be stated hereinafter, provides for the making of tests of the blood of the child, of Joan Berry, and of defendant. Said stipulation was approved by the Honorable William S. Baird, a judge of the superior court. After the birth of the child blood tests were made by physicians, chosen as provided in the stipulation. They unanimously reported their conclusion from the tests that defendant was not the father of the child. Counsel who at that time represented plaintiff did not, as provided in the stipulation, file a dismissal of the action upon the receipt of said report. Thereupon defendant made a motion for dismissal based upon the terms of the stipulation and the physicians' report. Counsel who now represent plaintiff were substituted for the attorneys who commenced the action and who entered into said stipulation, and the present guardian ad litem was substituted for the grandmother. The motion to dismiss was heard by the Honorable Stanley Mosk, a judge of the superior court. No evidence was offered at the hearing of the motion concerning the justness or fairness of the stipulation to the minor. Judge Mosk denied the motion on March 8, 1944. Defendant then answered denying the allegations of the complaint and setting up as an affirmative defense the stipulation to which reference has been made, the report of the physicians, the payment of the sums which he agreed in the stipulation to pay, and alleging that by reason of the stipulation, the physicians' report, and the payment of said sums, plaintiff was estopped to proceed with the action. The case came on for trial before the Honorable Clarence L. Kincaid, whereupon, on motion of defendant, his special defense was considered and ruled upon before the case proceeded to trial. Again no evidence was presented as to whether the stipulation was for the best interests of the minor. The court ruled that "the first affirmative defense herein which is a plea in bar to the further prosecution of the action is denied."

The case was tried before a jury which rendered a verdict that defendant is the father of plaintiff. A judgment so decreeing was entered in accordance with the verdict and adjudging that defendant pay to the guardian ad litem the sum of $75 per week for the support and education of the child during her minority, or until the further order of the court, and the sum of $5,000 attorneys' fees.

Defendant has appealed from the whole of the judgment except the portion requiring the payment of said sum as attorneys' fees.

Plaintiff has appealed from those portions of the judgment awarding said amounts for her support and maintenance and for the fees of her attorneys, claiming that both are insufficient. Her appeal is covered by a separate opinion this day filed. Cal.App., 169 P.2d 453.

1. *Did the court err in denying defendant's motion to dismiss the action?* The stipulation to which reference has been made contains the following, among other provisions: That subsequent to the making of said claim by Joan Berry defendant voluntarily agreed to pay to her the sums of money set forth in the stipulation for medical care and for her support and for all hospital and medical expenses necessary for her proper care during the period of her pregnancy and confinement and attendant upon the birth of the child, upon condition that she would voluntarily submit said child after its birth to medical tests for the purpose of determining its paternity and that she would make herself and said child available at all times so that said tests could be made by competent medical experts; that an order be made by the superior court whereby defendant shall be required to pay to the guardian ad litem the amounts set forth in the stipulation for said purposes, and that attorneys' fees in the

sum of $5,000 shall be paid directly to the attorneys for plaintiff; that if the action shall be tried defendant shall pay an additional sum of $5,000 as attorneys' fees; that the action shall not be brought to trial until at least four months after the birth of the child and not until appropriate tests shall have been conducted as provided in the stipulation; that after said child shall have lived for a period of not less than four months it shall be made available for the purpose of having such tests made; that one physician shall be named by defendant, one by the guardian ad litem, and the two physicians so chosen shall select a third "who shall be especially skilled in such matters, who shall make a blood test or other tests accepted by medical science for the purpose of proving and establishing paternity, and who shall report their findings and conclusions with respect to the paternity of said child to the said guardian ad litem and to the defendant"; that said Joan Berry shall be bound by said stipulation as if she were the plaintiff and real party in interest; that defendant, by entering into the stipulation, shall in no way be deemed or construed as thereby admitting any allegation in the complaint, but on the contrary denies that he is or could be the father of the child.

The following paragraph contains the provision under which defendant claims that, by reason of the report of the physicians, the dismissal of the action is made mandatory:

"It is further stipulated that in the event two of said physicians shall determine, as the result of said test or tests that the defendant herein is not the father of said child of Joan Berry, then and in such event the above entitled action shall be forthwith dismissed, with prejudice, and the defendant herein shall not thereafter be obligated to make any other or further payments in the above entitled action for any purpose whatsoever. In the event plaintiff's attorneys of record shall fail or refuse to file with the clerk of the above entitled court an order for the dismissal of said action with prejudice, under the circumstances and at the time hereinabove agreed upon, then and in such event the defendant may, without prior notice, present to the above entitled court a copy of said medical report of said two physicians, acknowledged by them before a Notary Public, and upon the presentation of said acknowledged copy of said report, the said court shall then and thereupon order the dismissal of the above entitled action, with prejudice."

Attached to the stipulation is a statement signed by said Joan Berry which recites: That she is represented by counsel of her own choosing and is acting under their advice; that she has read the stipulation and agrees to all of its provisions and in consideration thereof agrees to release defendant of all claims that she now has or may hereafter have against him except as set forth in said stipulation; that she agrees that she will make herself and the child available and will, at all reasonable times, cooperate and agree to have any and all physical and medical examinations made of her and of the child that may be required by defendant's attorneys for the purpose of making the tests provided for in said stipulation; that she further agrees that in the event the physicians' report shall show that defendant is not the father of her child she will accept said report as establishing that fact and will not, personally or on behalf of the child, make any further claims against defendant for the support, maintenance, care and education of the child or of herself.

Said stipulation and the attached agreement of Joan Berry were presented to said Judge William S. Baird, who, without a hearing, without the taking of any evidence, and without making inquiry or a finding as to whether the stipulation or the order was for the best interests of plaintiff child, signed an order reading as follows: "Upon reading the foregoing stipulation and statement and agreement of Joan Berry, it is ordered that said stipulation be and the same is hereby approved and the parties are ordered to perform the terms thereof as set forth therein." The stipulation, agreement, and order were filed on June 10, 1943.

[1-5] The guardian ad litem and her attorneys were without power to enter into and the court was without power to approve the stipulation. Section 196a of the Civil

Code provides that a civil suit in behalf of a minor illegitimate child to enforce the obligation of a parent to support it may be maintained by a guardian ad litem and in such action the court has power to order and enforce the performance of such obligation. The power of a guardian ad litem in such an action is not unlimited. In effect the court is the guardian, and the person named as guardian ad litem is an officer of the court appointing him and is the agent of the court. "He is like an agent with limited powers." Cole v. Superior Court, 63 Cal. 86, 89, 49 Am.Rep. 78. A minor who must of necessity appear by his guardian, is not bound by the admissions of the guardian which mean the sacrifice or giving away of the ward's property. Kidwell v. Ketler, 146 Cal. 12, 18, 79 P. 514. See also Waterman v. Lawrence, 19 Cal. 210, 217, 79 Am.Dec. 212. The relationship between a guardian ad litem or the attorney whom he employs and the minor is not the same as that between an attorney and an adult client. It is the duty of the guardian and the attorney to protect the rights of the minor, and it is the duty of the court to see that such rights are protected. The court may set aside or disregard concessions of the guardian which have not already been judicially approved and which are shown to the court to have been improvidently made. Any acts or concessions that apparently waive or surrender any material right of the minor, such as *the right to a trial,* should be set aside unless they be shown to be beneficial or, in any event, not prejudicial to the rights and interests of the minor. Eidam v. Finnegan, 48 Minn. 53, 50 N.W. 933, 934, 16 L.R.A. 507. The appointment of a guardian ad litem is not a bare technicality and the office of guardian involves more than perfunctory or shadowy duties. It is the duty of a guardian ad litem to protect or defend a suit, as the case may be. The guardian ad litem can neither admit anything against nor waive anything in favor of his ward, but the adversary of the infant must be required to prove his whole case. Greene v. Mabey, 35 R.I. 11, 85 A. 118, 120, Ann.Cas.1915A, 1290; Spotts v. Spotts, 331 Mo. 917, 55 S.W.2d 977, 983, 87 A.L.R. 660.

In the instant case, before the issues were joined between plaintiff and defendant by the filing of the latter's answer, the stipulation was entered into and presented to Judge Baird for his approval. No evidence was introduced from which the court could determine whether the terms of the stipulation were fair and reasonable or whether the interests of the minor were protected. The instrument provided that judgment should go against the minor by way of dismissal of the action in the event that two of the physicians made a report, which was not required by the stipulation to be verified, favorable to defendant. Without knowledge of the facts the court could not exercise supervision over the rights of the minor or the acts of the guardian ad litem. The order recited that "upon reading the foregoing stipulation" the same was approved and the parties were ordered to perform its terms. This was an approval of what had been done by the guardian and the attorneys not because the judge who signed the order found that it was for the best interests of the minor but solely because the consent of the guardian and her attorneys had been given and they were satisfied.

[6] Neither the guardian ad litem nor the attorneys for the minor, nor both, had power to consent to a judgment depriving the minor of its right to claim support from defendant without the opportunity of a trial at which all available evidence could be introduced for consideration by the jury, not merely such evidence as the parties considered proper for the determination of the issue involved.

[7-10] A stipulation that only such evidence as shall be agreed upon by the parties shall be admissible will not be allowed to control the action of the court in the reception of other evidence or to determine the effect to be given to it. Courts will not permit the course of justice to be controlled or the conduct of an action to be circumscribed in such manner as to defeat the ends of justice. Parties cannot arrogate judicial functions to themselves nor can they agree to oust the court of the jurisdiction given to it by law to admit all evidence applicable to a cause and to

render judgment accordingly. McCormick v. Woodmen of the World, 57 Cal.App. 568, 571, 207 P. 943. Neither can a court be deprived of its jurisdiction to admit competent circumstantial evidence by an agreement of the parties requiring direct and positive proof of a fact. Utter v. Travelers' Ins. Co., 65 Mich. 545, 32 N.W. 812, 816, 8 Am.St.Rep. 913. In Fidelity & Deposit Co. of Maryland v. Davis, 129 Kan. 790, 284 P. 430, 434, 68 A.L.R. 321, the court said that the experience of seven centuries has proved that the rules of evidence promote the general welfare and are for the best interests of the people, and that an agreement as to what shall constitute conclusive evidence is an attempt to make the court a ministerial officer of the parties to do that which the parties agree shall be done. In Conwell v. Varain, 20 Cal.App. 521, 130 P. 23, a stipulation was made in open court that the cause be submitted upon the single question of fact whether one line written in ink in a document was above or beneath another line, and that judgment should be rendered for plaintiff or for defendant accordingly as a handwriting expert appointed by the court should report concerning which line was superimposed upon the other. The court held (20 Cal. App. at page 528, 130 P. 23) that while an attorney had authority to stipulate upon certain matters, a stipulation that the cause be submitted upon the unsworn report of an expert and that such report should be conclusive was not to be tolerated.

An examination of the cases cited by defendant will readily show that they are not applicable to the case at bar although statements may be found therein arguendo that seem to favor his theory. In the case of In re Price, 61 Cal.App. 592, 215 P. 710, the mother of the minor and not the guardian ad litem had employed attorneys and the question was whether they were entitled to be paid for their services. No stipulation was involved and the only question decided by the court was that when a guardian ad litem has been appointed no one else may exercise his powers. In Newport v. Hatton, 195 Cal. 132, 231 P. 987, both sides of an action in which minors were defendants were controlled by the same attorney, and by fraudulent concealment of the rights of the minors the facts were not truly presented to the court. In Estate of Hastings, 206 Cal. 524, 274 P. 973, the court appointed an expert witness in a proceeding by a claimant of the estate of a deceased person. The court held that the attorney for the incompetent claimant not having made an objection to the appointment of the expert all objections to such action were waived. However, there was no stipulation that his evidence should be binding or that it should be given any greater weight than such evidence is usually accorded. In Taylor v. Hill, 115 Cal. 143, 44 P. 336, 46 P. 922, the only point was whether an attorney employed by the guardian ad litem had power to waive a statutory notice of a claim.

[11] The effect of the stipulation in question here was to rest the final judgment and the determination of the rights of the unborn infant solely upon the unverified report of two physicians. This was an attempt to deprive the court of the power to receive any evidence concerning the paternity of the child other than the report of the physicians, and to make conclusive that which has not been declared by the legislature to be conclusive (see Code Civ.Proc. secs. 1837, 1978), and which the Supreme Court of this state has expressly declared is not conclusive. Arais v. Kalensnikoff, 10 Cal.2d 428, 432, 74 P.2d 1043, 115 A.L.R. 163.

[12] The stipulation was not a compromise of the minor's claim, and if intended as such the annexed order purporting to approve it was invalid and failed of its purpose. Section 1431 of the Probate Code provides that when a minor has a disputed claim for damages, money, or other property against a third person the same may be compromised, but that before the compromise is valid it must be approved by the superior court of the county wherein the minor resides upon the filing of a verified petition in writing. The record does not show and defendant does not claim that a verified petition was filed, and, as heretofore pointed out, no hearing was had and no evidence taken.

[13] Since the stipulation and the purported order approving it are of no effect there was no necessity that an application be made on behalf of the minor for relief therefrom. In connection with his argument that the stipulation and the accompanying order purporting to approve it constituted a consent to a dismissal of the action upon the happening of the events provided for in the stipulation, defendant cites Pacific Paving Co. v. Vizelich, 2 Cal.App. 515, 83 P. 459; Moffitt v. Jordan, 127 Cal. 628, 60 P. 175; Brown v. Superior Court, 10 Cal.App.2d 365, 52 P. 2d 256; and Webster v. Webster, 216 Cal. 485, 14 P.2d 522. The rights of a minor were not involved in any of said cases and whatever may be found in the opinions in reference to applications for relief from stipulations is inapplicable to the instant case for the reasons hereinbefore stated.

It follows that Judge Mosk's order denying defendant's motion to dismiss and Judge Kincaid's order denying his plea in bar were properly made.

[14-17] 2. *Did plaintiff make out a prima facie case against defendant?* "Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence." Code Civ.Proc. sec. 1833. "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason." Code Civ.Proc. sec. 1844. A witness is presumed to speak the truth. Code Civ.Proc. sec. 1847. Whether Miss Berry was entitled to full credit was for the jury and the trial judge to determine. Estate of Gird, 157 Cal. 534, 542, 108 P. 499, 137 Am.St.Rep. 131; Estate of Snowball, 157 Cal. 301, 305, 107 P. 598. She testified that she and defendant had four acts of sexual intercourse at or about the date when, in the ordinary course of nature, the child must have been begotten. These acts occurred on the 10th, 23d, 24th and 30th days of December, 1942. This evidence alone was sufficient not only to constitute a prima facie case but to sustain the verdict although denied by defendant. State v. Reese, 43 Utah 447, 135 P. 270, 273. Her testimony was corroborated by defendant's butler as to the fact that she arrived at defendant's home on the evening of December 23d and remained there until some time in the afternoon of December 24th, occupying either defendant's room or a room connected therewith by a bathroom, and that defendant was present in the room during at least a portion of the night of the 23d and in the morning of the 24th. The testimony of the butler that in a conversation had by him with Miss Berry in the spring of 1943 she stated that she was married to a captain in the army and was going to have a baby did not detract from the prima facie case made out by other evidence. It does not appear that she stated when she had become the wife of the captain, and even if it were true that she had married after December, 1942, and even though her evidence were contradicted by other evidence, a prima facie case still remained. Defendant's admission that he had had illicit relations with Miss Berry prior to March, 1942, is not contradictory of her testimony but in fact tends to corroborate her evidence and to show the probability of his having had sexual intercourse with her in December, 1942. State v. Reese, 43 Utah 447, 135 P. 270, 278.

[18] Section 1833 of the Code of Civil Procedure does not say that prima facie evidence is that which suffices "until contradicted *or* overcome" but "until contradicted *and* overcome" by other evidence. When prima facie evidence of a fact has been introduced its effect is not destroyed by the introduction of contradictory evidence. It stands as proof until both contradicted *and* overcome by other evidence. Miller & Lux Inc. v. Secara, 193 Cal. 755, 770, 227 P. 171.

[19] There was evidence that Miss Berry was in Tulsa, Oklahoma, in November, 1942, and in January and April, 1943. While there she was in the company of a man other than defendant whom she had met in May, 1942. Both she and the man in question testified that on two occasions he called at her hotel, took her to dinner

and to a theater, and accompanied her back to the hotel. There is no evidence or intimation of improper relations on those occasions. She borrowed money from the man in Tulsa but he testified that the money was loaned through the medium of his attorney and that the attorney obtained a chattel mortgage on Miss Berry's personal property covering the amount of the loan. There was also evidence that on several occasions in Los Angeles she was in the company of another man and twice was in his apartment. The briefs do not point us to anything in the record to indicate whether or not any other persons were present in the apartment while she was there. But even though complete or satisfactory proof had been made of sexual acts by Miss Berry with any other man on other occasions, it would still have been the exclusive function of the jury to determine whether defendant is the father of her child by virtue of his act in December, 1942.

[20] The burden of proof did not rest on defendant to prove that he was not the father of the child. Nevertheless, in his attempt to show that Miss Berry had had illicit relations with other men it was incumbent upon him to show that such relations were had at or about the time when, in the ordinary course of nature, the child must have been conceived, Estate of Gird, 157 Cal. 534, 547, 108 P. 499, 137 Am.St.Rep. 131; Kyne v. Kyne, 38 Cal.App.2d 122, 131, 100 P.2d 806, and that at such time there existed both the desire and the opportunity on the part of Miss Berry and a man other than defendant to have improper relations. Mensing v. Croter, 209 Cal. 318, 320, 287 P. 336, 280 P. 1026.

The case of Sonnenberg v. State, 124 Wis. 124, 102 N.W. 233, cited by defendant, does not lend aid to his assertion that a prima facie case was not established. That was a criminal case in which the fact that the defendant was the father of the child was required to be proved beyond a reasonable doubt, and the question of the establishment of a prima facie case did not enter into the decision.

[21] 3. *Was the testimony of Miss Berry so unsatisfactory and incredible as to amount to no substantial evidence?* This question is discussed in twenty-three pages of defendant's brief wherein attention is drawn to discrepancies between the testimony given by Miss Berry in her deposition and that given by her at the trial and contradictions of some portions of her testimony by other witnesses are pointed out. The credibility of Miss Berry, like that of all other witnesses, was a matter for the jury to decide. Having heard all of the testimony, including extensive cross-examination of each witness by opposing counsel, the jury made its determination and the verdict will not be disturbed. Treadwell v. Nickel, 194 Cal. 243, 252, 228 P. 25.

[22] With reference to one of the alleged acts of sexual intercourse defendant asserts that Miss Berry's evidence was so improbable and incredible that none of her testimony can be believed. It may be said that the facts related by her concerning that occasion are not such as might be expected, but people do unusual things in unusual circumstances. The performances of desirous and adventurous persons cannot always be rationalized. Quaint though the episode may appear, the jury, presumably composed of experienced persons, must have believed her statements, and merely because the incident as described may have been unique and extraordinary an appellate court will not say that her testimony is incredible. Notwithstanding defendant's critique the jury believed Miss Berry's evidence.

[23] When a verdict is attacked as being unsupported by the evidence the power of the appellate court is limited to a determination whether there is any *substantial* evidence, contradicted or uncontradicted, that will support the conclusion of the jury. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Estate of Snowball, 157 Cal. 301, 305, 107 P. 598.

[24] 4. *Were the blood tests conclusive that defendant is not the father of plaintiff?* The qualifications, competency, and integrity of the physicians designated to make the blood tests are not questioned. After the tests were completed they made a report reading as follows:

"Examination of the bloods of Charles Chaplin, Joan Berry and Carol Ann Berry give the following results.

| | Group | Type |
|---|---|---|
| Charles Chaplin | O | MN |
| Joan Berry | A | N |
| Carol Ann Berry | B | N |

Conclusion reached as the result of these blood grouping tests is that in accordance with the well accepted laws of heredity, the man, Charles Chaplin, cannot be the father of the child, Carol Ann Berry. The law of heredity which applies here is 'The agglutinogens A and B cannot appear in the blood of a child unless present in the blood of one or both parents.'"

Two of the physicians testified at the trial that the report truly represented their findings from the tests made. They and one other physician testified that by reason of said tests defendant was not and could not have been the father of plaintiff. The report and the evidence of the physicians were not controverted by any scientific evidence, but were before the jury to be considered with all of the other evidence in the case. According to the evidence, the so-called A and B test was discovered about 1900 and the M and N test about 1930. It may be argued that because defendant's blood was type MN and the bloods of both Miss Berry and plaintiff were type N, defendant might have been the father of plaintiff. One physician testified, "We could not have excluded him on such an incomplete test," and another, "We could not rule him out." But it appears from the evidence that the M and N test was an incomplete test and study of the bloods of the respective parties, and that the A and B test was necessary to an authentic and complete report.

[25, 26] But the blood tests were not conclusive evidence. It was so declared in the only reported case in California in which blood tests were used for the purpose of attempting to determine the parentage of a child. Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163. In that case the court held, 10 Cal.2d at pages 431, 432, 74 P.2d at page 1046, 115 A.L.R. 163, that the evidence concerning the blood test "is expert opinion because the conclusions reached by the examiner are based upon medical research, and involve questions of chemistry and biology with which a layman is entirely unfamiliar," but that such tests and the evidence thereof are not conclusive because not so declared by the code (Code Civ.Proc. sec. 1978); and further, that expert testimony is to be given the weight to which it appears to be justly entitled.

[27] Conceding the immutability of the scientific law of blood-grouping, which we have no reason to question, the infallibility of the results of blood tests depends upon the skill employed in making them. Errors are reported due to (1) the lack of training of the serologist; (2) the use of commercial sera; (3) the failure to make a countertest. 16 So.Cal.Law Rev. 190.

[28] When scientific testimony and evidence as to facts conflict, the jury or the trial court must determine the relative weight of the evidence. Rolland v. Porterfield, 183 Cal. 466, 469, 191 P. 913; Estate of Blake, 136 Cal. 306, 309, 68 P. 827, 89 Am.St.Rep. 135. The law makes no distinction between expert evidence and that of any other character. Treadwell v. Nickel, 194 Cal. 243, 252, 228 P. 25; State Comp. Ins. Fund v. Industrial Acc. Comm., 195 Cal. 174, 184, 231 P. 996.

The decision in the Arais case has been the subject of discussion and criticism in law reviews and other legal periodicals [1] but not by other courts as far as we have been able to ascertain, and it remains the law of this state until modified or overruled by the court that rendered the opinion.

1 "Conclusiveness of Blood-Grouping Tests in Proof of Non-Parentage," 26 Cal. Law Rev. (1937–38) 456; "Scientific Gadgets in the Law of Evidence—Blood Tests," 53 Harvard Law Rev. (1939–40) 285, 288; "Blood Tests as Proof of Paternity," 8 Kansas Bar Assn. Journal (1939–40) 479, 481. "Admissibility of Blood Tests in Paternity Cases," 11 So. Cal.Law Rev. (June, 1938) 524; a symposium consisting of three articles on the subject of Blood-Grouping, 16 So. Cal. Law Rev. (March, 1943) pp. 161, 177, 193. The Arais case is referred to in a note on pp. 166, 167.

[29] 5. *Did the court err in requiring defendant to stand in front of the jury with Miss Berry and plaintiff?* Defendant complains of the order of the court directing him to stand in front of the jury in close proximity to the mother holding her child in her arms in order that the jurors might study and compare the physical features of the infant plaintiff with those of defendant. We see no reason why they should not have been given the benefit of personal observation of the parties and we have not been referred to any authority to the effect that such an order of the court is improper or prejudicial. On the other hand, such a comparison has been expressly approved. People v. Richardson, 161 Cal. 552, 561, 120 P. 20; Mathews v. Hornbeck, 80 Cal.App. 704, 708, 252 P. 667; In re Jessup, 81 Cal. 408, 418, 21 P. 976, 22 P. 742, 1028, 6 L.R.A. 594. In the latter case a photograph showing the decedent and the claimant to the estate in the same picture, was introduced for the purpose of comparison. It does not appear in either of the other two cases whether the child and its alleged father were required to stand side by side in front of the jury, but it does not seem that such a presentation would create any greater emotional appeal to the members of the jury than if the child and the reputed father had not been placed so close to each other. The jurors were entitled to the ocular demonstration ordered by the court, and it will be assumed that they exercised their powers of observation rather than of imagination.

We are not impressed with the thought advanced by counsel for defendant that the sympathy of the jurors could have been aroused by the juxtaposition of the three parties in interest. The apprehension expressed by counsel that plaintiff in the arms of her mother caused compassionate visualization of the ancient masterpieces of "Madonna and Child" is dispelled by the character of the evidence in the case which kept the minds of the jurors fixed on the unspiritual and terrestrial affairs of the mother and defendant.

[30] 6. *Did the court err in instructing the jury?* Defendant complains of the following instruction: "Whatever claims the medical profession may make for blood tests to determine parentage, no evidence is by law made conclusive or unanswerable unless so declared by the Code of Civil Procedure of the State of California, and the said Code of Civil Procedure of this state does not declare that this type of expert testimony is conclusive or unanswerable, therefore, you are not bound by such medical opinions." The instruction correctly states the law as declared in Arais v. Kalensnikoff, supra. Other instructions were given upon the subject of expert testimony but it is not claimed that there is conflict among them. The instruction complained of contains no emphasis upon or detraction from evidence of any character introduced at the trial.

7. *Defendant's appeal from the award of $75 per week to plaintiff.* Defendant has not questioned the reasonableness of the award of $75 per week, if he be required to pay any amount at all, but by reason of his contention that he is not plaintiff's father he has appealed from said part of the judgment. Further reference to said appeal is unnecessary by reason of our decision this day rendered on plaintiff's appeal, 169 P.2d 453, that the amount is reasonable.

The portions of the judgment appealed from by defendant are affirmed.

MOORE, P. J., concurs.

McCOMB, Justice.

I concur in the judgment because of the fact that this court is bound by the decision of the Supreme Court in Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163.[2] I believe, however, that that court was in error in its determination of the case.

[2] In the cited case the evidence upon which defendant was adjudged to be the father of the child in question, although excluded by the blood test, showed that:
1) Defendant was twice married;
2) The mother had named a man other than defendant as the father in the child's birth certificate; and
3) Defendant was seventy years of age, and, according to his wife, had been impotent for a number of years.

(See Arais v. Kalensnikoff, Cal.App., 67 P. 2d 1059.) This view is concurred in, as pointed out in the opinion of Mr. Justice Wilson, by writers in a number of the leading law journals in the United States. Sidney B. Schatkin in a recent work, Disputed Paternity Proceedings (1944), at page 135, thus referred to the Supreme Court's opinion in Arais v. Kalensnikoff, supra:

"It remained, however, for the Supreme Court, highest judicial tribunal in the State, to render a decision that has evoked the most bitter and critical comment. It has been called 'a striking miscarriage of justice.' The facts in that case have been described as 'standing in a niche all of their own in the judicial hall of fame.' "

It is possible that in view of the advances made in the medical profession since the decision by the Supreme Court in the Arais case, the present court may see fit to review the rule announced in the previous decision and establish a rule of jurisprudence on this subject consonant with the principle uniformly recognized without question by the medical profession of the United States and Europe.

In discussing blood-groupings analogous to those disclosed by the evidence in the instant case Professor Wigmore, commenting upon the subject in his monumental work on Evidence, Volume 1, Third Edition (1940), section 165b, page 615, says:

"But at this point comes into play the great discovery of science (emerging after many years of patient research by numerous scientists, but now accepted as correct by all) viz. that *no particular gene A, B, or O, will appear in the progeny unless it was present in one of the parents.* This universal negative truth of heredity is the basis of the inferences to be examined later."

Ascertainment of the factual truth in the adjudication of any controversy is a consummation devoutly to be wished. Time was when the courts could rely only upon human testimony. But modern science brought new aids. The microscope, electricity, X-ray, psychology, psychiatry, chemistry and many other scientific means and instrumentalities have revised the judicial guessing game of the past into an institution approaching accuracy in portraying the truth as to the actual fact where, in the pursuit of which, scientific devices may be applied. The chemical tests for learning the presence of poisons in the blood stream, application of the Roentgen ray in defining the fracture of a bone, the use of the microscope in acquiring exact knowledge of the authorship of documents, of the presence of bacteria or of the prevalence of white corpuscles—all argue eloquently for a reliance upon scientific devices for ascertaining the truth. If the courts do not utilize these unimpeachable methods for acquiring accurate knowledge of pertinent facts they will neglect the employment of available, potent agencies which serve to avoid miscarriages of justice.

In the case at bar a widely accepted scientific method of determining parentage was applied. Its results were definite. To reject the new and certain for the old and uncertain does not tend to promote improvement in the administration of justice.




74 Cal.App.2d 669

**BERRY v. CHAPLIN.**

**Civ. 15143.**

District Court of Appeal, Second District, Division 2, California.

May 27, 1946.

Hearing Denied July 24, 1946.

**1. Bastards ⚿78**

Where pretrial stipulation in filiation proceeding was silent as to amount to be paid by defendant for plaintiff's maintenance and support in the event defendant should be found to be plaintiff's father, amount to be allowed therefor was in discretion of trial court. Civ.Code, § 196a.

**2. Bastards ⚿78**

An order for support and education of illegitimate child is to be made by court in exercise of its sound discretion con-

sidering needs of child and financial ability of father. Civ.Code, §§ 137, 196a.

**3. Bastards ⇐92**

Reviewing court will not interfere with order of trial court fixing amount to be paid by father for support and maintenance of his illegitimate child unless as a matter of law trial court abused its discretion, and all reasonable inferences from evidence which will uphold order will be indulged. Civ.Code, §§ 137, 196a.

**4. Bastards ⇐16**

Father's duty to support illegitimate child does not end with the furnishing of mere necessities, if he is able to afford more. Civ.Code, §§ 137, 196a.

**5. Appeal and error ⇐946**

Discretion is "abused", and thereby subject to review, whenever in exercise of its discretion court exceeds the bounds of reason; all of the circumstances before it being considered.

See Words and Phrases, Permanent Edition, for all other definitions of "Abuse of Discretion".

**6. Appeal and error ⇐948**

An abuse of discretion is never presumed, but must be affirmatively established by party complaining of provisions of an order, and unless a clear case of abuse is shown, and unless there has been a miscarriage of justice, reviewing court will not substitute its opinion for that of trial court and thereby divest trial court of its discretionary power.

**7. Bastards ⇐49**

Defendant, by failure to deny allegation of complaint that defendant had a vast amount of real and personal property sufficient to pay plaintiff in filiation proceeding amount of any order or judgment, admitted the truth of allegation but did not establish how extensive the holdings were. Civ.Code § 196a.

**8. Bastards ⇐78**

Where illegitimate child required the care of either a nurse, its mother, or its grandmother, and maintenance of one of them was a necessary part of support of child, father could not be required to provide food, housing and clothing for both mother and grandmother in the absence of proof that child's care required attendance of both. Civ.Code § 196a.

**9. Bastards ⇐78**

In filiation proceeding, defendant's standard and condition of living, his position in society, value of his property, incumbrances thereon, his income, and his indebtedness are elements to be considered in determining amount that he should be required to pay for plaintiff's support and maintenance. Civ.Code, § 196a.

**10. Bastards ⇐54**

In filiation proceeding, burden of proof rests upon plaintiff to prove defendant's ability to pay as fully as it does to establish parenthood, and it is not incumbent upon defendant to appear voluntarily and disclose facts concerning his property and income, but he may await introduction of evidence by plaintiff on such subject and then present his defense. Civ. Code, § 196a.

**11. Bastards ⇐53, 54**

Court cannot indulge a presumption as to style of living of defendant in a filiation proceeding or of any other person or group of persons or take judicial notice thereof. Civ.Code, § 196a; Code Civ. Proc. § 1875.

**12. Evidence ⇐3**

Night club gossip, newspaper and magazine stories, or a pretentious style of living cannot form the basis for judicial notice of wealth of a litigant. Code Civ. Proc. § 1875.

**13. Evidence ⇐4**

Courts may take judicial notice of facts that may be regarded as forming a part of the common knowledge of every person of ordinary understanding and intelligence provided such facts are certain and indisputable. Civ.Code, § 196a; Code Civ.Proc. § 1875.

**14. Evidence ⇐4**

Judicial notice is not taken of facts which court cannot know without resort to proof. Civ.Code, § 196a; Code Civ. Proc. § 1875.

**15. Bastards ⇐78**

Award of $75 per week for support and maintenance of illegitimate child, in light of amounts paid for prenatal expenses and thereafter and in light of absence of evidence of defendant's wealth, was not an abuse of discretion. Civ.Code, §§ 137, 196a.

**16. Bastards ⇐78**

Judgment directing defendant in a filiation proceeding to pay a specified sum per week during minority of plaintiff "or until further order of the court", reserves continuing jurisdiction to increase or diminish amount, giving consideration to possible future changes in needs of plaintiff and financial condition of defendant. Civ.Code, §§ 137, 196a.

**17. Bastards ⇐94**

Legal services performed on behalf of a child in a filiation proceeding are a part of the child's right of support, and consequently court has power to make an award for attorneys' fees in such a case as an incident to its authority to make an order for support of the child. Civ.Code, § 196a.

**18. Stipulations ⇐14(1)**

Where stipulation in filiation proceeding made before plaintiff's birth by other counsel and relating to blood test to be made and attorneys' fees was void by reason of provisions attempting to make blood tests conclusive and to deprive court of jurisdiction to determine parentage after a trial in the ordinary course, so that a motion to be relieved from its effect was unnecessary, plaintiff's present counsel were not bound by stipulation insofar as it limited amount of attorneys' fees. Civ.Code, § 196a.

**19. Bastards ⇐94**

Where stipulation purporting to fix attorneys' fees in a filiation proceeding was void, the amount defendant might be required to pay rested within sound discretion of trial court. Civ.Code, § 196a.

**20. Attorney and client ⇐140**

In determining reasonable compensation for an attorney who has rendered services in connection with a legal proceeding, court must consider nature of litigation, its difficulty, amount involved, skill required and skill employed, attention given, success of attorney's efforts, his learning, age, and experience in particular type of work, intricacies and importance of litigation, labor and necessity for skilled legal training, and ability in trying cause and time consumed.

**21. Attorney and client ⇐140**

Where attorney has testified to services performed in connection with case, court in fixing fees is not bound by opinion of attorney as to value of services performed, but may allow such amount as will reasonably compensate attorney for time, labor, and skill employed in preparation for and in conduct of trials of case and in collateral matters applicable to case.

**22. Bastards ⇐94**

Evidence concerning services performed by attorneys for illegitimate child in filiation case established that $5,000 was not a reasonable or adequate fee. Civ. Code, § 196a.

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Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Filiation proceeding by Carol Ann Berry, an infant, by A. H. Risse, her guardian ad litem, against Charles Spencer Chaplin, which proceeding was originally commenced before plaintiff's birth by plaintiff's grandmother as guardian ad litem. From certain adverse portions of the judgment, plaintiff appeals.

Affirmed in part and reversed with directions in part.

Joseph Scott, Cuthbert J. Scott, A. H. Risse, and J. Howard Ziemann, all of Los Angeles, for appellant.

Wright & Millikan, Loyd Wright, Charles E. Millikan, and S. Earl Wright, all of Los Angeles, for respondent.

WILSON, Justice.

This is plaintiff's appeal from portions of the judgment in the same filiation proceeding that is the subject of an opinion filed concurrently herewith (169 P.2d 442)

in which defendant's appeal from parts of said judgment is determined. On the ground that the amounts are inadequate she has appealed from those portions of the judgment awarding (1) the sum of $75 per week for her support and maintenance and (2) the sum of $5,000 to her attorneys for their services. Reference is made to said opinion for a statement of facts. Such additional matters as are necessary to a consideration of plaintiff's appeal will be stated herein.

Immediately upon the rendition of the verdict of the jury finding that defendant was the father of plaintiff the court, without a jury, proceeded with a hearing for the purpose of determining the amounts that should be awarded for plaintiff's maintenance and support and for her attorneys' fees. At the conclusion of the hearing the court adjudged that the sums above mentioned should be paid by defendant.

[1] 1. *Did the court err in not awarding a greater amount than $75 per week for plaintiff's support and maintenance?* The stipulation discussed in our opinion on defendant's appeal did not contain any agreement as to the amount to be paid by defendant for plaintiff's maintenance and support in the event that he should be found to be her father. Hence the amount to be allowed therefor was within the discretion of the court, and the possibility suggested by plaintiff that the court might have deemed itself bound by the stipulation is not present. The only question is whether discretion was exercised so arbitrarily in fixing the amount that this court will interfere with the order.

Section 196a of the Civil Code provides that the father as well as the mother of an illegitimate child must give him support and education suitable to his circumstances, and that in an action brought on behalf of the minor the court shall have power to order and enforce performance of the parental obligation the same as under section 137 and other sections of the Civil Code. Section 137 relates to orders in divorce actions for the support of a wife and child and provides that any such order may be varied, altered, or revoked at the discretion of the court.

[2-6] The following rules of law are applicable to this proceeding: An order for the support and education of an illegitimate child is to be made by the court in the exercise of its sound discretion, considering the needs of the child and the financial ability of the father. There may be room for a difference of opinion in regard to the amount which should have been awarded, but an appellate court will not interfere with the order of the trial court unless, as a matter of law, the latter has abused its discretion, and all reasonable inferences from the evidence which will uphold the order will be indulged. Brockmiller v. Brockmiller, 57 Cal.App.2d 623, 625, 135 P.2d 184. The father's duty to support the child does not end with the furnishing of mere necessities if he is able to afford more. Bailey v. Superior Court, 215 Cal. 548, 555, 11 P.2d 865. In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered. Makzoume v. Makzoume, 50 Cal.App.2d 229, 231, 123 P.2d 72. An abuse of discretion is never presumed but must be affirmatively established by the party complaining of the provisions of the order. Wilder v. Wilder, 214 Cal. 783, 785, 7 P.2d 1032; Kaiser v. Hancock, 25 Cal.App. 323, 328, 143 P. 614; Lynch v. Lynch, 69 Cal.App. 66, 71, 230 P. 462. The burden is on the party complaining of the order to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power. Hale v. Hale, 55 Cal.App.2d 879, 883, 132 P.2d 67; Sharpe v. Sharpe, 55 Cal.App.2d 262, 265, 130 P.2d 462.

[7] The complaint alleges that defendant has a vast amount of real and personal property, including extensive holdings in the motion picture industry, sufficient to pay plaintiff the amount of any order or judgment in this action. By failing to deny, defendant admitted the truth of the allegation, but how "extensive" or "vast" his holdings may be does not appear from the pleadings or from the evidence.

Preceding the introduction of evidence plaintiff's counsel expressed a desire to examine defendant, his auditor and his books for the purpose of determining his resources, or to obtain a statement from his attorney concerning defendant's ability to care for the child "from the standpoint of a man of enormous wealth, not just a mere livelihood." Defendant's counsel offered to stipulate that he "has the financial ability to respond to any reasonable order made by this court suitable to the circumstances of the plaintiff." The proffered stipulation does not appear to have been accepted by counsel for plaintiff.

During the argument repeated references were made by plaintiff's counsel to her necessities and to the purported wealth of defendant. At one point the court stated: "The court is interested in hearing evidence on both subjects of the necessities and cost of necessities for the support and maintenance of the plaintiff minor, as well as the state and condition of wealth of the defendant as a means of ascertaining what is a reasonable amount to be allowed both for such support and counsel fees in consideration of all the circumstances of the case." Counsel were thus explicitly advised that the court was awaiting evidence upon which to base its order.

We have searched the record for evidence on both subjects, plaintiff's necessities and defendant's ability to respond, and find none except that of the guardian ad litem who was the only witness examined. He testified that in his opinion plaintiff should be awarded between $1,000 and $1,500 per month. As the basis of his estimate he stated that in his opinion defendant was worth "well in excess of one million dollars," and that it was his "understanding" that defendant's children had been educated in Europe and had had other unusual social advantages. A motion to strike his answer was denied, the trial judge stating that it "would be given such weight by the court as an opinion under those circumstances warranted." This is definite and clear-cut language attesting that the court did not place any value on the opinion of the witness and was a second invitation to counsel to produce factual evidence. The suggestion was unheeded. The record is devoid of facts pertinent to this material feature of the case.

With reference to the needs of plaintiff the guardian ad litem testified that he had paid $150 per month as rent for the house in which the child, its mother, and its grandmother resided and that he had not been able to find a suitable house for less rent; that neither the mother nor the grandmother was employed and neither contributed to the support of the household. He had no knowledge concerning the child's wardrobe except from hearsay. The only checks he had drawn as guardian ad litem were for rent, utilities, and food, the amounts not stated.*

[8] It is conceded that unless a nurse should be engaged the child must be cared for by either the mother or the grandmother. The maintenance of one of them is a necessary part of the support of the child, but defendant cannot be required to provide food, housing, and clothing for both the mother and the grandmother unless it is made to appear by proof of facts that the child's care requires the attendance of both. There was no evidence concerning the amounts necessary for the maintenance of the child and its mother except as to the amount of rent paid for their home. The guardian ad litem testified that he prepared an accounting for plaintiff's grandmother during the period of her guardianship from information furnished by her. The only specific items concerning which evidence was given by him consisted

* In this connection the following questions were asked and answers given in his cross-examination:

"Q. So, not only the child but Mrs. Gertrude E. Berry and Miss Joan Berry have lived on the sum that was paid to you through our office, is that correct? A. No, that is not correct.

"Q. What is correct? A. Well, they have certain other obligations that haven't been paid.

"Q. Are those obligations of the child or obligations of Miss Berry and Mrs. Berry? A. Miss Berry and Mrs. Berry.

"Q. Personal obligations? A. Personal obligations of their own."

of payments totaling slightly more than $600 made by the grandmother to several department stores, one amount being $403.13. The witness had no knowledge as to whether or not the expenditures were made for merchandise purchased for the minor.

In James v. Commonwealth, 190 Ky. 458, 227 S.W. 562, 563, it is held that in bastardy proceedings evidence is admissible to show the amount of property possessed by the mother of the child and by the defendant, and that the child is entitled to a contribution from its father of such sum as is commensurate with his ability to pay; and in State v. Reese, 43 Utah 447, 135 P. 270, 278, that an award in such a proceeding should be in accordance with the circumstances of the case and that the wealth of the accused, his ability to earn money, the lack of means of the mother and the health and condition of both should be taken into consideration. The case of Kyne v. Kyne, 70 Cal.App.2d 80, 83, 160 P.2d 910, states the same rule with which we are in accord. But there is no evidence in this action except that of the guardian ad litem heretofore referred to concerning defendant's ability to pay, and that, as we have said, was merely an expression of his opinion without a basis of fact.

[9, 10] The record is silent concerning defendant's standard and condition of living, his position in society, the value of his property, the encumbrances thereon, his income, and his indebtedness, all of which are elements that must be considered in determining the amount that he should be required to pay. Plaintiff's counsel did not, as was their right, call upon him to testify concerning those matters. Since the burden of proof rested upon plaintiff to prove defendant's ability to pay as fully as it did to establish parenthood, it was not incumbent upon him to appear voluntarily and disclose facts concerning his property and income. As in any other lawsuit defendant was privileged to await the introduction of evidence by plaintiff and then to present his defense.

[11, 12] The trial court could not, nor can we, either indulge a presumption as to the style of living of defendant or of any other person or group of persons, or take judicial notice thereof. The scope of judicial notice has been amplified by the courts far beyond the matters enumerated in section 1875 of the Code of Civil Procedure, but its frontiers have not been so expanded as to encompass night club gossip and stories appearing in newspapers and magazines within the domain of proof of wealth or of any other necessary fact. How many citizens, prominent in business, social, and civic affairs, have been reputed to be possessed of vast resources but have been adjudicated bankrupts without assets, or whose estates after death have been entirely consumed in the payment of indebtednesses of which their closest associates have had no knowledge! A pretentious style of living is not necessarily indicative of great wealth. It may be maintained from comparatively meager means to satisfy a vainglorious desire of a person to appear to be what he is not; and too, it may be rendered possible by funds that are secured through devious ways and that can be acquired only by reason of the impression made by the "front" that such funds are able to provide.

[13, 14] The comprehensive statement that courts are presumed to know what everyone else knows is not wholly accurate. Rather should it be said that courts may take judicial notice of facts that may be regarded as forming a part of the common knowledge of every person of ordinary understanding and intelligence. 31 C.J.S., Evidence, § 9, p. 510. To this should be added a second test: Is it certain and indisputable? Varcoe v. Lee, 180 Cal. 338, 346, 181 P. 223. Judicial notice is not taken of facts which the court cannot know without resort to proof. 31 C.J.S., Evidence, § 9, p. 512. Measured by these rules the trial court was left in ignorance concerning the financial condition of defendant.

The stipulation which was signed on June 9, 1943, provided that defendant should pay to the guardian ad litem forthwith the sum of $2,500 together with the sum of $100 each week until the trial for medical care and for the living expenses of Miss Berry and the infant plaintiff;

also the sum of $4,600 for expenses connected with Miss Berry's confinement, $500 of which was to be paid before the birth of the child, $1,000 at birth, $500 per month for four months after birth, and $1,100 after the child had been submitted to physicians for blood tests. All of said payments were made by defendant.

[15] In determining the amount to be allowed for plaintiff's support the court may have taken into consideration the amounts paid as provided for in the stipulation and the fact that no evidence was offered as to the purpose for which the money was expended. The court having before it nothing more than the evidence above outlined, made the award which seemed to it under the circumstances to be meet and proper. By reason of the rules of law hereinabove stated and of the dearth of evidence we are not disposed to interfere with the conclusion reached. See Gambetta v. Gambetta, 30 Cal.App. 261, 263, 157 P. 1141; Whiteside v. Wilkerson, 211 Cal. 752, 297 P. 15.

[16] Section 137 of the Civil Code provides that an order for support may be varied or altered at the discretion of the court. The judgment provided that the sum of $75 per week should be paid during the minority of plaintiff "or until the further order of the court," thus reserving continuing jurisdiction to increase or diminish the amount, giving consideration to possible future changes in the needs of plaintiff and the financial condition of defendant. In Kyne v. Kyne, 38 Cal.App.2d 122, 100 P.2d 806, the court sustained a judgment for the support of an illegitimate child. Upon a hearing had six years later in the same action it was proved (1) that by reason of the age of the child its needs were greater than when the judgment was rendered, and (2) that the income of the defendant was much larger. Based on those facts the court increased the amount and the order was sustained. Kyne v. Kyne, 70 Cal.App.2d 80, 160 P.2d 910.

In the instant case plaintiff may apply at any time, and from time to time, for an increased award, and at the hearing of any such application she will have an opportunity to offer more extensive evidence both as to her necessities and as to defendant's financial ability than that presented at the previous hearing.

*2. Was the court bound by the stipulation as to the amount of fees to be allowed plaintiff's attorneys?* With reference to attorneys' fees the stipulation provided as follows: "The sum of Five Thousand Dollars ($5,000.00) payable forthwith on account of attorneys' fees for services rendered by plaintiff's attorneys of record in this action and for services rendered to said Joan Berry prior to the filing of this action. In that connection, it is further stipulated that when and if the above entitled action shall be tried, the defendant shall pay upon the conclusion of said trial and entry of judgment in this action, a further sum of Five Thousand Dollars ($5,000.00) as plaintiff's attorneys' fees, which said sum shall be in full for all services rendered by any attorneys for plaintiff in the above entitled action."

In our decision on defendant's appeal (169 P.2d 453) we held the stipulation to be void by reason of its provisions that attempted to make the blood tests conclusive and to deprive the court of jurisdiction to determine the parentage of plaintiff after a trial had in the ordinary course of legal procedure, and that the order purporting to approve the stipulation was likewise void.

[17] Section 196a of the Civil Code empowers the court to make an order for the support of an illegitimate child in such amount as the evidence shows to be necessary and proper. Since legal services performed on behalf of a child in a filiation proceeding are a part of the child's right of support Andrade v. Newhouse, 54 Cal. App.2d 339, 344, 128 P.2d 927, the power of the court to award attorneys' fees is no less than its power to award support to the minor. Consequently in this case such amount may have been and may yet be allowed as is commensurate with the services performed by plaintiff's attorneys unhampered by the stipulation.

[18] Defendant maintains that plaintiff's present counsel are bound by the stipulation limiting the amount of attorneys' fees to the same extent as if they had been the original attorneys in the case, citing

Smith v. Whittier, 95 Cal. 279, 30 P. 529. That case held that an attorney who was substituted into an action was bound by a stipulation made by his predecessors relating to a procedural matter—the use of a deposition at the trial. No authorities have been furnished in support of defendant's assertion that the court is confined to the amount set forth in the stipulation. Defendant also cites the cases of Richardson v. Musser, 54 Cal. 196, and Moffitt v. Jordan, 127 Cal. 628, 60 P. 175, relating to the power of the court to relieve a party from a stipulation upon motion where it was entered into through inadvertence, mistake, or excusable neglect. Those decisions have no application to the case at bar. Since the stipulation was and is void a motion to be relieved from its effect was unnecessary.

[19] 3. *Is the sum of $5,000 a reasonable and adequate amount to be allowed as plaintiff's attorneys' fees?* Since the stipulation purporting to fix the attorneys' fees is void, the amount that defendant may be required to pay is within the sound discretion of the court. The question now is whether the amount fixed by the judgment is so small that this court can say that the trial court abused its discretion in making the allowance.

[20] The compensation of an attorney does not lie in the economic law of supply and demand like the fluctuating price of wheat and potatoes. Among the factors to be considered in determining what constitutes a reasonable compensation for an attorney who has rendered services in connection with a legal proceeding are the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded (City of Los Angeles v. Los Angeles-Inyo Farms Co., 134 Cal.App. 268, 276, 25 P.2d 224); the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed. Palm Springs etc. Co. v. Kieberk Corporation, 46 Cal.App.2d 234, 241, 115 P.2d 548; Collins v. Welsh, 2 Cal.App. 2d 103, 110, 37 P.2d 505.

When plaintiff's present counsel took charge of the case they were faced with the stipulation to which reference has been made in this opinion and in our decision on defendant's appeal. If the stipulation were valid, or if invalid but uncontested, plaintiff was out of court by reason of the physicians' report on the blood tests. The first problem to which counsels' attention was of necessity directed was whether the stipulation was valid, since by its terms as written plaintiff was deprived of her right of support from defendant without a trial in a court of law and without any showing excepting the unverified medical opinion which had already been rendered. Her privilege of cross-examination of the physicians as to the method and accuracy of their tests had been waived. This question was before the court on defendant's motion to dismiss with prejudice when the substitution of attorneys was made, and a contest of the motion was immediate.

The evidence detailing the legal services performed was given by one of counsel for plaintiff and is uncontradicted. The motion to dismiss was argued at length and was denied by the trial court. Defendant then filed in the District Court of Appeal a petition for a writ of mandate seeking to compel the Superior Court to dismiss the action. Plaintiff's attorneys appeared with the County Counsel, who represented the court, in opposition to the petition, briefs were filed, and the petition was denied. Defendant filed a petition in the Supreme Court for a similar writ. Conferences were had by plaintiff's attorneys with the County Counsel, a printed brief was prepared and filed, and the writ was denied. The case went to trial before a jury. The trial continued for three weeks, with recesses for two days occasioned by the absence of witnesses and by the holiday season. The jury disagreed and the case was reset for trial. In the meantime defendant had served a notice of intention to take a deposition in New York upon written interrogatories. Counsel for plaintiff prepared cross-interrogatories, consulted with counsel for defendant, and appeared in

court for the issuance of the commission to take the deposition. The second trial of the action consumed approximately two weeks. Investigators were employed to obtain evidence; their reports were examined; witnesses were interviewed; research was made for applicable law; instructions to the jury were prepared for both trials. A criminal case which in some manner involved the parties to this proceeding was tried in the United States District Court. One of the attorneys from the office of plaintiff's counsel sat through the trial and made notes and memoranda of the entire testimony. Counsel also studied the complete transcript of said trial in search of evidence pertinent to plaintiff's cause. Conferences were had with Miss Berry lasting for several hours almost daily and over a long period of time. Her relations with defendant having extended over a considerable period, it was necessary that all facts be ascertained and analyzed by counsel and that the admissible evidence be winnowed from the inadmissible. Counsel labored on the case not only during business days but on many nights, Saturdays and Sundays including the holiday season. One of counsel spent several weeks on the case without conferring with any other clients of the office. The attorney who gave the evidence concerning the time and labor consumed testified that in his opinion $50,000 would be a reasonable fee for the services performed.

[21, 22] The court was not bound by the opinion of counsel as to the value of the services performed but might have allowed such amount as would reasonably compensate the attorneys for the time, the labor, and the skill employed in the preparation for trial and in the conduct of the two trials, and in collateral matters applicable to the case, including attendance in the Federal court and resistance of the petitions in the District Court of Appeal and the Supreme Court. It is clear from the above outline of the labor performed in resuscitating an action which appeared to be dead when they took charge of it and in pressing it to a successful conclusion that the sum of $5,000 is not a reasonable or adequate fee. The record does not indicate whether the court deemed itself to be limited to the amount stated in the stipulation or whether the sum of $5,000 was considered a reasonable fee disregarding the stipulation. The trial judge had had a long experience both as a practitioner at the bar and as a judge of the municipal and of the superior courts and from that experience was capable of forming an estimate of the value of legal services. It seems incredible that he would have considered such a small amount to be a reasonable compensation for the services performed, and we are impelled to draw the inference that he considered himself bound by the stipulation.

Giving consideration to the factors that must be weighed in determining a reasonable attorneys' fee, the amount allowed is not sufficient compensation for the services performed by plaintiff's counsel and for the result achieved. Their work was executed with the thoroughness that characterizes skilled attorneys. Important and unusual questions of law were involved. As the result of their efforts the outcome of the case is that plaintiff's parentage does not remain anonymous, and instead of suffering defeat by reason of the stipulation which was entered into prior to her birth she has had preserved to her the right of support by defendant during her minority

That portion of the judgment relating to the award of support to plaintiff is affirmed; that portion fixing the fee of plaintiff's attorneys is reversed with directions to the trial court to disregard the stipulation and to determine the amount of the attorneys' fees in accordance with the evidence introduced at the hearing and such additional evidence, if any, as may be offered; plaintiff-appellant to recover her costs of appeal.

MOORE, P. J., and McCOMB, J., concur.

74 Cal.App.2d 638

## ALPHONZO E. BELL CORPORATION v. LISTLE.

Civ. 15111.

District Court of Appeal, Second District, Division 2, California.

May 27, 1946.

Rehearing Denied June 13, 1946.

Hearing Denied July 24, 1946.

**1. Jury ⇐28(17)**

In lessor's suit to cancel oil and gas lease for lessee's failure to resume drilling operations within period following service of notice of default, issues involving lessee's election to treat lease as terminated because of alleged constructive eviction, lessee's surrender of lease and abandonment thereof were merely legal issues which in exercise of sound discretion court could submit to jury notwithstanding stipulation waiving jury trial had included those issues. Const. art. 1, § 7.

**2. Judgment ⇐198**

In lessor's suit to cancel oil and gas lease wherein lessee filed a cross-complaint seeking damages, court having determined pursuant to waiver of jury trial that lease was in full force subsequent to date of suit, subject to lessor's affirmative defense to cross-complaint, final form of judgment was to be determined by verdict upon issues raised by such affirmative defense. Const. art. 1, § 7.

**3. Mines and minerals ⇐78(7)**

In lessor's suit to cancel oil and gas lease because of lessee's failure to resume drilling operations within 60 day period following service of notice of default, evidence warranted holding that lease had never been terminated unless by lessee's acts after date of commencement of suit.

**4. Mines and minerals ⇐59**

A lessor's premature declaration of forfeiture of oil and gas lease for lessee's failure to resume drilling operations within 60 day period following service of notice of default, filing suit to enforce such declaration, and lessor's demands thereafter that lessee vacate the premises without first having allowed lessee the full 60 days to remedy default, constituted a positive repudiation of lease by lessor.

**5. Landlord and tenant ⇐48(1), 49(1) Specific performance ⇐64, 101, 129**

When lease has been repudiated by lessor, lessee may sue for specific performance or for damages for breach, or he may disregard notice of forfeiture and base his action upon continued subsistence of lease and wrongful attempt to terminate it, and in action based upon either theory he may recover such damages for breach as would have arisen from nonperformance of lessor at appointed time, and lessor's repudiation if not withdrawn is a continuing excuse for lessee's refusal to perform. Civ.Code, §§ 1511, 1512.

**6. Mines and minerals ⇐78(1)**

Where performance of obligations imposed by oil and gas lease was prevented by lessor, lessee's rights were protected until trial and judgment in lessor's suit to cancel such lease by fact that despite lessor's repudiation lease continued in force, as against contention that lessee was obliged to continue operation under lease or to hold herself ready, willing and able to carry out its provisions.

**7. Contracts ⇐303(4)**

Any conduct or declaration of promisor evincing a clear intention to treat his contract as no longer binding is a legal prevention of performance, since the law does not require a useless act.

**8. Mines and minerals ⇐78(7)**

Where lessor unequivocally notifies lessee before lessee is in default that oil and gas lease is terminated and does not retract his notice but sues to quiet title against lessee, lessee is entitled to enforce the contract without previously performing or offering to perform obligations imposed upon him. Civ.Code, § 1440.

**9. Mines and minerals ⇐78(7)**

A lessee's delay in drilling an oil well is not conclusive evidence of intention to abandon or surrender the lease, since abandonment is a question of intention to be determined from all the facts.

**10. Mines and minerals ⇐73**

Where oil and gas lease was in force even after lessor's suit to cancel such lease was commenced, lessee was vested with present interest in land, an estate tanta-

mount to a freehold which includes a right to possess, enter upon and occupy the land.

**11. Mines and minerals ⇐78(1, 7)**

Where lessee occupied the land and proceeded with development as required by oil and gas lease, lessee and not lessor was entitled to possession, and judgment upholding defense in lessor's suit to cancel such lease that lessee was not in default was sufficient to establish lessee's title to lease.

**12. Mines and minerals ⇐77**

A unilateral repudiation of oil and gas lease by lessor neither evicts lessee nor terminates the lease but such result would follow only the reciprocal and mutual agreement of both parties, so that before lessee under oil lease forfeits his rights thereto after its repudiation by lessor it must be shown that lessee abandoned all plans to prosecute drilling requirements, and if he does not keep lease alive by electing a remedy whereby to maintain his leasehold, he loses his rights.

**13. Mines and minerals ⇐78(1)**

Where lessee under oil and gas lease resisted lessor's suit to quiet title from inception and prosecuted a successful appeal from adverse judgment, such action together with lessee's frustrated attempts to resume and continue drilling operations kept lease alive and lessee was thereby excused from having made no offer of readiness to do actual development work under lease after commencement of lessor's suit to cancel such lease.

**14. Mines and minerals ⇐51(1)**

Oil and gas lessee's right of action for damages arose immediately after lessee received notices of duty to cure default, of lessor's unjustified declaration of forfeiture, of suit to quiet title and of demands under threat of prosecution that lessee vacate the premises.

**15. Mines and minerals ⇐51(4)**

In lessor's suit to cancel oil and gas lease wherein lessee cross-complained for damages on theory of tort committed by lessor upon lessee's property rights, and not on theory of constructive eviction, instructions as to amount of damages predicated on latter theory were properly rejected.

**16. Mines and minerals ⇐51(4)**

In lessor's suit to cancel oil and gas lease wherein lessee filed cross-complaint for damages for lessor's tort in constructing water well adjacent to oil well, instruction that in arriving at amount of damage jury should award the amount reasonably necessary to place lessee in position she would have occupied had damages not occurred was proper. Civ.Code § 3333.

**17. Trespass ⇐47**

For a tortious act damages will be awarded to extent that injured party will be restored to position he would have occupied had trespass not occurred. Civ. Code, § 3333.

**18. Trespass ⇐50**

While general rule for ascertaining damages to realty injured or destroyed by trespass is to prove its diminution in value resulting from wrongful act, there is no universal test for determining such sum and in view of doubt as to correct measure where injuries affect entire freehold as well as value of separate structures thereon, care must be exercised in selecting the rule as to measure of damages applicable in particular case.

**19. Mines and minerals ⇐51(5)**

The measure of damages to be assessed for destroying a prospect hole for oil and gas is the amount of money necessary to redrill the well to horizon at which destruction occurred, notwithstanding venture may result in total loss.

**20. Mines and minerals ⇐51(3)**

In lessor's suit to cancel oil and gas lease wherein lessee filed cross-complaint for damages resulting from drilling of water well by lessor adjacent to lessee's oil well, evidence of cost of drilling another oil well was properly admitted.

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Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Suit by Alphonzo E. Bell Corporation against K. L. Listle to cancel an oil and

gas lease, wherein defendant filed a cross-complaint. From a judgment for defendant, plaintiff appeals.

Affirmed.

Overton, Lyman, & Plumb and B. R. Ware, all of Los Angeles, for appellant.

A. D. Haines, T. H. Canfield, and John A. Westwick, all of Santa Barbara, for respondent.

MOORE, Presiding Justice.

Plaintiff sued to cancel an oil and gas lease by reason of the failure of defendant to resume drilling operations within the 60-day period following the service of notice of default. It demanded that its title be quieted and that it be restored to possession. Defendant denied plaintiff's right to possession, alleged that if she had defaulted her default had been cured within the sixty days and if not she had been prevented from so doing by the wilful acts of plaintiff. Those acts consisted of permitting defendant to continue drilling operations, of supplying her with fuel, oil and water and of encouraging her to spend substantial sums of money and that by reason thereof plaintiff was estopped from maintaining the action.

Upon the issues so framed a trial resulted in a judgment in favor of plaintiff as prayed. On appeal it was reversed by Division Three of this Court (55 Cal.App. 2d 300, 130 P.2d 251) on the grounds (1) that while plaintiff's notice to defendant attempted to grant her 60 days after September 27, 1939, within which to cure her default, such time was not allowed, and that notice of forfeiture and of a termination of the lease was prematurely served on January 16, 1940; (2) that plaintiff's conduct estopped it from insisting that the time within which defendant might cure her default expired on December 26, 1939; and (3) that the court neglected to find that defendant had acted in good faith in resuming her drilling operations or that the latter were insufficient to remedy her default. The opinion reversing the first judgment is a lucid statement of the issues adjudicated at the former trial as well as the grounds of reversal.

The Cross-Complaint

Thereafter defendant filed her cross-complaint alleging (1) that drilling operations had commenced prior to August 15, 1939, as required by the lease; (2) that while notice of default was served on October 28, drilling operations were resumed in good faith on December 27; (3) that plaintiff made no immediate objection to such operations but on the contrary on December 27 notified defendant that the boilers were in need of repair and on threat of criminal prosecution forbade them to be used; (4) that despite defendant's activities to comply with lease requirements plaintiff mailed a notice of termination of the lease on January 16, 1940, but thereafter aided and abetted defendant by supplying water essential to her operations; (5) that defendant expended about $3,000 in connection with her renewed efforts to comply with drilling requirements; (6) that on February 23 plaintiff filed its action to quiet title and five days later ordered defendant, her servants, agents and employees off the premises with threats of arrest for those who remained; (7) that defendant has done all things required of her by the lease but at all times subsequent to February 28, 1940, plaintiff refused to allow defendant to enter the property; (8) that while she has been entitled to possession at all times, plaintiff evicted her on February 28 and still remains in exclusive possession; (9) that since the ousting of defendant by plaintiff the well drilled by defendant through neglect and disuse has been damaged in the sum of $35,000; (10) that following its re-entry and possession of the property and while the lease was in full force and effect and defendant was entitled to peaceable possession and without her consent, plaintiff drilled a water well in close proximity to the oil well of defendant which had been drilled to a depth of 3000 feet; (11) that as a proximate result of drilling the water well defendant's oil well has been irreparably damaged to defendant's loss in the sum of $35,000.

Answer to Cross-Complaint

To the cross-complaint plaintiff filed three affirmative defenses, the last of them

being that at all times mentioned in the cross-complaint plaintiff has been and is the owner of the land described in the oil lease; that defendant has no interest in the property; that the lease provides that defendant will peaceably surrender possession of the premises upon expiration of the lease; that defendant has neglected to prosecute diligently the drilling of the well commenced on August 15, 1939, or thereafter diligently to drill any additional oil wells as required by the lease; that pursuant to lease provisions notice of plaintiff's election to terminate the lease was duly served upon defendant and demand was made for a quitclaim deed which defendant has never delivered.

Following a second trial before a different judge it was found that drilling operations had been resumed diligently and in good faith and that by reason of its conduct plaintiff was estopped to assert a forfeiture as of December 27, 1939, after which day the lease was in full force and effect at all times. It was concluded that plaintiff take nothing (1) on its original complaint or (2) on its third affirmative defense to the cross-complaint, with respect to which issues a jury was waived. But pursuant to stipulation with reference to such waiver it was agreed that in event of the court's decision in favor of defendant all other issues should be submitted to a jury. They were so submitted, resulting in a general verdict for defendant in the sum of $25,000 and in special verdicts (1) that defendant did not abandon or surrender the lease and the well with intent not to pursue further development; (2) that defendant did not treat the acts of plaintiff as terminating the lease or her rights in the well or the property; (3) that the drilling of the water well was a proximate cause of injury to the oil well.

From the judgment based upon such verdicts plaintiff appeals.

## The Findings Against Plaintiff Are Supported.

[1, 2] It will be borne in mind that plaintiff presented two claims as bases for quieting its title, namely, (a) its ownership, its lease containing restrictive covenants, defendant's violation of those covenants, her failure to cure her default and her continued occupancy, all alleged in the original complaint, and (b) the acts constituting its third affirmative defense to the cross-complaint which are recited above under "Answer to Cross-Complaint." It will not be gainsaid that the issues involving (1) defendant's election to treat the lease as terminated by reason of an alleged "constructive eviction", (2) her surrender of the lease and (3) her abandonment thereof were merely legal issues which in the exercise of a sound discretion the court was authorized to submit to a jury (Constitution, Art. I, sec. 7; Duran v. Pickwick Stages System, 140 Cal.App. 103, 108, 35 P.2d 148) even though the stipulation waiving a jury trial had included those issues. Dickey v. Kuhn, 125 Cal.App. 68, 72 13 P.2d 834. The court having determined pursuant to the waiver of a jury trial that the lease was in full force and effect at all times subsequent to February 23, 1940, subject to plaintiff's third affirmative defense, the final form of the judgment was to be determined by the verdict upon the issues raised by the third affirmative defense.

[3] The evidence of defendant's right to continuous possession of the lease is as follows: The lessor having agreed to furnish the drilling equipment, fuel, oil and water and having required drilling to commence by August 15, 1939, the well was spudded on that day. The depth of 3000 feet had been reached by September 27, when operations ceased. On October 28 plaintiff mailed its notice of cessation of operations and thereby demanded that drilling be resumed within 60 days. Operations did begin again on December 27 with plaintiff's acquiescence and active support. On January 16, 1940, plaintiff declared a forfeiture on the ground that defendant had not resumed drilling as required by the notice of October 28 and demanded a quitclaim. Defendant replied that she had resumed within the 60 days and was then engaged in prosecuting the development and that there was no ground for terminating the lease. No further steps were taken by plaintiff towards evicting defend-

ant until February 23 when it filed suit to cancel the lease. In the meantime the boilers had been repaired at plaintiff's insistence, a packer had been set for a water shutoff and the hole had been swabbed. Such operations continued to February 28 when the order came for defendant and her employees to quit the property at once. Although all operations ceased on February 29 and all employees of defendant left the lease, defendant on March 1 wrote plaintiff denying termination of the lease, asserting its validity and declaring plaintiff would be held responsible for any injury to the leasehold caused by it. At no time thereafter did she yield her position but continued to assert the subsistence of her lease. Three days after departing from the well-site, with plaintiff's permission defendant cleaned out the plug in the tubing in order to leave the hole in good condition pending litigation. Upon proof of the foregoing facts, in view of the decision on the former appeal the trial court was warranted in holding that defendant's lease had never been terminated, unless by her acts after February 23, 1940.

[4] Neither did plaintiff make proof of any facts occurring between the first and the second trials that might show defendant to have surrendered or abandoned the lease prior to the second trial other than the continued desistance of defendant to occupy and develop the lease. It follows that the jury by its verdict correctly found that plaintiff had repudiated the lease and driven defendant from its land. The declaration of forfeiture of the lease on January 16, 1940; filing suit to enforce such declaration on February 23; plaintiff's demands on February 28 that defendant vacate the premises—all without first having allowed her the full sixty days to remedy her default—constituted a positive repudiation of the lease.

[5] It is a principle firmly established by sound authorities (1) that when a lease has been repudiated by the landlord the lessee may sue for specific performance or for damages for the breach (Buckmaster v. Bertram, 186 Cal. 673, 678, 200 P. 610) or (2) he may disregard the notice of forfeiture and base his action upon the continued subsistence of the lease and the wrongful attempt to terminate it. In an action based upon either theory he may recover such damages for the breach as would have arisen from the nonperformance of lessor at the appointed time (5 Williston, Sections 1297, 3701), and lessor's repudiation if not withdrawn is a continuing excuse for lessee's refusal to perform. Ibid. sec. 1334. If performance of the obligations imposed by a lease be prevented by the lessor the lessee is entitled to all the benefits which he would have obtained by the mutual performance of both parties (Civil Code, sec. 1512), and the failure of the lessee to perform is excused when his performance is prevented by the lessor (Civil Code, sec. 1511).

[6-8] In the instant case the rights of defendant were protected until trial and judgment by the fact that despite plaintiff's repudiation the lease continued in force. Felton Chemical Company v. Superior Court, 33 Cal.App.2d 622, 627, 92 P.2d 684; Liver v. Mills, 155 Cal. 459, 101 P. 299. Therefore the contention of plaintiff that defendant was obliged to continue operations under the lease or to hold herself ready, willing and able to carry out its provisions cannot be maintained. If such contention were the law irremediable injuries could be perpetrated upon honest lessees who may have invested large sums for purchase or rental of equipment essential to drilling operations, or who might have, on the strength of the oil lease, arranged a loan payable in progressive installments for the development of their mineral rights but who would be frustrated by expensive and extended litigation. If the rule prevailed as contended by plaintiff a lessee might with certainty be promptly and hopelessly despoiled of a fortune which by his explorations is shown to be within a short distance from the bottom of his drill stem. If it were the law that after a lessor has inequitably repudiated his lease the lessee must refrain from attempts to induce the lessor to abide by the lease and faithfully perform its covenants or hold himself in readiness to proceed, a penalty would thereby be placed upon honorable business dealings. Hadfield v. Colter, 103 Misc. 474, 170 N.Y.S. 643, 650.

The law does not require a useless act. Any conduct or declaration of a promisor evincing a clear intention to treat his contract as no longer binding is a legal prevention of performance. Alderson v. Houston, 154 Cal. 1, 11, 96 P. 884. Where a lessor unequivocally notifies his lessee before the latter is in default that the lease is terminated and does not retract his notice but sues to quiet title against his lessee, the latter is entitled to enforce the contract without previously performing or offering to perform the obligations imposed upon him. California Canning Peach Growers v. Harris, 91 Cal.App. 654, 267 P. 572; Shaw Wholesale Company v. Hackbarth, 102 Or. 80, 198 P. 908; Bu-Vi-Bar Petroleum Company v. Krow, 10 Cir., 40 F.2d 488, 69 A.L.R. 1295; Civil Code, sec. 1440.

That an unjustifiable declaration of forfeiture excuses performance by the lessee under an oil lease more readily than does the repudiation of other types of contract must instantly appear. The difficulties of drilling through thousands of feet of sedimentary rocks of varying degrees of hardness, of shutting off waters from water-bearing horizons, of keeping the drill in its perpendicular progress, of capturing and bringing to the surface substances of such migratory and volatile character as petroleum products, render highly valuable every moment of development or of delay in the development of an oil and gas lease. Also, the expense and uncertainty attendant upon the drilling of an oil well emphasize the justice of exempting the lessee from proceeding after litigation to cancel his lease has been instituted.

[9] Contrary to plaintiff's contention a lessee's delay in drilling an oil well is not conclusive evidence of an intention to abandon or surrender the lease. Abandonment is a question of intention to be determined from all the facts. Hudspeth v. Schmelzer, 182 Okl. 416, 77 P.2d 1123. A declaration of forfeiture and a suit to enforce it being attacks upon the lessee's title are of such serious import and their successful prosecution is fraught with such far-reaching consequences that a lessee is at once relieved from further activity in the development of a lease. The results of drilling for petroleum products are in themselves so universally uncertain that injustice only could follow should the doctrine be applied that a lessee must continue to prosecute his drilling activities even after his title is threatened by an action to compel him to vacate the property. The complete desistance of a lessee who is innocent of default from prosecuting his contractual obligations to develop the oil and gas potentialities of the leased property is an appropriate and fair response to the lessor's hostile and unjustifiable attempts to cancel the lease. Consumers' Gas Trust Company v. Worth, 163 Ind. 141, 71 N.E. 489; Lieber v. Ouachita Natural Gas & Oil Co., 153 La. 160, 95 So. 538; Ross v. Sheldon, Ky., 119 S.W. 225; Merrill's "Covenants Implied in Oil and Gas Leases" p. 177.

[10, 11] The jury having determined upon documentary evidence and the testimony of defendant's husband that defendant had neither abandoned nor surrendered her lease, and this court having already held that the lease was in force at all times, it logically follows that the judgment herein reaffirmed the existence of defendant's leasehold estate and all of her rights acquired by the lease. She was thereby immediately vested with a present interest in the land, an estate tantamount to a freehold (Dabney v. Edwards, 5 Cal.2d 1, 15, 53 P.2d 962, 103 A.L.R. 822; Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871), and such estate includes a right to possess, enter upon and occupy the land. Callahan v. Martin, supra. Inasmuch as defendant did occupy the land and proceeded with a development program as required by the lease, the next step in the judicial logic necessarily followed, to wit, that plaintiff is not entitled to possession but defendant is, and the judgment upholding the defense that she was not in default is sufficient to establish her title to the lease. Mills v. Fletcher, 100 Cal. 142, 34 P. 637.

[12, 13] What of plaintiff's contention that its repudiation of the lease resulted in defendant's constructive eviction? Such is not the law. A unilateral repudiation of a lease by the lessor neither evicts the

lessee nor terminates the lease. Such result would follow only the reciprocal and mutual agreement of both parties. Alderson v. Houston, 154 Cal. 1, 96 P. 884. Therefore, the lessor cannot by the mere announcement of his wishes terminate his contractual relations with his lessee. Before a lessee under an oil lease can be said to have forfeited his rights thereto after its repudiation by the lessor it must be shown that the former abandoned all plans to prosecute the drilling requirements. If he does not keep the lease alive by electing a remedy whereby to maintain his leasehold but on the contrary simply does nothing, he loses his rights, as was the result in Rehart v. Klossner, 48 Cal. App.2d 46, 119 P.2d 148, cited by plaintiff. But that case is not authority for plaintiff's contention that defendant's leasehold estate was terminated by plaintiff's ex parte repudiation. For six years Klossner did no work at all on the demised premises, although he was obligated by his lease to commence drilling by June 10, 1933. Having extended the time for commencement of operations to May 10, 1938, by payment of rentals, thereafter he neither paid rent nor proceeded with development although obligated to do so by August 10, 1938. He continued to do nothing after receipt of notice of his default on August 24. Suit was not filed until February 24, 1939, indicating extreme leniency on the part of lessor. His defenses (1) that performance was impossible by reason of a storm on the day he was served with notice of termination of lease and (2) that Mrs. Rehart's demand for a quitclaim constituted a repudiation came with poor grace under the circumstances. Judgment against him was the only deducible rational conclusion. The treatment of Klossner was in decided contrast with that accorded Mrs. Listle, who received not only notices and demands but was sued and driven from the scene of her explorations and heavy expenditures after she had within the time specified resumed drilling operations. Having been driven from the lease and subjected to legal action, defendant did all that was possible to keep the contract alive until the courts had adjudicated her demands. She resisted plaintiff's suit to quiet title from the inception of the action and prosecuted a successful appeal from an adverse judgment. This together with her frustrated attempts to resume and continue drilling operations in December 1939 kept her lease alive and she was thereby excused from having made no offer of readiness to do actual development work on the lease after February 28, 1940. See O'Connell v. Federal Outfitting Company, 5 Cal.App.2d 327, 42 P.2d 1070; McConnell v. Corona City Water Co., 149 Cal. 60, 85 P. 929, 8 L.R.A.,N.S., 1171.

[14] It follows then that defendant was not obliged to offer performance or to continue to stand ready to perform the lease. After receipt of notices (1) of her duty to cure her default, (2) of the declaration of forfeiture, (3) of the suit to quiet title, and (4) of demands under threat of prosecution that she vacate the premises, defendant's right of action arose without more ado. At that time, however, her right consisted primarily in maintaining peaceable possession to the end that she might continue her drilling operations. While she might have renounced such right and instead have prosecuted an action for the profits she would have realized but for plaintiff's repudiation of the lease and prevention of lessee's performance (Sobelman v. Maier, 203 Cal. 1, 9, 262 P. 1087), she chose to stand solely upon the fact that she was vested with a leasehold estate in the land. By having the leasehold restored to her she could thereafter develop the petroleum deposits and at the same time recover from plaintiff damages for loss of profits or injuries it may have done to the leasehold. This course she pursued by her affirmative defense and her cross-complaint, resulting in the pacification of her title and a recovery for the damages done by the trespass.

### No Error in Instructions Given or Rejected

[15-17] Plaintiff assigns as error the rejection of two of its proposed instructions which were to the effect that in arriving at the amount of damage the jury should award "the sum which is equal to the difference in the fair market value of

the leasehold estate and interest of the cross-complainant under her * * * lease as amended, immediately before the commencement of the drilling of the water well and immediately after the completion thereof; provided, however, that if the injury, if any, has been repaired or be capable of repair so as to restore the fair market value as it existed immediately before such injury, if any, at an expense less than such difference in value, then the measure of damage is the lesser expense of such repair rather than such difference in value." In support of this assignment plaintiff cites Salstrom v. Orleans Bar Gold Mining Company, 153 Cal. 551, 96 P. 292; Perkins v. Blauth, 163 Cal. 782, 127 P. 50; and Kennedy v. Treleaven, 103 Kan. 651, 175 P. 977, 7 A.L.R. 277. While the authorities support the text of the proposed instructions they are not in point in view of the rule according to which the court properly proceeded in prescribing the measure of the damages to be applied. Contrary to plaintiff's contention neither the cross-complaint nor the theory upon which the case was tried is based upon constructive eviction. Defendant's pleadings and the theory upon which she based her right of recovery were that she was entitled to damages for a tort committed by plaintiff upon her property rights at a time when she was entitled to peaceable possession of her propery. The mere fact that in the first count of her cross-complaint defendant alleges her eviction by plaintiff is not an admission that she was constructively evicted. The term as applied in such pleading signifies nothing more than that by its hostile acts plaintiff forced her to absent herself from the premises on which she had drilled the hole. However, in the second count of her pleading her language alleges only that while her lease was in force the plaintiff, without defendant's permission, "entered upon the leasehold premises and drilled * * * a water well in close proximity to the oil and gas well * * *." Neither is the fact that plaintiff was landlord material. That it had done her wrong was the crux of the case.

That she kept the contract in force by asserting her right to retain possession and to drill her well entitled her to the instruction that the jury should not "consider whether or not the said oil and gas well has produced or would produce oil in paying quantities or if deepened would or would not produce oil in paying quantities; but in arriving at the amount of damage, if any, you should determine and award as damages the amount reasonably necessary to now place cross-complainant Listle in the position she would have occupied had the damage, if any, not occurred. This amount should be a sum reasonably required to repair such damage, if any, if such damage can be repaired, or if it cannot be repaired then such reasonable sum as will be necessary to replace the oil well hole with one in all practical respects similar to the oil well hole as it existed before the damage, if any." There was neither error in the instructions given nor in the rejection of the instructions proposed. The measure of damages suffered by reason of a tortious act is the amount which will compensate for all the detriment proximately caused thereby whether it could have been anticipated or not. Civil Code, sec. 3333. For such wrongs damages will be awarded to the extent that the injured party will be restored to the position he would have occupied had the trespass not occurred. Cassin v. Cole, 153 Cal. 677, 679, 96 P. 277; Foley v. Martin, 142 Cal. 256, 71 P. 165, 75 P. 842, 100 Am. St.Rep. 123.

[18] While the general rule for ascertaining damages to real property injured or destroyed by a trespass is to prove its diminution in value resulting from the wrongful act (LeBrun v. Richards, 210 Cal. 308, 319, 291 P. 825, 72 A.L.R. 336; Green v. General Petroleum Corporation, 205 Cal. 328, 336, 270 P. 952, 60 A.L.R. 475), yet there is no universal test for determining such sum. Williams v. Faria, 112 Cal.App. 455, 297 P. 78. One method is by estimating the cost of replacement of improvements. Green v. General Petroleum Corporation, supra; Williams v. Faria, supra. But in view of the doubt as to the correct measure where the injuries affect the entire freehold as well as the value of separate structures thereon, care must be exercised in selecting the rule as

to the measure of damages applicable in any given case. Hancock v. George R. Curtis Paving Company, 114 Cal.App. 624, 628, 300 P. 65.

[19] However, the defendant is not forced to rely upon the familiar principles declared by the foregoing authorities. In an action where the probative facts closely parallel those of the case at bar the Supreme Court of Oklahoma set at rest the contention that proof of damage to the owner of a prospect hole in a producing oil field cannot be made for the reason that no value of the well or of the prospective profits to be derived therefrom can be established, "since no one could tell whether, if drilled to completion, oil and gas would be found, and, if none were found, the hole was of no value." The court held that the action was not for prospective profits nor for the value of an oil well, but for the value of the prospect hole rendered worthless by the negligent acts of defendants. The owner of land or of a leasehold may expend his own money in drilling a prospect hole to any depth. That the venture may result in a total loss to him is not a defense on behalf of the wrongdoer. North Healdton Oil & Gas Co. v. Skelley, 59 Okl. 128, 158 P. 1180, 1181. The measure of damages to be assessed for destroying a prospect hole for oil and gas is the amount of money necessary to redrill the well to the horizon at which the destruction occurred. 4 Thornton Oil and Gas, sec. 1279.

No Error in Admitting Evidence of Cost of Well

[20] The assignment that the court erred in overruling plaintiff's objection to the defendant's proof of the cost of drilling another well is disposed of by the North Healdton decision. The case of Johnson v. Hinkel, 29 Cal.App. 78, 154 P. 487, cited by plaintiff, is not pertinent. It was an action for breach of contract. The wrongful destruction of the hole was not involved. By a recovery of the cost of replacement Johnson would have recovered more for the breach than from a complete performance. Not only had the hole been abandoned but it was situated in nonproductive desert land.

The hole drilled by defendant herein was in an active oil field only 2500 feet from a producing property. Presumptively she had expert advice as to the lay of the structure, her husband having drilled a producer in the same vicinity, and the testimony was that the formations encountered in the two wells were "practically identical." Having the unrestricted right to explore her lease for 20 years and until oil and gas were no longer to be found in paying quantities, she was at liberty to exercise her own discretion and judgment as to the locus of a hole to be drilled and to risk her wealth upon her own ventures. Neither upon any theory that has been proposed nor upon any authorities cited may the defendant without compensation be deprived of the right of enjoyment of a valuable property right, to wit, the right to possess a hole drilled 3000 feet over an oil bearing structure on her own leasehold and the right to peaceable possession of the lease, so long as she is not in default.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.




74 Cal.App.2d 604

**TRANSPORTATION BLDG. CO. v. DAUGHERTY, Commissioner of Corporations.**

**Civ. 14985.**

District Court of Appeal, Second District, Division 3, California.

May 24, 1946.

Rehearing Denied June 21, 1946.

Hearing Denied July 18, 1946.

**1. Corporations ⇐68**

Where it clearly appeared from evidence before State Commissioner of Corporations that proposed plan for change of capital structure of corporation and a contract for management of corporation's property, subject to approval by stockholders who are entitled to vote thereon, would be fair, just, and equitable, that corporation intended to honestly transact its busi-

ness under that plan, and that issuance of securities and carrying out of the plan would not work a fraud upon stockholders whose stock was to be exchanged for new stock to be issued under the plan of reorganization, it was not within discretionary power of commissioner to deny permit authorizing change in corporation's capital structure. Gen.Laws, Act 3814, § 4.

**2. Mandamus ⇐172**

In proceeding for writ of mandate to compel State Commissioner of Corporations to issue a permit authorizing corporate plaintiff to change its capital structure and enter into a contract for management of its property, sole question was whether there were disadvantages in proposed plan which would have justified commissioner in refusing permit upon ground that plan was unfair, unjust, inequitable, or fraudulent. Gen.Laws, Act 3814, § 4.

**3. Corporations ⇐68**

The courts, in review of action of State Commissioner of Corporations on application for a permit authorizing corporation to change its corporate structure, could reach decisions of fact based on unconflicting evidence before commissioner and draw conclusions from the findings which differed from those of commissioner. Gen. Laws, Act 3814, § 4.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by the Transportation Building Company against Edwin M. Daugherty, as Commissioner of Corporations of and for the State of California, for a writ of mandate directing the commissioner to issue a permit authorizing plaintiff to change its capital structure and enter into a contract for the management of its property, if and when the proposed plan is approved by stockholders of the corporation who are entitled to vote thereon. From judgment granting the writ of mandate and from order overruling demurrer to the petition, the defendant appeals.

Judgment affirmed, and attempted appeal from the order dismissed.

Robert W. Kenny, Atty. Gen., and T. A. Westphal, Jr., Deputy Atty. Gen., for appellant.

Walker, Adams & Duque and Earl C. Adams, all of Los Angeles, for respondent.

SHINN, Justice.

This is an appeal by the Commissioner of Corporations from a judgment of the superior court directing the Commissioner to issue a permit authorizing plaintiff, Transportation Building Company, to change its capital structure and enter into a contract for the management of its property, if and when the proposed plan is approved by the stockholders of the corporation who are entitled to vote thereon.

The petition for writ of mandate filed by plaintiff incorporated the entire record of the evidence taken before the Commissioner of Corporations. No additional evidence was taken in the superior court. The return by the Commissioner to the alternative writ was by general demurrer and also by answer. The demurrer was overruled and an order was made that the petition be granted. Findings and conclusions were filed and a peremptory writ was issued. The ground of the decision was that certain findings and conclusions of the Commissioner upon which he based his refusal to issue the permit were not supported by the evidence adduced at the hearing.

[1] We are in accord with the views of the trial court. It appears clearly to us from the record that the proposed plan of plaintiff is fair, just and equitable, that plaintiff intends to fairly and honestly transact its business under that plan, and that the issuance of the securities and the carrying out of the plan will not work a fraud upon the stockholders of plaintiff whose stock is to be exchanged for new stock to be issued under the plan of reorganization. See sec. 4, Corporate Securities Act, Deering's General Laws, Act 3814. Under these circumstances, and in view of considerations hereinafter discussed, it was not within the discretionary power of the Commissioner to deny the application.

The property of plaintiff corporation consists of the land and a 13-story and basement, Class A loft type building at the

southwest corner of Seventh and Los Angeles Streets in Los Angeles. The building was constructed in 1923, by Standard Holding Company, which authorized the issuance of $625,000 of 6½ per cent bonds. Thereafter Assets Corporation acquired the property, subject to the bonds but did not assume them. The operation of the building was not a successful one. In 1938 the bonded indebtedness was $425,000, but the income had been insufficient to meet the required payments of principal and interest and they were in default. There was a reorganization in bankruptcy and plaintiff corporation was formed to take over the property, with an authorized capital of 14725 no par shares, consisting of 8508 shares of preferred and 6217 shares of common. In acquiring the property through the reorganization in bankruptcy, plaintiff was authorized to exchange its preferred shares and 4254 common shares to the bondholders of Assets Corporation in units of two shares of preferred and one of common, and approximately $4.13 in cash, for each $100 principal of bonds, and also to issue 1963 shares of common stock to Assets Corporation. The plan was carried out and the conversion was accomplished with the minor exception that, at the time plaintiff's application was heard by the Commissioner, $3300 face value of bonds had not been converted. At that date there were issued and outstanding 8442 preferred shares and 6184 common shares and there were in reserve sufficient shares to exchange for the then unconverted bonds. In February, 1944, the brokerage firm of O'Melveny-Wagenseller and Durst, Inc. purchased from divers owners 5046 shares of preferred stock and 2523 shares of common, in units of two shares of preferred for one of common, for a price of $53.60 per unit. A large part of these shares were acquired from Assets Corporation and in that transaction the brokerage firm acquired the additional 1963 shares of common, paying no additional consideration therefor. The brokers then sold the units so acquired to their customers at $57 per unit and retained the 1963 shares of common.

In March, 1944, plaintiff filed its application with the Commissioner for a permit allowing it to make substantial changes in its articles of incorporation. The capital was to be increased to 8508 shares of preferred and 10,000 shares of common, both having changed rights, preferences and privileges. (It will not be necessary to mention all the features in which the new stock would differ from the old. The important ones will be taken up in order.) It was proposed to exchange 8508 shares of new, no par, preferred for the outstanding 8508 shares of preferred, share for share, or to exchange preferred and common for outstanding bonds on the basis of two shares of preferred and one of common for each $100 face value of bonds; also to exchange 6217 shares of new common, share for share, for the outstanding common and to sell and issue to the brokerage firm the balance of the 10,000 shares of common, namely, 3783 shares, at a price of 10 cents per share and the execution of a management contract by the brokers. The proposed management contract was one by which the brokerage firm agreed to manage the building for seven years or until the preferred shares had been fully retired, whichever should occur sooner, and was to receive compensation of not to exceed $50 per month, to be paid to the president of plaintiff corporation, and $25 per month for keeping the records of plaintiff, bookkeeping and auditing.

[2] All the stockholders of plaintiff were given notice of the hearing to be held before the Commissioner of Corporations and this notice was sufficient to inform them in detail as to the changes proposed to be made in the certificate of incorporation and the proposed sale of 3783 shares of common to the brokers at 10 cents per share, and the execution of the management contract. The stockholders were invited to attend the hearing but none attended or opposed the granting of the permit. The plan as proposed had three main purposes: First, the removal from the articles of certain restrictive provisions which were obstructing successful management of the business; second, lowering the call price of the preferred shares, and, third, to increase the number of common shares for the purpose of selling the additional shares to O'Melveny, Wagenseller

and Durst at 10 cents per share as the principal consideration for an agreement by the firm to manage plaintiff's property for a maximum term of seven years. It appears from the findings of the Commissioner and the briefs filed in his behalf that he found fault with all the major features of the plan. His findings, as will be pointed out, were almost exclusively in the nature of conclusions as to the merits of the plan from a business standpoint. The trial court made findings differing from those of the Commissioner, but with a single exception, which we shall mention later, these also consisted of conclusions drawn from the admitted facts. Stated simply, the appeal brings us (1) a record in which there is no dispute as to the facts; (2) an order of the Commissioner refusing a permit, based not upon a finding of unfairness but substantially upon his opinion that it would be unwise for the stockholders to give their approval to the plan, and (3) the judgment of the trial court directing the Commissioner to issue the permit, based upon conclusions of the trial judge which were the opposite of those drawn by the Commissioner. We are of the opinion that no cause was shown for a denial of the application, and that it was the duty of the Commissioner to grant it. In the statement of our conclusions it is necessary to discuss the apparent advantages and disadvantages of the proposal. We should make clear, however, that we consider it to be the right and privilege of the stockholders to decide whether the advantages outweigh the disadvantages, and that our question is whether there are disadvantages which would have justified the Commissioner in refusing the permit upon the ground that the plan is unfair, unjust, inequitable or fraudulent.

Petitioner was not seeking a permit to make a public offering of securities, as that term is commonly understood. There was involved only a matter of internal management of a going concern, affecting no one except the present stockholders of the corporation. Necessarily there can be no amendment of the capital structure unless the present stockholders, after approval of the plan by the Commissioner, also approve it in the manner provided by the existing articles.

An analysis of the plan must take as a starting point a definite figure as the present value of the property. It would otherwise be impossible to appraise the fairness of the proposed reduction in the call price of the preferred, or the contract with the brokers. The Commissioner found: "That the Commissioner is unable to determine the exact worth of the Transportation Building, the principal asset of applicant, however it does appear that said building is worth in excess of $255,240; * * *" The finding of the superior court was: "It is not true that defendant was unable to determine the exact worth of the Transportation Building nor is it true that said building is worth in excess of $255,240.00 or any amount in excess of $225,000.00." The importance of this finding is obvious. The present preferred stock of plaintiff is retirable at $50 per share upon call, or upon liquidation, which would return a possible maximum of $425,400, or such lesser sum as might be received in case of liquidation, before the common stockholders would receive anything. Under the amended articles the retirement and liquidation price would be reduced from $50 to $30 per share or to $255,240. The Commissioner made the following finding: "That the proposed exchange as set forth in said application would reduce the liquidating value of the outstanding preferred shares and bonds from $425,400 to $255,240; that said reduction in liquidating value would redound to the benefit of the holders of common shares; that said exchange of shares would result in the transfer of the voting control of Transportation Building Company from the holders of preferred shares to the holders of common shares." The change in the liquidating "price" per share obviously would not lessen the "value" per share unless the property should be worth more than $255,240, nor would the proposed change in the retirement or liquidating price of the preferred be of advantage to the holders of common stock unless the property has now, or later acquires, a value in excess of $255,240. The evidence before the Commission-

er was that the present gross value of the property was $225,000 and that if a sale should be made at that price, the net amount received, after payment of commission and expenses of sale, would be about $213,000, or $26.50 per share for the preferred stock, with nothing for the common. This value of the property was testified to upon the hearing before the Commissioner by a competent and experienced appraiser, Mr. W. W. Touchstone. No witness testified to any different value and the testimony of Mr. Touchstone was corroborated by that of the secretary of the company, who testified to a gross value of $225,000. It appears from the evidence taken at the hearing that the Deputy Commissioner who presided was not dissatisfied with the testimony of Mr. Touchstone, for he stated: "If there is no objection, I will reserve determination as to whether a formal appraisal will be required by the Commissioner, until the close of the hearing." The Commissioner did not cause an appraisal to be made, but thereafter made the finding that he was unable to determine the exact worth of the property, but that "it does appear that said building is worth in excess of $255,240." This did not "appear" from the evidence. There was evidence that plaintiff had refused the offer of $225,000, but this means no more than that the directors, instead of selling at a price that would not pay the preferred shareholders even $30 per share, chose to retain the property in the hope of getting a better price. The Deputy Commissioner appears to have given weight to the fact that the Federal Court, in the reorganization proceeding of 1939, apparently considered it a possibility that the preferred stockholders would receive $425,400, the amount of the unpaid bonds, at some future time, since it fixed a liquidating price of $50 per share. This was not evidence as to value, nor was there anything in the record to warrant a finding that the market value of the property could not be ascertained from the evidence. The Commissioner had before him the highest type of expert evidence of value and no opposing evidence of any sort. The only finding consistent with the evidence was the one made by the superior court, namely, that the market value of the property was $225,000 and no more. Upon this basis of value the preferred stockholders will have given up no part of the present value of the shares if they consent to a liquidation price of $30 per share.

Another proposed change in the articles relates to the payment of dividends on the preferred shares. Under the present articles they are payable out of "net cash receipts," regardless of earnings, and at the rate of $2.50 per share, $1.50 of which is cumulative, $1 noncumulative. They have been paid in this manner and there is, at present, no arrearage. Under the proposed amendment the dividends would be payable only out of surplus or net earnings. The Commissioner found: "That the net profit from operations of applicant for the year 1942 was the sum of $348.65, and for the year 1943 was the sum of $2,390.55, that because of the provisions of the articles of incorporation of Transportation Building Company allowing the payment of dividends on the preferred shares out of *'net cash receipts'* [emphasis added] there is no arrearage in dividends on said shares; that an amendment of the articles of incorporation vesting voting control of the subject company in the holders of common shares and limiting the payment of dividends to holders of preferred shares so that such dividends could only be paid out of 'surplus and net profits' accounts might result in an early default in dividends; * * *" The superior court found: "It is not true that the proposed amendment to the certificate of incorporation of plaintiff providing for the payment of dividends on preferred shares of plaintiff out of *surplus or net profits* [emphasis added] might result in an early or any default in such dividends." It is immaterial which of these prognostications is the more accurate. The welfare of the corporation does not depend upon uninterrupted payment of dividends regardless of the source of the funds. The Commissioner's auditor, Mr. Heyne, testified: "These dividends are in reality distribution of capital by reason of the fact that the company has incurred an operating deficit from its inception to December 31, 1943." The owners of the pre-

ferred shares may be dissatisfied with the present policy and wish to change it. They should be allowed that opportunity.

Under the present certificate of incorporation there is a related restriction which interferes with good management. No more than $3,000 may be spent in any one year for repairs, improvements or alterations without the unanimous consent of the board of directors or the holders of a majority of preferred shares, nor more than $5,000 in any one year for such purposes, without the consent of a majority of the preferred shares. This unwise restriction would be removed by the proposed amendment of the articles. According to the testimony of Mr. Touchstone, the expenditure of between $20,000 and $50,000 will be required to put the Transportation Building in repair. He stated it as his opinion that if this is done, the property will be worth $300,000, his theory no doubt being that the resulting increase in value would be derived through a higher type of operation after the rejuvenation of the building. The present policy of diverting capital to the payment of dividends, with the result that the property has been allowed to deteriorate, and the income has been seriously impaired, is indefensible from the standpoint of good management.

Another objection, emphasized by the findings of the Commissioner, and now urged by him, is that the proposed amendment contemplates a change in voting rights. The preferred shareholders now have the right to elect all but one of the directors. Under the proposed amendment the common shareholders would elect the directors except in the event of a failure to pay dividends for a period of 18 months, whether consecutive or not, in which event, and so long as the default existed, the holders of preferred shares would have a right to elect a majority of the directors. The Commissioner found: "* * * that said exchange of shares would result in the transfer of the voting control of Transportation Building Company from the holders of preferred shares to the holders of common shares; * * *" Of this change it is said in appellant's brief: "Again, however, this change in rights, preferences and privileges is definitely a loss to preferred shares and properly considered by the respondent [appellant] in determining if the plan was not unfair, unjust or inequitable." The proposed amendment would be in conformity with customary, approved, and sound corporate management. The present scheme for control and management, under which the preferred shareholders have continued to take dividends from capital, is unusual, inadvisable and, in the case of plaintiff corporation, has been demonstrated to be unsound. Clearly this is a change which the stockholders should be allowed to make if they wish to do so. Other proposed changes in the articles are unimportant and need not be noted.

Another of the findings upon which the Commissioner appears to base his refusal reads: "That the sale and issuance of 3783 common shares to O'Melveny-Wagenseller and Durst, Inc., as contemplated in said application would result in the control of the management and operation of applicant being transferred from the holders of preferred shares representing an original investment in applicant and its predecessor corporations of $422,100 to a firm representing an investment in applicant of $378.30; * * *" The Commissioner's statement of the case in his opening brief commences with the following paragraph: "The ultimate factual question in this case, to state it rather tartly, is whether the firm of O'Melveny-Wagenseller and Durst, Inc. should be permitted to gain control of respondent company which has assets admitted to be worth $225,000 and found by the Corporation Commissioner to be worth in excess of $255,240, upon investing the sum of $378.30 and agreeing to manage a building, which is the principal asset of respondent company, for a period of seven years."

It is true that the brokerage firm, if it saw fit to retain the stock, would own 5746 shares of common out of a total of 10,000 shares and could elect a majority of the directors. Perhaps the holders of the preferred would approve this change of control. If they are satisfied to have the brokerage firm acquire a controlling interest of the common stock, it will be

their privilege to make the change in the capital structure providing for additional common stock, and if they do not prefer that management they no doubt will vote against the plan. The lack of opposition at the hearing would indicate that they will vote approval of the plan, in the hope that new management will revitalize the business of the corporation. We do not see what hope there can be for improvement of the position of the stockholders, other than by the improvement of management. The Commissioner appeared to attach much importance to the fact that the new arrangement might result in a large profit to the brokers. That, we think, is not the question. The building is at the intersection of two important streets in Los Angeles; it is a 13-story store and loft building and the land and building represent an initial outlay of some $900,000. It has never been a successful operation. Messrs. O'Melveny, Wagenseller and Durst are offering to assume the management of the property for seven years. It is not at all inconceivable that they are more interested in the welfare of their clients than they are in any profit they may make out of the undertaking. If the permit is granted and through able management they convert an unprofitable operation into a successful one, so that the common stock becomes of value, they will realize a gross profit of some 57 percent and the other holders of common stock 43 percent of any increase in value that accrues to the common stock. For the chance of making this profit they accept a heavy responsibility to their clients, not by the investment of money, but of time and effort, and by putting to the test their managerial ability. It cannot be said that they have nothing to lose, or that they have been actuated in their proposal solely by a desire for financial gain. The evidence before the Commissioner furnished no reason for doubt that the interested parties are acting in good faith, with the welfare of the stockholders in view. If a doubt had existed, it should have been resolved in favor of the applicant. The purpose of regulatory legislation, such as the Corporate Securities Act, is to enable state agencies to make inquiry as to whether good cause exists for withholding approval, and to deny approval if it appears affirmatively that good cause does exist. The presumption of fair dealing is with the applicant and should control unless it is overcome by contrary evidence. If the proposed effort is successful, the stockholders will profit; if it is unsuccessful, it is highly probable that they will be in no worse position than they are at present. In the meantime, the management by the firm, the evidence disclosed, will save the company $1600 or $1800 per year in expense, even if there be no increase of income.

The stockholders of plaintiff have a right to be relieved from the burdensome restrictions of their existing capital structure. They should not be compelled to go on depleting their capital and allowing their property to remain in disrepair, and to decay. It is necessary that someone undertake to end the present sad state of affairs. It is the right of the corporation, without the approval of the Commissioner of Corporations, to make a contract with the firm of O'Melveny, Wagenseller and Durst, Inc. for the management of the building, and for such compensation as it may wish to pay the brokers for their efforts. It has not seen fit to do this. It wishes to put its house in order and to remove the obnoxious restrictions from the articles, which have operated as a hindrance and detriment from the beginning. All the corporation is asking is that the stockholders be allowed to decide by two-thirds vote of the holders of the preferred shares (and those are the ones the Commissioner feels may be imposed upon) whether the plan submitted for the approval of the Commissioner is a desirable one for them to adopt. The question before the Commissioner was not whether they should adopt the proposed plan or some alternative plan which might be more advantageous to them. So far as disclosed by the record, it was a question of adopting the proposed plan or doing nothing. The issuance of the permit would at least give the shareholders a chance, under amended articles, to work out a better plan of management than the one proposed, if they do not approve it. To deny the per-

mit is to encourage a sale of the property in order to avoid further loss through its operation under unwise restrictions.

The conclusions of law, signed by a Deputy Commissioner, read as follows:

"From the foregoing facts the Commissioner of Corporations is unable to find:

"1. That the plan of business of Transportation Building Company as set forth in its application filed with the Commissioner on March 15, 1944, is not unfair, unjust or inequitable;

"2. That the securities that Transportation Building Company proposes to sell and issue as set forth in said application are not such as in the opinion of the Commissioner of Corporations will not work a fraud upon the purchaser thereof."

It is made the duty of the Commissioner, by section 4 of the Corporate Securities Act, Deering's General Laws, Act 3814, to issue a permit "if he finds that the proposed plan of business of the applicant is not unfair, unjust, or inequitable, that it intends to fairly and honestly transact its business, and that the securities that it proposes to issue and the method to be used by it in issuing or disposing of them are not such as, in his opinion, will work a fraud upon the purchaser thereof." There was a finding that the exchange would redound to the benefit of the holders of the common shares, and there was a finding "that the exchange of shares as contemplated in the said application would not result in the holders of preferred shares receiving considerations commensurate with the advantages to be surrendered by such shareholders to the benefit of the holders of common shares." The Commissioner did not find that the plan was unfair, unjust or inequitable nor that a fraud would be worked upon those who would acquire the new stock. There was no dispute whatever as to the facts, and there was no failure to disclose any facts in connection with the proposal. It is a fair, just, and equitable plan unless it is the reverse. It is an honest plan if it is not dishonest. There is no middle ground. The Deputy Commissioner evidently thought there was, and that without any finding or evidence to support a finding that the plan was unfair, unjust or inequitable, it was his duty to refuse the permit because of his opinion that the shareholders should be able to work out a better deal for themselves.

The order cannot be justified upon the ground that the Commissioner was of the opinion that it would be the exercise of poor business judgment for the stockholders to amend their articles and to entrust the management of the property to the brokerage firm. The Commissioner's act of refusing to issue the permit was, in effect, a veto of the plan by him, on behalf of the holders of the preferred shares. Such supervisory control of the internal affairs of a corporation, however wisely it may be exercised, is not vested in him. It appears from what we have said that the evidence before the Commissioner clearly disclosed that the proposed plan is not unfair, unjust or inequitable, that it is not dishonest in any particular, and that it will defraud no one. If the plan should prove to be unwise or unsuccessful, the responsibility will be that of the stockholders and not of the state

[3] It is the contention of the Commissioner that the trial court exceeded its power in making new findings and conclusions and in directing defendant Commissioner to issue the permit as applied for. It is claimed that the trial in the superior court was "de novo," and that this practice is forbidden except in cases in which it is sought to revoke an existing permit or license. It is contended that the court is limited to a review of the orders of the Commissioner of Corporations in matters relating to the issuance of securities and may not make new findings and conclusions. It is said that the trial was de novo because the court made findings and drew conclusions from the evidence contrary to those of the Commissioner. There was no trial de novo, but only a review. The court received no additional evidence and made no findings upon the evidence which was before the Commissioner, contrary to those of the Commissioner, in any particular in which the findings of the latter were supported by the evidence. In the respects in which the conclusions of the court differed from

those of the Commissioner the facts from which the conclusions were drawn were not in dispute. The power to review would be futile if the court could not reach decisions of fact based on unconflicting evidence, and draw conclusions from the findings, which differ from those of the Commissioner. The facts adduced at the hearing furnished no legal basis for a denial of the permit, and the court properly issued a peremptory writ directing respondent to issue it.

The judgment is affirmed. The attempted appeal from the order overruling the demurrer is dismissed.

WOOD, J., concurs.

DESMOND, Presiding Justice (concurring).

I concur in the judgment and take occasion to add some observations which to me seem important. The interest of the brokers' firm, O'Melveny-Wagenseller & Durst, Inc., in making a success of the plan under which they proposed to manage the plaintiff corporation is shown in various ways. It first became apparent when they arranged to purchase stock in the corporation in January and February of 1944. The situation is depicted quite clearly in a letter which Mr. Wagenseller, as president of his firm, sent on January 31, 1944, not only to the Transportation Building Company but also to all the shareholders of that corporation. In that letter he said, among other things:

"During the past few days we have purchased, or concluded arrangements to purchase, from your three principal stockholders, 5046 shares Preferred Stock, Transportation Building Company 4486 shares Common Stock, Transportation Building Company representing 59.3% of the Preferred Stock and 72.1% of the Common Stock, at $26.80 for each Preferred share, ex-dividend payable February 15th to stockholders of record February 1st, accompanied by all of the Common Stock. This is equivalent to a price of $53.60 per Unit of 2 shares Preferred and 1 share Common on the basis upon which the stock has heretofore been traded. * * *

"You are no doubt familiar with the operations of our firm in connection with such properties. The undersigned, on behalf of our firm and personally, has for some years past been operating such major loft building properties in the vicinity of your building as the Merchants Exchange Building (directly adjoining your property to the north), Cooper Building, Textile Center Building, Industrial Buildings, Allied Crafts Building, Graphic Arts Building and Lloyd & Casler Building, and several others. We have been most successful in the rehabilitation and operation of these properties and expect to apply the same thought and attention to the operations of the Transportation Building.

"In the near future we expect to propose to the stockholders of your company a plan of recapitalization and certain amendments to the Articles of Incorporation, which will permit the successful operation of the company and its property along the same lines we have used in operating the other properties in which we have an interest.

"At or about the same time we will, if conditions are acceptable to us, give every stockholder who does not care to continue his interest in the company an opportunity to sell his stock to us at the same price we paid the three largest stockholders. In the meantime, any stockholder desiring to sell his stock at this time may offer the same direct to us for immediate acceptance, at the same price paid the three largest stockholders, whose stock we have purchased."

It is apparent that when this letter was written the brokers' firm, with a substantial majority of stock, preferred and common, purchased or under option, had control of the plaintiff corporation. Evidence concerning the purchase was, in part, as follows:

"Q. [Addressed to Mr. Wagenseller] And from whom did you buy the shares? A. We bought the shares from the Assets Corporation, from a stockholder by the name of Weiler, from a stockholder by the name of Skinner. Those were the principal purchases. In addition to that we bought quite a number of shares from other stockholders. * * *

"Q. Were those shares bought in units or bought separately? A. We purchased from the Assets Corporation 2292 shares of preferred and 1146 shares of common in the form of units.

"Q. What did those units consist of? A. Two shares of preferred and one of common, which we paid $53.66 a unit for.

Mr. S—— [Executive deputy conducting the hearing]: What did you pay for the common? A. Nothing. They gave it to us for it had no value so far as they were concerned."

This witness stated "we didn't solicit the purchase of stock but we made an offer to all stockholders which was the same offer which we had made to the Assets Corporation and to the other gentlemen."

Inquiry was made concerning the prevailing market price for the units, two plus one, during the five years immediately preceding the purchase by the firm. The price quoted ranged from $20 to $22 per unit. Mr. Wagenseller testified that beginning with the latter part of January "the stock was $22.00 a unit. Then we came in and bought the stock at $53.60, which was approximately 100% over the highest price it had ever sold for clear back to 1939 and we are still buying it at that figure."

Having examined the exhibits and having read carefully all the testimony given before the executive deputy of the corporation department, who made the actual findings adverse to petitioner upon which the assistant corporation commissioner signed the order denying the application, I do not believe that the members of the firm of O'Melveny-Wagenseller & Durst, Inc., had any intention of dealing unjustly, unfairly or fraudulently with anyone, or that their plan would work that way. On the contrary, their policy, it seems to me, was to make money for others as well as for themselves. The first beneficiary of that policy was Assets Corporation which, by dealing with this firm, got rid, at an advanced price, of a load of stock which up to then had been quoted at an extremely low figure. This stock the firm later sold to its clients at a profit of a few thousand dollars, dealing with the stock on a two plus one unit basis so that the purchasers all became owners of preferred and common stock. When the preferred stock shall have been disposed of, as contemplated by the petitioner, the owners will have received for that stock a cash price equaling, at least, the $255,240 minimum value mentioned in the findings drafted by the deputy, and their common stock will have absorbed a substantial portion of the value now inherent in their preferred holdings. This condition in my opinion, tends to contradict the finding of the commissioner "That the exchange of shares as contemplated in the said application would not result in the holders of preferred shares receiving considerations commensurate with the advantages to be surrendered by such shareholders to the benefit of the holders of common shares." Up to the present time the common stock seems to have had no value. This appears from the italicized statement of Mr. Adams, attorney for petitioner-plaintiff before the executive deputy, noted near the close of the following passage quoted from the transcript, which is enlightening also upon other aspects of the case:

"Mr. Adams: Mr. Wagenseller, suppose you would not be permitted to recapitalize the company by amending the Articles to eliminate these restrictive features now contained therein which have been pointed out and discussed here in this proceeding, and include the reduction of the redeemable price and liquidation price of the preferred stock from $50.00 to $30.00 a share, would you want your firm and the clients and customers of your firm to retain their stock interest in this Transportation Building? A. I should say not. We have absolutely no interest in the building. We wouldn't want them to retain their interest in the property, but so long as they have an interest in the property we have to protect that interest they have. * * *

"Q. In other words, you believe as an operational proposition that this building can't be operated successfully unless this company recapitalize along the line of an orthodox company? A. It cannot be operated successfully, no question about that, and so far as we are concerned, we are not interested in reviving a dead horse for somebody else. We are willing to give to

the people interested in this property today everything they are entitled to. In other words, we believe by paying $30.00 a share, these people will get out of their property, $255,000. If that isn't fair, I don't know what in the world is. If they get only $255,000, we won't take a dime, but if they get more than $255,000, we are entitled, by gosh, to half of the profit, if we make the profit. * * *

"Mr. S—— [Executive Deputy]: Mr. Wagenseller, Do I understand the Articles of the Company at the present time restrict the amount of expenditures in excess of $5,000 for repairs unless there is a certain vote by the preferred and common shareholders? A. That is right.

"Q. In the event that vote of the preferred and common shareholders is sufficient, is there any restriction on the amount you might spend for repairs? A. No.

"Q. Do you and your clients hold a sufficient vote for that purpose? A. Oh yes. Sure, our clients—as I testified before, we have about 65%—and in the last sixty days since the end of January we have purchased and resold to our clients more than 65% of the preferred, and 76% of the common stock, so we control the situation absolutely from the standpoint of our own clients.

"Q. Yes. A. But here is a dead horse that has gone on for years. It has been greatly messed up. We are not interested in obtaining the property, or operating the property with all these restrictions around our necks. It has to be cleaned up. We have had an opportunity to get out, and not only that, but in this Management Contract, Mr. Commissioner, we have advised our Board of Directors in the Transportation Building that when this approval is asked of the preferred stockholders and the common stockholders for this recapitalization, that we will renew our offer of $53.60 for this stock. If they don't want to go along they have their choice of disapproving or approving, or selling their stock, which is still the same price we paid Assets Corporation, and which is more than 100% more than they got before. We think we have treated them fairly and honestly, but I will be darned if we want to sit around and operate that property and pay them $50.00—pay out $425,000. Life is too short. We are not interested. Today, we come and put in our efforts, and whatever we get after these people have been paid $30.00 liquidation value, which is $255,000, which is $30,000 more than they have ever been able to get out of the property—we are willing to pay them $255,000 as a liquidation value and then, after that, the same people still have 43% of the common stock, they still share with us. We are not taking it all. All we have is 57% of this company and they share with us.

"Q. In other words, if the company succeeds, as you anticipate, they (the shareholders) get $30.00 for the preferred shares and enjoy the prosperity of the company through their stock ownership of the common? A. That is right. We know what we can do with the building. There has been nobody else come along and pick up this company by the boot straps,—it has been a dead horse for a long time. We have connections to do it, we are entitled to a profit, and we don't take the profit until we earn it and the other fellow gets his money.

"Mr. Adams: I think that is about your story. * * *

"Q. [By Mr. R—— appearing for the Corporation Department]: Now, this application also asks for a permit containing an issuance clause by which the corporation will be permitted to sell 3800 and some shares of common at 10¢ a share? A. That is right.

"Q. However, if these Articles are amended, the common cannot participate in any dividend until all the preferred has been retired, is that not so? A. That is correct.

"Q. I have wondered how in the world you could figure a 10¢ value, or $1.00 value, or any value at all, appertaining to that common stock, in view of that provision, which seems to make dividends rather remote on that common stock? A. Dividends are remote on the common stock. By the time the money is spent on that property to fix it up, we will not

receive a penny on the property for several years to come. We will have to pay all the preferred off before we can get a dime, and not only pay it off but we will have to pay a profit upon its present current value.

"Q. Did you have any scheme in putting that 10¢ value on the common stock? A. Just an arbitrary value.

"Mr. Adams: *Mr. Wagenseller was of the opinion his firm would be entitled to the common stock for the value of his contract, the common stock having no value today, but I thought perhaps it being no par stock that it might be better to have the issuance of the common stock supported by a consideration of the value of this contract, whatever it may be, plus 10¢ per share. I think I am entirely responsible for that.* A. I think you will find we followed the same procedure with the Department here, with reference to the Cooper Building and the Merchants Exchange Building, where we can get a like amount of stock under these same conditions.

"Mr. R——: Well those conditions were not an outgrowth of the same situation where you are asking to amend the Articles as you are proposing to do here. A. No,—the only reason we are amending those,—the whole thing is a tax deal. If it wasn't for a tax deal we wouldn't be before you now. We would have bought the property and taken it over during the same time.

"Q. You took a fair depreciation on the old costs of the building, which was many hundreds of thousands of dollars,—about $600,000, the cost of the building? A. More than that.

"Q. The building and land came together about $905,000,—about $300,000 for the land value and the rest for the building value? A. That is right.

"Q. Now you can still use those old depreciation rates whereas if you bought the building you would have to establish a new depreciation rate based on the present consideration of the building? A. That is just exactly what it is. You see, our depreciation is greater than that. We took a depreciation of $15,976.92, that is the depreciation. That means that amount of money is tax money, so far as we are concerned. If we bought this building tomorrow for $225,000, I doubt if we could take more depreciation than $3,000. So we have $12,000 without paying income tax, and in addition to that we have an eight or nine hundred thousand capital set up for excess profits tax, where otherwise that would crucify us. That is all this whole thing is. Otherwise we couldn't monkey with it at all. We would have bought the property the same as we bought other property, and these stockholders are going to be a lot better off than they have been before. They are better off now They couldn't have gotten more than $22.-00 for it in January. Today they have $53.00.

"Mr. R——: Mr. Wagenseller, it may be that the stockholder is actually better off under this new management and under this proposed change, but what I am afraid of is this—it's requesting us to make this decision puts us in the place that should be occupied by a Court. * * *."

As is apparent, ultimately this case was presented to a court, and that court determined upon findings of its own that the findings and conclusions prepared by the representative of the corporation department and adopted by the commissioner were not supported by the evidence. Among the conclusions of the trial court the following is notable:

"At the time of the hearing held by defendant on the application of plaintiff, to-wit, May 12, 1944, all preferred and common shareholders of plaintiff acquiesced in the application of plaintiff and the issuance of the permit for which the application was made."

In addition to this strong argument supporting the fairness of the plan respondent furnishes another of similar import by pointing out that before the proposed change can be finally made the shareholders "will be called upon by respondent to vote either for or against such amendment in accordance with the provisions of respondent's certificate of incorporation."

74 Cal.App.2d 757

**POWERS et al. v. SHELTON et al.**

**Civ. 12981.**

District Court of Appeal, First District, Division 1, California.

May 31, 1946.

**1. Appeal and error ⇐930(1)**

On appeal from judgment on verdict of a jury District Court of Appeal would resolve all conflicts and construe the testimony most strongly in respondents' favor, in considering whether injured party was negligent as a matter of law.

**2. Automobiles ⇐245(74)**

In action for injuries sustained by high school student who, while standing on street side of parked automobile engaged in conversation with occupants, was struck by automobile driven by another student, whether injured student was negligent in allegedly failing to yield right of way and in allegedly moving from a place of safety to a place of danger was for the jury.

**3. Automobiles ⇐246(35)**

In action for injuries sustained by high school student who, while standing on street side of parked automobile engaged in conversation with occupants, was struck by another automobile, instruction restating in proper form the general rule that a person must exercise ordinary care for his own safety, that the degree of care varies in proportion to the nature of the act and surrounding circumstances, and that amount of caution required increases as does the danger that should reasonably be apprehended, was properly given.

**4. Automobiles ⇐246(5)**

In action for injuries sustained by high school student who, while standing on the street side of parked automobile engaged in conversation with occupants, was struck by automobile driven by another student, an instruction that while both students were charged with ordinary care, the amount of care required of other student at time of accident was greater inasmuch as he was driving on a public highway a vehicle capable of inflicting injury or death, was proper.

**5. Automobiles ⇐246(24)**
**Trial ⇐296(3)**

An instruction that a pedestrian lawfully upon a public highway may rely upon the exercise of reasonable care by drivers should include proviso that before pedestrian is entitled to invoke the assumption it must appear that pedestrian himself is exercising ordinary care, but absence of proviso is not ground for reversal if trial court elsewhere in its instructions has correctly and adequately instructed upon the law requiring exercise of ordinary care.

**6. Trial ⇐260(8)**

Where the subject matter of proposed instructions on contributory negligence was covered by other given instructions which substantially and correctly covered the legal principles applying to contributory negligence of pedestrians, proposed instructions were properly refused.

**7. Automobiles ⇐246(4)**

In action for injuries sustained by pedestrian when struck by automobile, instruction relating to motorist's duty as a driver was proper as against contention that instruction in effect stated that pedestrian had little or no duty to perform to protect himself and that motorist was compelled to exercise a greater amount of care for the protection of pedestrian.

**8. Automobiles ⇐246(49)**

In action for injuries sustained by pedestrian when struck by automobile, an instruction relating to the duties of a driver and including the duty to keep vehicle at such distance as to avoid running over a pedestrian in his sudden panic from surprise at knowledge of vehicle's unexpected approach was proper under the evidence.

**9. Automobiles ⇐246(4)**

In action for injuries sustained by pedestrian when struck by automobile, an instruction placing upon driver the duty to analyze a dangerous situation was proper.

**10. Trial ⇐260(8)**

In action for injuries sustained by pedestrian when struck by automobile, where practically all of the legal principles un-

derlying the doctrine of assumption of risk were given in instructions upon contributory negligence and the standard of ordinary care, refusal to give proposed instructions on assumption of risk was not prejudicial.

**11. Automobiles ⇐246(58)**

In action for injuries sustained by high school student who, while standing on street side of parked automobile engaged in conversation with the occupants, was struck by another automobile, instructions on the doctrine of last clear chance were proper under the facts.

**12. Damages ⇐210(1)**

In action for injuries sustained by pedestrian when struck by automobile, where jury was plainly told that before it could render a verdict in any amount, it must first find that defendants were liable, and that thereafter it could bring in a verdict for damages but in no event in excess of $5000, instructions in four of which jury was told that it could only bring in a verdict for $5000 were not misleading as giving impression that jury should return a verdict of $5000. Vehicle Code, § 352(c).

**13. Appeal and error ⇐1078(1)**

Trial court's mistake in telling jury that denials in answers were based on information and belief was harmless and would be given no special attention where not stressed as ground for reversal.

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Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by David Powers, a minor, by A. D. Powers, Jr., his guardian ad litem, and by A. D. Powers, Jr., individually against Gregory Shelton and others to recover damages for injuries sustained by the minor. Judgment for plaintiff, and defendants appeal.

Affirmed.

Kenneth C. Gillis and Brown, Rosson & Gillis, all of Oakland, for appellants.

William A. White, of San Francisco (Edward E. Heavey, of San Francisco, of counsel), for respondents.

KNIGHT, Justice.

This is an appeal from a judgment for $5000 entered pursuant to the verdict of a jury in an action to recover damages for personal injuries sustained by David Powers when struck by an automobile driven by Gregory Shelton.

The parties involved in the accident were high school students. Powers was 17 years old, and he brought the action through his father as guardian ad litem in which his father joined as a party plaintiff. Shelton was also 17 years old, and his parents were made parties defendant by reason of the fact that they had signed his application for a driver's license. Gregory Shelton was not served with summons; consequently he filed no demurrer or answer to the complaint; but he testified at the trial by way of deposition. At that time he was in the United States Naval Reserve and stationed at Farragut, Idaho. His parents filed separate demurrers and answers, and the verdict and the judgment were rendered in favor of David Powers and against Gregory Shelton's parents. The first point made in the appeal is that David Powers was guilty of negligence as a matter of law. There is no merit in the point.

[1, 2] Resolving all conflicts and construing the testimony most strongly in respondents' favor, the essential facts appearing from the evidence are these: The boys attended the University High School on 58th Street, in Oakland, and the accident happened on 58th Street approximately 125 feet east of the Grove Street intersection, between three and half past three o'clock in the afternoon, shortly after the classes had been dismissed. The students were still leaving the school grounds. Many of them drove to and from school in automobiles. 58th Street runs east and west, and a Ford coupe owned by a boy named Bouterious was parked facing east on the north side of the street. Bouterious occupied the seat behind the wheel, and two other high school boys were seated to his right. Four high school boys, including David Powers, stood in a line close up to the side of the Ford, on the street side, talking with the boys in the Ford. David

Powers was third in line from the front end of the Ford. The boys had been standing there about ten minutes prior to the accident, and much of the time Powers had his head inside the open window of the Ford. Some of the boys, including Powers, were members of the school basket ball team, and they were talking about a game that was to be played at four o'clock that afternoon with a team from another high school.

Parked on the same side of the street, about five car lengths east of the Ford, but facing west, was a Chevrolet coach belonging to Gregory Shelton. He got into the coach, accompanied by two school companions, and started the engine. He admitted that before doing so he saw the boys standing along side of the Ford. After starting the engine he pulled out sharply to the left to the center of the street, so that the left wheels of his coach were over the middle line of the street. He could have continued to drive straight ahead in that position, or even farther over on the south side, because it was clear of traffic; but instead of doing so he swerved back suddenly to the right, three to five feet, thus steering his car directly toward the boys standing along side of the Ford, to give them a "close-up," as the boys expressed it, which, it seems, was not an uncommon sport among the boys attending that school. The first two boys in line heard and saw the approach of the Shelton car and managed to escape being hit by getting in closer to the side of the Ford. One of them testified that the Shelton car passed within a foot or a foot and a half from him. The speed of the car as it reached and passed the Ford was estimated to be anywhere from 18 to 30 miles an hour, which was in excess of the speed limit in that zone. Powers, however, did not see or hear the approach of the car; and the outside handle of the door caught his right forearm, dragging him some distance, then throwing him unconscious to the pavement, and inflicting upon him serious, painful and permanent injuries. They consisted principally of a compound fracture of the bones of the forearm; and while he was lying on the pavement it became necessary for some of his companions to place a tourniquet on his arm to stop the excessive flow of blood. It was afterwards ascertained that one of the main muscles controlling some of the movements of the forearm had been torn completely loose, which resulted in a permanent injury, for the reason that he will never regain the full use of the arm.

The theory on which appellants base their contention that Powers was guilty of negligence as a matter of law is stated by them in their opening brief as follows: "Plaintiff was guilty of negligence as a matter of law by reason of the fact that he failed to yield the right of way to the Shelton car, and that he moved from a place of safety to a place of danger without even the slightest precaution." The first of the two factors upon which appellants base their theory finds no support in the evidence. The uncontradicted testimony shows that Powers was totally unaware of the approach of the Shelton car until the very moment he was struck by it; and certainly it would be most absurd for this court to declare that he was guilty of negligence as a matter of law, upon the theory that he failed to yield the right of way to the approaching vehicle, when the uncontradicted evidence establishes that, up to the precise time he was struck by the car he was entirely unaware of its presence or approach.

With reference to the second factor relied upon by appellants, that Powers was moving from a place of safety to a place of danger when he was struck and injured, appellants claim that just before he was hit, Powers moved backward into the street. The only witness so to testify, however, was one of the boys riding with Shelton, and the very most that can be said for his testimony is that it raised a slight conflict on that point. All of the rest of the testimony shows overwhelmingly that instantly before the impact Powers, who had been facing north, turned slightly to the right, but that he did not step backward, or attempt so to do, and such was the implied finding of the jury.

A mere glance at the essential facts of the two cases cited by appellants in support of their theory shows that those cases are

clearly inapplicable to the factual situation here presented. In Moss v. H. R. Boynton Co., 44 Cal.App. 474, 186 P. 631, a pedestrian stepped from a place of safety at the curb between intersections and started across the street, thus placing himself in a position of danger, without taking the precaution to keep a look-out for approaching traffic, and he was hit and injured by an on-coming car. In the other case (Chase v. Thomas, 7 Cal.App.2d 440, 46 P.2d 200) the plaintiff after double parking his laundry truck, went to the rear of the truck, took out a bag of laundry, closed the door and then stepped out farther into the street into the pathway of an approaching automobile, assuming that the driver thereof would slow up to give him the right of way.

In the present case the evidence shows beyond question that the sole proximate cause of the accident was the deliberate, willful and dangerous conduct on the part of Shelton in giving the boys standing along the side of the Ford a "close-up"—that is, by attempting to frighten them by driving his car as close as possible to them without striking them; and in doing so he misjudged his distance.

[3] Appellants' second principal ground of appeal is made up of objections to the giving and the refusal to give certain instructions. None of the objections made is of a substantial nature. Their first complaint is directed against three instructions given by the court, and the refusal to give two requested by appellants, relating to respondent's duty to exercise proper care for his own safety while on the street; and the amount of care to be exercised by him and the driver of the car. Appellants contend that the instructions given, reasonably construed, are to the effect that a pedestrian may rightfully place himself in a street, in a position of danger, and then, without taking any precautions for his own safety, do whatever he pleases, regardless of the automobile traffic on the street, and if hit could hold the driver of the car liable for the accident. The instructions do not admit of such construction.

The first of the three challenged merely restated in proper form the general rule that a person must exercise ordinary care for his own safety; and that the degree of care varies in proportion to the nature of the act and the surrounding circumstances; and that the amount of caution required by the law increases as does the danger that should reasonably be apprehended. The instruction was clearly in accord with well-established law. 19 Cal.Jur. 579; Henderson v. Los Angeles Traction Co., 150 Cal. 689, 89 P. 976; Bresee v. Los Angeles Traction Co., 149 Cal. 131, 85 P. 152, 5 L.R.A.,N.S., 1059; Casalegno v. Leonard, 40 Cal.App.2d 575, 105 P.2d 125.

[4] The second instruction was to the effect that while Shelton and Powers were both charged with the exercise of ordinary care, the amount of care required of Shelton at the time of the accident was the greater inasmuch as he was driving a vehicle on a public highway capable of inflicting injury or death. The instruction was clearly proper and contained a correct statement of the law upon that subject. See McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 146 P.2d 34, and numerous cases cited therein.

[5] The third instruction was based upon the law that a pedestrian lawfully on a public highway may rely upon the exercise of reasonable care by drivers to avoid injury, and that he is not bound, as a matter of law, to be continuously looking or listening for approaching vehicles, under penalty that if he fails to do so and he is injured as a result of the negligence of the driver of a vehicle, he shall be precluded from recovering damages for the injuries. Erickson v. Grady, 119 Cal.App. 596, 6 P.2d 1002; King v. Unger, 25 Cal. App.2d 632, 78 P.2d 255; Devecchio v. Ricketts, 66 Cal.App. 334, 226 P. 11; Fowler v. Allen, 49 Cal.App.2d 214, 121 P.2d 41; Ramos v. Service Bros. 118 Cal. App. 432, 5 P.2d 623; see also Salomon v. Meyer, 1 Cal.2d 11, 32 P.2d 631. Here as in the case of Fowler v. Allen, supra, the instruction did not contain the proviso that before a pedestrian is entitled to invoke the assumption that the driver of the

vehicle will exercise ordinary care, it must appear that the pedestrian himself is exercising ordinary care. In that case it was held, however, that while such an instruction should include such a proviso, the absence thereof does not serve as ground for reversal, if it appears that elsewhere in its instructions the trial court has correctly and adequately instructed the jury upon the law requiring the exercise of ordinary care; and in the present case that was done.

[6] The ground upon which the trial court refused to give two of appellants' proposed instructions on contributory negligence was that the subject matter thereof was covered by other instructions which were given. The record substantiates such ground of refusal. The first of the proposed instructions merely restated in brief form the general legal principle that one who stands or moves about in a public street without looking in the direction from which traffic might approach is guilty of contributory negligence, which if it contributes proximately to the accident bars a recovery of damages; and the second proposed instruction was to the same effect with the added statement that the pedestrian must continue to be alert; otherwise he is guilty of contributory negligence. There were several instructions given which substantially and correctly covered those legal principles, among them being those hereinabove discussed. Others given upon the subject were proposed by appellants. One of them read: "A pedestrian being on a traveled street is bound to take notice of the conditions of traffic and cannot blindly step into a place of obvious danger."

[7] The next group of instructions complained of relate to the appellant's duty as a driver of a motor vehicle. Four instructions are included in this group; but no objection is made to the first. The second is the same instruction as the second in the group above. Appellants claim that it conflicts with the first, in that the jury was told in effect that the respondent had little or no duty to perform to protect himself, and that Shelton was compelled to exercise a greater amount of care for the protection of the respondent. However, the instruction begins with "while the defendant * * * and the plaintiff * * * are both charged with the exercise of ordinary care * * *." Under the ruling in Pinello v. Taylor, 128 Cal.App. 508, 17 P. 2d 1939, the instruction was clearly proper for the reason that there the trial court refused to give such an instruction and the judgment in favor of the defendants was reversed.

[8, 9] The next instruction in this group relates to the duties of a driver, and includes the duty to keep the vehicle at such a distance "as to avoid running over him [a pedestrian] in his sudden panic from surprise at knowledge of its unexpected approach." There was sufficient evidence here upon which to base the instruction, for it fairly shows that there was a sudden panic among the boys standing beside the Ford caused by the wanton acts of Shelton. The last one in this group places upon the driver the duty to analyze a dangerous situation, and the instruction is definitely supported by the case of Nicolai v. Pacific Electric Railway Co., 92 Cal.App. 100, 101, 267 P. 758.

[10] Appellants next claim error in the refusal to give their proposed instructions on assumption of risk. In Potts v. Crafts, 5 Cal.App.2d 83, 42 P.2d 87, 88, it was said: "Strictly speaking, the assumption of a risk doctrine is applicable to the relation of master and servant. 16 Cal.Jur. 1061." And in Schleif v. Grigsby, 88 Cal. App. 174, at page 182, 263 P. 255, at page 258, it was said: "This doctrine [assumption of risk] has its general application to the relation of master and servant; and the authorities cited cover cases wherein this relationship existed. However, conceding that the theory underlying the doctrine of assumption of risk may have application to cases outside of this particular relationship of employment, it goes no farther than the accepted standard of ordinary care under the circumstances. In other words, the doctrine of assumption of risk in other cases does not absolve the wrongdoer of all blame, but places upon the party injured a higher duty if he voluntarily enters a position of known danger. Graff v. United

Railroads, 178 Cal. 171, 172 P. 603; Kelly v. Santa Barbara [Consol.] R. Co., 171 Cal. [415], 419, 153 P. 903, Ann.Cas.1917C, 67. * * *" In the present case, therefore, it cannot be successfully maintained that it was prejudicial to refuse to give instructions on assumption of risk, since practically all of the legal principles underlying the doctrine of assumption of risk were here given to the jury in the instructions upon contributory negligence and the standard of ordinary care.

[11] Appellants next contend that the giving of instructions on the doctrine of the last clear chance was error. No objection is made to the form of the instructions, but it is argued that the essential evidentiary elements necessary to invoke that doctrine were wanting. This argument is not sustainable. The factors which must be present to justify the giving of instructions on the doctrine of the last clear chance have often been stated, and it is quite unnecessary to repeat them here. One of the recent cases in which they are set forth is Gillette v. City and County of San Francisco, 58 Cal.App.2d 434, 136 P. 2d 611, and it is our opinion that under the law as laid down in that case, and in the cases cited therein, the facts of the present case were legally sufficient to warrant the giving of instructions on that doctrine.

[12] Appellants also make the complaint that the court overemphasized the question of damages by giving a large number of instructions thereon, in four of which the jury was told that under the law it could only bring in a verdict for $5000 (under Vehicle Code, sec. 352(c) limiting the liability of the parents to that amount). Appellants argue that these instructions gave the jury the impression it should return a verdict of $5000. It appears, however, that the jury was also plainly told that before it could render a verdict in any amount against appellants it must first find that the appellants were liable, and that thereafter it could bring in a verdict for damages, but in no event in excess of the sum of $5000. In that state of the record it cannot be held as a matter of law that the jury was mislaid by the giving of the instructions about which appellants complain.

[13] The mistake made by the trial court in telling the jury that the denials in appellants' answers were based on information and belief was harmless, and the point is not stressed as a ground for reversal. Therefore no special attention need be given to it.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.




74 Cal.App.2d 583

## WILLIAMS v. KINSEY.

Civ. 14986.

District Court of Appeal, Second Appellate District, Division 1, California.

May 24, 1946.

Hearing Denied July 18, 1946.

**1. Brokers ⇐66**

The Real Estate Act prohibiting licensed broker from paying compensation for performing "any of the acts herein specified" to any person not a licensed broker intended to make it unlawful for a licensed broker to divide his compensation with any unlicensed person who performed any of services of a broker in consummation of a deal. St.1919, p. 1252, as amended; St. 1935, p. 1475, § 2; St.1937, p. 2125, § 18.

**2. Brokers ⇐2**

When one deals with his own property his negotiations with reference to sale or exchange thereof do not constitute him a "broker" within Real Estate Act making certain agreements between brokers and unlicensed persons unlawful. St.1919, p. 1252, as amended; St.1935, p. 1475, § 2; St.1937, p. 2125, § 18.

See Words and Phrases, Permanent Edition, for all other definitions of "Broker".

**3. Brokers ⇐3**

The purpose of Real Estate Act is not to raise revenue but to protect the public and hence the act does not require a person to be licensed in order to act with regard to his own property or affairs. St. 1919, p. 1252, as amended; St.1935, p. 1475, § 2; St.1937, p. 2125, § 18.

**4. Brokers ⇐66**

Where licensed real estate broker agreed with defendant who was unlicensed that commission which broker had received from third party with whom defendant exchanged properties, and net proceeds of sale of property acquired by defendant above designated price were to be put in one pot and divided equally between broker and defendant, as means of paying amount due broker in lieu of commission on exchange of the properties, agreement was not unenforceable by broker on theory that it provided for payment of compensation to an unlicensed broker in violation of Real Estate Act. St.1919, p. 1252, as amended; St.1935, p. 1475, § 2; St.1937, p. 2125, § 18.

**5. Brokers ⇐53**

If broker's bringing together of defendant and third party was the effective cause of exchange of properties between defendant and third party then broker was entitled to recover commission from defendant. St.1919, p. 1252, as amended; St.1935, p. 1475, § 2; St.1937, p. 2125, § 18.

**6. Brokers ⇐56(3)**

Where after real estate broker initiated negotiations for exchange of properties between defendant and third party defendant completed the exchange by himself with aid of his salaried employee, defendant was estopped to contend against broker's claim for commission on ground that broker did not participate in negotiations which resulted in defendant and third party consummating a deal. St.1919, p. 1252, as amended; St.1935, p. 1475, § 2; St.1937, p. 2125, § 18.

**7. Brokers ⇐56(3)**

A real estate broker acting in capacity of a "middleman" in bringing seller and buyer or parties to exchange of properties together, need have nothing to do with actually negotiating the bargain in order to be entitled to commission. St.1919, p. 1252, as amended; St.1935, p. 1475, § 2; St.1937, p. 2125, § 18.

See Words and Phrases, Permanent Edition, for all other definitions of "Middleman".

**8. Brokers ⇐86(4)**

In broker's action for commission earned in exchange of properties between defendant and third party, evidence sustained finding that broker was a middleman who brought defendant and third party together who themselves negotiated terms of exchange thereby entitling broker to commission from defendant and from third party. St.1919, p. 1252, as amended; St. 1935, p. 1475, § 2; St.1937, p. 2125, § 18.

**9. Brokers ⇐86(1)**

Evidence that real estate broker was a broker for defendant and for third party in trying to negotiate numerous exchanges which were not consummated did not invalidate finding that broker was not the agent for either party where there was no evidence that broker was authorized to bind or commit either party or that he was to do anything with regard to negotiating terms of exchange other than to bring parties together. St.1919, p. 1252, as amended; St.1935, p. 1475, § 2; St.1937, p. 2125, § 18.

**10. Brokers ⇐2**

A distinction exists between a broker acting as an agent and a broker acting as middleman, in that a broker acts as "agent" when there is confided to him the power to act on behalf of parties and to exercise discretion, skill and judgment, whereas a "middleman" possesses none of such prerogatives and earns his commission simply by bringing parties together.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent".

**11. Brokers ⇐86(8)**

In broker's action on contract whereby defendant agreed to pay broker in lieu of commission on exchange of properties one-half of net proceeds of sale of property acquired by defendant above $30,000, evidence sustained finding that there was no agreement that defendant was to be allowed inter-

est on $30,000 value of the residence acquired or on money advanced by defendant in maintaining and operating such residence.

**12. Appeal and error ⇐989**

When finding or judgment is attacked on ground of insufficiency of the evidence, province of appellate tribunal begins and ends with determination whether there is any substantial evidence, contradicted or uncontradicted, which will support questioned finding of fact or judgment.

**13. Appeal and error ⇐717**

Deliberations of courts, and oral or written opinions are conclusively merged in their orders or judgments and may not be considered for purpose of reversing such orders or judgments.

**14. Appeal and error ⇐533(1), 717**

The written or oral opinion of trial court is no part of record on appeal and will not be considered by appellate court for purpose of predicating error upon rulings of trial court or in determining whether findings of fact are supported by the evidence.

**15. Appeal and error ⇐717**

Inconsistencies between written or oral opinion of trial judge or his antecedent expressions and findings of fact cannot be considered by an appellate court. Code Civ.Proc. § 632; Rules on Appeal, rule 5.

**16. Interest ⇐1**

Except in case of a loan of money, which is made subject to payment of interest by presumption, the matter of payment of interest must be made the subject of an express agreement, otherwise it cannot be charged. Civ.Code, § 1914.

**17. Brokers ⇐71**

Where defendant agreed to pay real estate broker in lieu of commission one-half of net proceeds of sale of house acquired by defendant in exchange of properties above designated price, defendant was not entitled to interest on his contribution of capital in absence of agreement entitling him to make such charge. Civ.Code, § 1914.

**18. Appeal and error ⇐1010(1)**

A finding justified by substantial evidence cannot be disturbed.

**19. Brokers ⇐86(8)**

In broker's action on contract whereby defendant agreed to pay in lieu of commission one-half of net proceeds of sale of house acquired by defendant in exchange of properties above designated price, evidence justified court's refusal to allow credit to defendant for use of furniture moved into the house, reimbursement for expense of transportation and allowance of interest thereon on ground that furniture was not sold with the house and that expenses were not reasonably incurred in maintaining or effecting the sale of such house but were made for defendant's benefit.

**20. Brokers ⇐71**

A moral obligation to pay real estate broker a commission for bringing together property owners who exchange their properties was itself sufficient legal consideration for subsequent written agreement whereby one of such parties agreed to pay in lieu of commission, one-half of net proceeds of sale of house acquired above designated price. Civ.Code, §§ 1605, 1606.

**21. Appeal and error ⇐169**

An issue raised for first time on appeal could not be considered.

**22. Contracts ⇐340**

Lack of consideration of a written instrument is an affirmative defense and must be pleaded.

**23. Action ⇐45(1)**

A common count for money had and received alleging that there came into possession of defendant money for and on account of plaintiff for plaintiff's use and benefit which belonged to him, may be joined in same complaint with other common counts or in a cause of action on express contract.

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Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Ralph O. Williams, doing business as Ralph O. Williams Company, against G. E. Kinsey, to recover money due under a contract whereby defendant agreed to pay plaintiff in lieu of commission one-half of the proceeds of a sale of a house above a

certain price. From a judgment for plaintiff, defendant appeals.

Affirmed.

W. T. Stockman and Bodkin, Breslin & Luddy, all of Los Angeles, for appellant.

Clifford E. Hughes and Meserve, Mumper & Hughes, all of Los Angeles, for respondent.

WHITE, Justice.

Defendant appeals from an adverse judgment.

It appears from the record that during the year 1941 plaintiff was a licensed real estate broker actively engaged in such business in the City of Los Angeles. Defendant, though not a licensed real estate broker, was an operator in real estate on a more or less large scale. He published and circulated among some 800 real estate brokers, including plaintiff, brochures in which he set forth his holdings on which he was open to proposals. Through these brochures defendant advertised that he dealt through brokers only and would pay a real estate commission to any one effecting a transaction involving one of his properties. Plaintiff was aware of such advertisements, and was also aware of the fact that Asa V. Call was the owner of a large estate property improved with a residence, in the city of Beverly Hills, which Mr. Call was interested in disposing of, and plaintiff felt he could be instrumental in bringing about a transaction whereby the defendant might exchange one of his properties for the above mentioned property of Mr. Call. In the fall of 1941 plaintiff took defendant to see the Call property and interested him in acquiring it. At defendant's suggestion, plaintiff submitted to Mr. Call, three of the former's properties, but no deal was consummated. There is in the record substantial evidence that plaintiff first brought defendant and Asa V. Call together in an effort to effectuate a transaction under the terms of which Mr. Call would exchange his residence for one of defendant's properties and that defendant was to pay plaintiff a commission in the event such a transaction eventuated between defendant and Mr. Call. The record further reflects the fact that there was no agreement in writing calling for the payment of a commission because, as testified by plaintiff, "it was useless to have a contract signed in advance for a commission where the deal was an exchange, because it was impossible to describe the transaction before a deal was actually worked out."

It further appears that on or about December 1, 1941, plaintiff learned that defendant was acquiring certain property known as Beaconsfield Manor, and he thereupon went to the defendant, inquiring of him if he was interested in exchanging Beaconsfield Manor for Mr. Call's property. Defendant informed plaintiff at that time that he had already opened negotiations with Mr. Call to effect an exchange thereof for Mr. Call's property through defendant's salaried employee, Mr. Grunwald. Defendant also told plaintiff that the latter was not to talk to Mr. Call, but was to "keep your hands off, I will pay your commission of $5,000." According to plaintiff's testimony, defendant advised him that he had earned his commission by bringing Mr. Call and the defendant together and that if defendant was successful in effecting a trade of any of his properties involving the Call residence he would see that respondent "was protected on any commission that he had coming from Mr. Call." There is also testimony that defendant further stated that when the negotiations got to the point where escrow instructions were to be signed, plaintiff would be notified and could go to the bank with the other parties where the escrow was to be held, at which time proper escrow instructions would be worked out providing for the payment of the commission to which plaintiff was entitled from Mr. Call and from the defendant, to which plaintiff agreed.

There is also contained in the record evidence that on December 8, 1941, Mr. Call and defendant opened an escrow providing for the exchange of Beaconsfield Manor for the Call residence; that plaintiff was not notified thereof and no provision was made for the payment of any commission to him by either party. Upon discovering that Mr. Call and defendant had signed escrow instructions without his knowledge, thereby leaving him with no written agree-

ment regarding his compensation, plaintiff contacted defendant. Upon the defendant's suggestion, plaintiff attempted to get in touch with Mr. Call, but was unsuccessful, and after several days advised the defendant that he knew of no way to protect himself under the circumstances other than to file a lien for his commissions against the escrow. In this regard plaintiff testified that defendant said "he would give me an agreement that would protect me all the way around. He stated Mr. Call had beaten him down on his margin in the deal and that he could not pay me any cash commission; that he figured that he was entitled to a minimum of 15% profit on the exchange of Beaconsfield for the Call residence, and that therefore he was going to put the Call house into my deal with him on my commission at $30,000; that when he sold the Call house he would give me one-half of the net proceeds of the sale above $30,000; that since we did not know how much commission Mr. Call was going to pay, we would throw all of the commissions into one pot and divide them equally. He said that in this way he thought that I would make an amount that would total more than a 5% commission on both sides of the deal." Thereupon defendant wrote out and handed to plaintiff an agreement, dated December 23, 1941, reading as follows:

"It is understood that in lieu of my paying you a commission on the Call, Beaconsfield trade, I will pay you one-half of the net proceeds of the sale of the Call house above $30,000. You are to pay me one-half of commission you collect from Call."

Subsequently the escrow was closed, on December 31, 1941, and Mr. Call got the Beaconsfield Manor while appellant got Mr. Call's residence. Thereafter Mr. Call paid plaintiff a commission of $850, and defendant paid plaintiff $500, which sum, according to the latter's testimony, was on account of commissions. Thereafter defendant sold the house he had acquired from Mr. Call for $55,000 and received the money therefor. Upon discovering the sale, plaintiff demanded his compensation pursuant to the aforesaid contract of December 23, 1941, and defendant declined to pay plaintiff any further compensation in addition to what he had already paid. At that time defendant rendered plaintiff a statement setting forth the disposition of the funds received from the sale of the Call property, taking credit for $425, being one-half the commission Mr. Call paid plaintiff, and the $500 which defendant had paid to plaintiff. Thereupon this action ensued.

Plaintiff's complaint pleads the foregoing facts in the first cause of action thereof and in the second cause of action sets up a common count for money had and received. Plaintiff's prayer was for judgment against the defendant for the sum of $10,521.75, with interest thereon at the rate of seven per cent per annum from September 25, 1943. By his answer defendant denied he advanced $500 or any other sum to plaintiff as a commission, but on the contrary alleged that the $500 was paid in full settlement of the claim under the aforesaid written contract; denied that he had rendered a statement showing the net profit to be $1,389.69 or any other sum, but alleged that the aforesaid statement was defendant's ledger sheet showing net profits, furnished to plaintiff's attorney at his request. The answer further denied any sum was due for money had and received.

By his answer defendant also set up various defenses, the first of which alleged that concurrently with defendant's agreement to pay plaintiff one-half of the net proceeds on the sale of the Call residence over $30,000, plaintiff agreed that he would use his best efforts in selling the Call residence and would accomplish it in a few weeks, for a substantial profit; alleged that defendant relied upon the representation and believed plaintiff, which plaintiff knew; that plaintiff intended that defendant should rely upon the statement, knew it was false, and did not intend to use his best efforts to sell the Call residence, nor did he believe he could sell it, but intended to deceive defendant. As a second affirmative defense, defendant alleged that the claim of plaintiff was compromised and settled March 5, 1942, upon the payment of the aforesaid $500. For a third separate defense, it was alleged that if any sum were due plaintiff it was not in excess of one-half of $1318.69, as itemized in the above-mentioned statement, which, in itemized form, was at-

tached to defendant's answer, less closing costs of the deal, at that time undetermined.

Following trial before the court, sitting without a jury, judgment was rendered in favor of plaintiff and against the defendant for the sum of $3,582.05, from which judgment defendant prosecutes this appeal.

Appellant concedes, with reference to his second affirmative defense, that the court found upon conflicting evidence that the $500 paid in March, 1942, was merely a payment on account and not in full settlement of the contract, as claimed by defendant. Appellant also concedes, with reference to his first affirmative defense, that there was a substantial conflict in the evidence with reference thereto and that the court found against defendant's contention in regard to his claim that after payment of the aforesaid $500 no effort was made by plaintiff to sell the Call property. Because these findings are based upon conflicting evidence of a substantial nature, defendant has abandoned these defenses on appeal.

The main ground urged by appellant for a reversal is that the judgment is contrary to law, in that the indisputable evidence shows that while plaintiff was a licensed real estate broker under the laws of the State of California (California Real Estate Act, Stats.1919, p. 1252, as amended, now Chapter 3, Sections 10130 to 10221, Business and Professions Code), that neither defendant nor his salaried employee, Mr. Grunwald, who proposed to Mr. Call that the latter trade his residence for the defendant's Beaconsfield property, was a licensed real estate broker or salesman; that the aforesaid contract of December 23, 1941, upon which recovery was sought herein, provided that plaintiff's compensation for services rendered in consummating an exchange of properties contemplated that plaintiff should pay to defendant one-half the real estate commission he received from Asa V. Call for services defendant and his employee rendered in consummating the exchange; that the agreement being indivisible, plaintiff's compensation cannot be arrived at without taking into consideration such compensation received from Asa V. Call; and that said contract therefore contravenes the express provisions of the laws of this state (Sec. 2, Calif. Real Estate Act, now sec. 10134, Business and Professions Code).

Section 2 of the California Real Estate Act, St.1935, p. 1475, in effect at the time herein pertinent, provided (in part): "One act, for a compensation of buying or selling real estate of or for another, or offering for another to buy or sell or exchange real estate, or negotiating the purchase or sale or exchange of, or listing or soliciting prospective purchasers of real estate, or negotiating a loan on or leasing or renting or placing for rent real estate, or collecting rent therefrom shall constitute the person, copartnership or corporation making such offer, sale or purchase, exchange or lease, or negotiating said loan, or so renting or placing for rent or collecting said rent or listing or soliciting, a real estate broker or salesman within the meaning of this act."

Section 18 of the same act provided:

"It shall be unlawful for any licensed broker to pay any compensation for performing any of the acts herein specified to any person who is not a licensed broker, or a salesman licensed under the broker paying the compensation, and no real estate salesman shall be employed by or accept compensation from any person other than the broker under whom he is at the time licensed. It shall be unlawful for any licensed real estate salesman to pay any compensation for performing any of the acts specified in section 2 hereof to any licensee except through the broker under whom he is at the time licensed. It shall be a misdemeanor for any person, firm or corporation, whether obligor, escrow holder or otherwise, to pay or deliver to anyone a compensation for performing any of the acts specified in section 2 hereof, who shall not be known to be, or present evidence to such payor that he is a regularly licensed real estate broker at the time such compensation is earned. Punishment for said misdemeanor shall be a fine not exceeding fifty dollars for any one offense.

"[*Employment or compensation of unlicensed person.*] No licensed broker shall

employ or compensate directly or indirectly any person for performing any of the acts specified in section 2 of this act who is not a licensed broker or who is not a salesman licensed under the broker employing, or paying the compensation to, such person." St.1937, p. 2125.

The court found that plaintiff was a licensed real estate broker at the time of the transaction here in question and that at such time the defendant was not so licensed. The court further found "that thereafter and on or about the 1st day of December, 1941, defendant acquired Beaconsfield Manor, and through his agents and representatives and without the knowledge of plaintiff, interested Mr. Call in exchanging the Call property for Beaconsfield Manor; that the escrow instructions wherein and whereby it was arranged that the Beaconsfield Manor was to be exchanged for the Call property, were signed by the defendant and by Mr. Call without the participation of plaintiff, and without the plaintiff having talked to Mr. Call concerning the same; that plaintiff did not act as the agent for Asa V. Call or defendant, or arrange any of the terms of the exchange of the Beaconsfield Manor for the Call property, but acted as a mere middleman who brought said parties together in an attempt to effect an exchange of the Call property for property, other than Beaconsfield Manor, belonging to the defendant, and that defendant and Mr. Call arranged the terms of the exchange of Beaconsfield Manor for the Call residence between themselves, without the assistance of plaintiff."

It was further found by the court "that plaintiff had collected a commission of $850 from Mr. Call some time in the month of February, 1942, and that plaintiff and defendant agreed that the said commission and the net proceeds of the sale of the Call house above $30,000 was (sic) to be put in one pot and divided equally between plaintiff and defendant as the means of determining and paying the amount due plaintiff in lieu of a commission on the Beaconsfield-Call exchange; that it is true that the $500 paid by defendant to plaintiff on the 5th day of March, 1942, was paid by defendant to plaintiff on account of the commission to which he would ultimately be entitled when the Call property was sold; * * *."

The first question presented is whether, under the facts herein, it was the agreement between the parties that plaintiff, a licensed broker, should split his compensation as such real estate broker with defendant, an unlicensed person, a portion of the services for which compensation was to be received having been performed by defendant, an unlicensed person, through his salaried employee, also an unlicensed person.

[1, 2] At the time here pertinent section 18 of the Real Estate Act made it unlawful for "any licensed broker to pay any compensation *for performing any of the acts herein specified* to any person who is not a licensed broker, or a salesman licensed under the broker paying the compensation * * *." (Emphasis added.) The query therefore arises, what are "any of the acts herein specified"? Manifestly, the Real Estate Act intended to make it unlawful for a licensed broker to divide his compensation with any unlicensed person who performed any of the services of a broker in the consummation of a deal. The question then arises, did the defendant act as a broker in the transaction with which we are here concerned? Section 2, of the Real Estate Act declares the following acts to constitute one a broker or salesman: "One act, for a compensation, of buying or selling real estate *of or for another*, or offering *for another* to buy or sell or exchange real estate, or negotiating the purchase or sale or exchange of * * * real estate * * *." In the exchange of the Call residence for the Beaconsfield Manor apartments there were only two parties. Mr. Call was one and the defendant, as owner of the Beaconsfield Manor apartments, was the other. From the record it is obvious that defendant was not Mr. Call's broker, and certainly defendant could not employ himself as his own broker, nor did plaintiff employ defendant as his broker. The court found that plaintiff brought the principals together and that they arranged among themselves, as own-

ers of the respective properties involved, to negotiate the terms of the deal. That when one deals with his own property his negotiations with reference to the sale or exchange thereof do not constitute him a broker within the meaning of the act, under the facts here presented, is evidenced by section 2 thereof, which provides that "the provisions of this act, except as to sections 19a and 20a to 20*l* inclusive" (not here involved) "shall not apply to anyone who shall directly perform any of the acts aforesaid with reference to his own property * * *."

[3, 4] The purpose of the real estate act is not to raise revenue, but to protect the public (Firpo v. Murphy, 72 Cal.App. 249, 253, 236 P. 968), and therefore it does not by its specific terms require a person to be licensed in order to act with regard to his own property or affairs. As to what was the agreement between the parties, the court, upon conflicting but substantial evidence, found "that it is true that plaintiff had collected a commission of $850 from Mr. Call some time in the month of February, 1942, and that plaintiff and defendant agreed that the said commission and the net proceeds of the sale of the Call house above $30,000 was to be put in one pot and divided equally between plaintiff and defendant as the means of determining and paying the amount due plaintiff in lieu of a commission on the Beaconsfield-Call exchange; * * *." The court's finding in this regard removes the agreement in question from the category of agreements inhibited by the Real Estate Act. Furthermore, we are convinced that the defendant, acting as a principal and not as a broker in connection with his own property, was not performing "any of the acts" specified in the Real Estate Act, was not a broker, and does not therefore come within either the letter, spirit or meaning of the provisions of the act which make certain agreements between brokers and unlicensed persons unlawful.

[5, 6] Appellant next contends that the court erred in its finding numbered III, reading in part, "that plaintiff did not arrange for the exchange of the 'Call house' for 'Beaconsfield', but merely brought the owners of said properties together prior to the first day of December, 1941, as hereinafter found." Appellant argues that the undisputed evidence shows that the parties were brought together as to other property only; that respondent's contract with appellant was special and not general; that the former performed no services in connection with the trade of properties that was consummated and is therefore not entitled to recover. That respondent originally brought appellant and Mr. Call together cannot be disputed. The evidence in that regard is without contradiction. If this "bringing together" of Mr. Call and appellant was the effective cause of the particular deal that was finally made, then respondent is entitled to recover. Neiswender v. Campbell, 119 Cal.App. 504, 507, 6 P.2d 584. Furthermore, after respondent had initiated the negotiations for an exchange of properties between appellant and Mr. Call, the former took the matter into his own hands and completed an exchange by himself with the aid of his salaried employee. Respondent was thereby so completely discharged from responsibility that appellant is estopped to contend against respondent broker's claim for a commission on the ground that the latter did not actually participate in the negotiations which resulted in appellant and the party to whom respondent introduced appellant consummating a deal. Larrabee v. Republic Bond etc. Co., 100 Cal.App. 447, 451, 280 P. 149; Leckey v. Holst, 97 Cal. App. 698, 701, 275 P. 1015; 4 Cal.Jur. 577, § 21; 2 Am.Jur., "Agency", §§ 304 to 306; Leathers v. Canfield, 117 Mich. 277, 75 N. W. 612, 45 L.R.A. 51; 14 A.L.R. 472; Green v. Robertson, 64 Cal. 75, 76, 28 P. 446; Clark v. Allen, 125 Cal. 276, 279, 57 P. 985; King v. Reed, 24 Cal.App. 229, 236, 141 P. 41. The cases cited and relied upon by appellant are easily distinguishable from the case at bar in their respective factual backgrounds.

[7, 8] Although in conflict, there is nevertheless substantial evidence in the record to show that respondent acted in the capacity of a middleman—in other words, a broker who brings seller and buyer, or the parties to an exchange of properties, together. In his capacity as such middle-

man the broker need have nothing to do with actually negotiating the bargain. Ryan v. Walker, 35 Cal.App. 116, 119, 169 P. 417. Contrary to appellant's contention, finding III does find the ultimate facts alleged in paragraph III of the complaint as it stood following amendment and at the time the finding was made, namely, that respondent as a middleman brought appellant and Mr. Call together; that appellant and Mr. Call themselves negotiated the terms of the exchange of the Call residence for appellant's Beaconsfield Manor apartments, and that respondent thereby became entitled to two commissions—one from Mr. Call and another from appellant; that Mr. Call paid the commission he owed and appellant gave respondent the aforesaid contract of December 23, 1941, instead of paying the commission he owed to respondent. The phrase "as hereinafter found" refers to finding VII, where it was comprehensively set forth that while respondent did not arrange the terms of the exchange agreed upon, he acted as a middleman and that the parties themselves arranged the terms of the transaction. The challenged finding III finds support in the testimony given by respondent that after bringing Mr. Call and appellant together he learned that appellant was acquiring Beaconsfield Manor in the latter part of November, 1941, and told appellant that he thought it would be a good deal for Mr. Call; that he had been theretofore and was at that time attempting to arrange an exchange of the Call property for one of appellant's properties, and that several deals had been considered. Appellant told respondent that his employee, Mr. Grunwald, had already proposed through Mr. Rolapp, an employee of the Pacific Mutual Life Insurance Company, that Mr. Call consider trading his residence for Beaconsfield. Respondent at that time told appellant that it was odd that appellant's employee should "go behind respondent's back" and try to make a deal directly. Appellant then explained that Mr. Grunwald and Mr. Rolapp were very good friends; that the deal was progressing nicely, and that he, appellant, considered that the deal had better chances of eventuating if respondent kept his hands off of it. At that time appellant told respondent that he, appellant, would pay respondent a commission of $5,000; "that if he" (appellant) "was successful in effecting a trade of *any* of his property involving the taking of the Call residence, Mr. Grunwald would see that I" (respondent) "was protected on any commission that I had coming from Mr. Call"; that respondent had put Mr. Call in touch with appellant; that Mr. Call was respondent's prospect and that respondent had earned his commission in bringing Mr. Call and appellant together, and that respondent might spoil the deal which was apparently progressing very nicely, "if he were to get in there and start talking to Mr. Call and his people". Appellant told respondent that when the negotiations got to the point where escrow instructions were to be signed, respondent would be notified; that respondent would go to the bank where the escrow was to be held with the other parties and that proper instructions would be worked out for the payment of a commission to which respondent was entitled from Mr. Call and from appellant. Respondent agreed not to talk to Mr. Call regarding the deal on Beaconsfield and it is undisputed that he did not talk to Mr. Call.

In other words, appellant's agreement was that he would pay a commisson in the event of an exchange with Mr. Call of "any" of appellant's properties. Obviously, this would include the Beaconsfield Manor apartments.

[9, 10] It is further contended by appellant that the portion of finding VII reading, "that plaintiff did not act as the agent for Asa V. Call or defendant or arrange any of the terms of the exchange of Beaconsfield Manor for the Call property, but acted as a mere middleman who brought said parties together in an attempt to effectuate an exchange of the Call property for property, other than Beaconsfield Manor, belonging to the defendant," is contrary to the undisputed evidence. We deem it unnecessary to here set forth the evidence which has been hereinbefore narrated in detail. Suffice it to say that even though it be conceded that respondent was a broker for Mr. Call and for appellant in try-

ing to negotiate numerous exchanges which were not consummated, nevertheless such evidence does not invalidate a finding that respondent was not the agent for either party in the strict legal sense of that term, because there was no evidence to the effect that respondent was invested with any power to bind or commit either party or that he was to do anything with regard to negotiating the terms of the exchange other than to bring the parties together. Appellant fails to recognize the distinction between a broker acting as an agent and a broker acting as a middleman. This distinction is set forth with clarity in Clark v. Allen, supra, 125 Cal. at page 278, 57 P. 985, where the court declares that a broker acts as an agent when there is confided to him the power to act on behalf of the parties and to exercise discretion, skill and judgment; whereas a middleman possesses none of these prerogatives, and earns his commission simply by bringing the parties together. In the case just cited the court said:

"For a defense to the action [it is] claimed that plaintiff's assignors, the brokers, received compensation for their services from the other party to the trade, without his (defendant's) knowledge, and for that reason he now insists that the brokers are barred from recovering any compensation from him. In other words, it is claimed that the law will not allow the brokers to act as the agents of both parties, and a contract of that kind for compensation will not be recognized by the courts. As a general principle, this contention is sound; but there are circumstances where a party may act for two persons and charge compensation from both for his services. If the duty of the broker is simply to bring together two men who desired to exchange their lands, and the broker's entire duty was performed when he has brought the two men together, then we see nothing against good morals and a sound public policy in allowing compensation to the broker from each of the parties. In such a case, the broker is in no sense representing conflicting interests. He has nothing whatever to do with the trade. Under the contract, his advice and assistance to either party are not called for. Upon the state of facts here assumed, *the broker may be termed a 'middleman,' and not an 'agent' in the strict sense of the term.*"

The next point urged by appellant is that the court erred in finding that defendant was indebted to plaintiff in the sum of $3,582.05 and interest, because in arriving at said sum the court failed to allow defendant interest on the $30,000 value of the Call residence, or interest on money advanced by defendant in maintaining and operating said Call residence until it was sold, or compensation for the use of furniture in the Call residence, including reimbursement for expenses incurred in transportation of such furniture from Oregon to the Call residence. For an intelligent consideration of this point, it is necessary to remember that appellant's agreement with respondent was that he would pay the latter "one-half of the net proceeds of the sale of the Call house above $30,000." The court found that the gross sales price of the Call property was $55,000. It was also found that certain items listed in Exhibit "A" attached to defendant's answer "were incurred and paid by defendant as reasonable expenses of maintaining and selling the Call property," totalling the sum of $15,985.90; that the net proceeds over $30,000 from the sale of the Call property, before commissions, was $55,000 less $30,000, less $15,985.90, to-wit, the sum of $9,014.10; that one-half of said amount is $4,507.05; "that defendant is entitled to credit for $500 heretofore paid by him to plaintiff on account of commissions and the sum of $425, as and being one-half of the commission paid plaintiff by Mr. Call; that one-half of the net proceeds of the sale of the Call property over $30,000, * * *" less the above mentioned expenses and credits amounted to $3,582.05, for which plaintiff was given judgment.

By its findings the court determined that defendant was not entitled to interest upon his investment of $30,000 in the Call property or interest upon the disbursements made by him as reasonable expenses of maintaining and selling the Call property. With reference to the agreement between the parties defendant testified that "in arriving at such net proceeds, I was to receive $30,000 plus the cost of main-

tenance and upkeep, including caretaker, gardener, taxes, reasonable interest to me on the $30,000, and any other expenses incurred, including any commission paid on the sale, and after such deduction the net proceeds should be divided equally between us"; while the plaintiff testified as follows: "All of this conversation was in connection with the proposed trade of Mr. Call's house for the Cunningham apartments. This was the only time that Mr. Kinsey and I ever discussed the carrying charges that would be involved on Mr. Call's residence. There was no agreement or discussion at any time with respect to his being allowed to deduct any carrying charges over and above $30,000, or any other amount in connection with the exchange of Mr. Call's residence for the Beaconsfield apartments. * * *"

On rebuttal plaintiff testified: "There never was at any time any discussion between Mr. Kinsey and myself that he was to have any interest or any carrying charges in connection with any proposed exchange of any of his properties for the Call residence. There never was any discussion of Mr. Kinsey being entitled to the cost of maintenance and upkeep, including caretaker, gardener, taxes or any other item on the Call property. The only discussion that was had concerning these items was at the time that I first showed the Call property to Mr. Kinsey. We sat in my automobile in the front of his house after I had taken him to see the Call property the first time in the fall of 1941. At that time I told him what the taxes were and we discussed what it would cost to maintain the house and grounds. That was several months before Mr. Kinsey acquired the Beaconsfield. It was understood that in the event that he made a deal on the Call house he would naturally have to take care of those expenses. * * * It was only after the escrow was signed up between Mr. Kinsey and Mr. Call behind my back, that any arrangement other than a 5% commission to me on both sides of the deal, was discussed. The terms of that deal were arranged orally within two or three days after the deal went into escrow in December, 1941. There was no discussion between Mr. Kinsey and myself prior to or at the time of giving the memo of December 23, 1941, except the discussion which I have heretofore related on the stand."

The court found "that there was no agreement or discussion between the plaintiff and defendant to the effect that interest was to be charged as a disbursement against the gross proceeds of the sale of the property on the sum of $30,000 set forth in the agreement of December 23, 1941, or on any of the disbursements shown in Exhibit A to defendant's answer, * * *. That in the fall of 1941 and in connection with the proposed exchange of the Call property for property, other than Beaconsfield Manor, belonging to the defendant, plaintiff and defendant discussed the amount of taxes on the Call property, the expense of paying a gardener, and the amount of insurance, but that there was no discussion between plaintiff and defendant at any time concerning interest on $30,000 or interest on any moneys that might be disbursed by defendant as carrying charges on, or expenses in effecting the sale of, the Call property; * * *."

[11, 12] In view of the foregoing testimony given by plaintiff, it cannot be said that the findings just quoted are without evidentiary support. True, there was a conflict, but when a finding or judgment is attacked upon the ground of insufficiency of the evidence, the province of an appellate tribunal begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the questioned finding of fact or judgment. Eggert v. Pacific States Savings & Loan Ass'n, 57 Cal.App.2d 239, 243, 136 P.2d 822; Viner v. Untrecht, 26 Cal.2d 261, 158 P.2d 3; Cordell v. City of Los Angeles, 67 Cal.App.2d 257, 265, 154 P.2d 31.

Appellant insists, however, that the record shows that the court believed the defendant rather than the plaintiff, because by its finding numbered VII it determined that defendant was entitled to add the

sum of $15,985.10 expended for the upkeep and maintenance of the Call property to the sum of $30,000 in computing the net proceeds, and because, as revealed by the statement on appeal, the court in giving "its decision from the bench" stated, "I find for the plaintiff upon the contract." That after disallowing certain items of deductions claimed by defendant, the court said: "However, I disagree with Mr. Hughes (one of plaintiff's counsel) and feel that Mr. Kinsey (the defendant) is entitled to reasonable interest, and I feel he is entitled to credit at the rate of 3% per annum, and the credit for interest, per schedule attached to the answer as Exhibit "A", to wit, $4319.25, is reduced to 3% per annum.

"Question By Mr. Hughes: You mean interest on $30,000 and the carrying charges?

"The Court: No, interest on $30,000, the value of the Call residence, from the time it was acquired until it was sold. No interest will be allowed on the carrying charges or other expenses paid by Mr. Kinsey.

"Mr. Hughes will prepare the findings and serve them."

It appears that thereafter counsel for plaintiff communicated with the trial judge, and on July 28, 1944, wrote a letter to defendant's counsel, a copy of which was transmitted to the trial judge. The letter follows:

"Re: Williams v. Kinsey

"Gentlemen:

"At the close of the trial of the above entitled action it was not clear to me from the remarks made by the court whether or not there was to be a finding that the contract had been modified by an oral agreement. I asked Judge Clarke about it, and upon being advised that there was to be no such finding, I asked, and received permission from the court, that I be allowed to prepare findings making no provision for the payment of interest. The court granted this request, stating that I should write you a letter setting forth the facts and advising you that if you desired to raise any issue on that point, the same could be done by proposing counter findings and setting the same down for settlement.

"Accordingly, I have prepared and hand you herewith a copy of the findings prepared as per my suggestion above set forth.

"I have not cited to the court, but cite to you now the case of Young v. Canfield's Estate, 33 Cal.App. 343, 164 P. 1134, which is practically on all fours with the case at bar, which, in my judgment, makes it rather futile to spend any more time on the interest question."

The statement on appeal then continues: "Thereafter plaintiff prepared and served proposed findings of fact and conclusions of law and judgment, in which findings and judgment interest was disallowed entirely. Objections to the failure of the court to make an allowance of interest in the findings were filed by defendant and settlement of the findings was set down for hearing."

At such hearing defendant's counsel called the attention of the court to the foregoing letter, and the trial judge stated that a copy thereof had been received by him through the mail. Following such hearing the court adopted the findings prepared by plaintiff and disallowed the aforementioned interest items. Thereafter defendant moved for a new trial, and during the hearing of such motion the statement on appeal reveals that the following occurred: "* * * the court stated during the course of the hearing thereof that at the close of the trial he had felt that as a matter of equity Mr. Kinsey was entitled to reasonable interest on $30,000, but that after hearing argument he felt that he was wrong and that Mr. Kinsey was not entitled to any interest, and thereupon denied the motion for a new trial."

[13-15] What transpired in the instant case demonstrates the wisdom of the rule that the deliberations of courts are conclusively merged in their orders or judgments, and the oral or written opinions of trial judges may not be considered for the purpose of reversing such orders or judgments. De Cou v. Howell, 190 Cal. 741, 751, 214 P. 444; Southern California etc.

Lines v. San Diego etc. Ry. Co., 66 Cal. App.2d 672, 676, 152 P.2d 470. That the written or oral opinion of the trial court is no part of the record on appeal and will not be considered by the appellate court for the purpose of predicating error upon the rulings of the trial court or in determining whether the findings of fact are supported by the evidence, is the general rule. Rickards v. Noonan, 40 Cal.App.2d 266, 271, 104 P.2d 839. It is settled that inconsistencies between the written or oral opinion of a trial judge or his antecedent expressions and the findings of fact cannot be considered by an appellate court. Lord v. Katz, 54 Cal.App.2d 363, 366, 128 P.2d 907; 20 Cal.Jur. 129, § 80; Lynch v. International B. Corporation, 68 Cal.App. 432, 229 P. 968; Gates v. Green, 151 Cal. 65, 69, 90 P. 189. We do not regard subdivision (a) of Rule 5 of Rules on Appeal for the Supreme Court and District Courts of Appeal of this state, adopted by the Judicial Council and effective July 1, 1943, authorizing the inclusion of "any written opinion of the superior court" in the record on appeal, as in any way restricting by antecedent expressions of the trial court the absolute power of the trial judge to declare his final conclusions in the only manner authorized by law, to-wit, by filing his "decision" (findings of fact and conclusions of law) as provided in section 632 of the Code of Civil Procedure. In the instant case the trial judge frankly stated that while at the conclusion of the trial he was of the opinion, as orally expressed, that "as a matter of equity Mr. Kinsey was entitled to reasonable interest on $30,000, but after hearing argument he felt that he was wrong and that Mr. Kinsey was not entitled to any interest."

[16, 17] The court having found, and there being substantial evidence to support the finding, that there was no conversation or agreement between appellant and respondent to the effect that appellant was to have reasonable interest, it now devolves upon us to determine whether, in the absence of any agreement between the parties for the payment of interest on the $30,000 and the carrying charges, the determination of the court not to award such interest is supported by law. The rule seems well established that except in the case of a loan of money, which by our code is made subject to the payment of interest by presumption (Civ.Code, sec. 1914), the matter of payment of interest on the "net proceeds of the sale," as used in the agreement before us, must be made the subject of an express agreement; otherwise it cannot be charged. Young v. Canfield's Estate, 33 Cal.App. 343, 344, 164 P. 1134; Howard v. D. W. Hobson Co., 38 Cal.App. 445, 176 P. 715. Where, as here, appellant advanced his capital and respondent his skill, the former was not entitled to interest on his contribution of capital to the venture in the absence of an agreement entitling him to make such charge. Clement v. Duncan, 191 Cal. 209, 221, 215 P. 1025. In the state of the record here presented, the finding of the court disallowing interest on the $30,000 and carrying charges was supported both by the evidence and the law.

[18, 19] With reference to the refusal of the court to allow credit to the defendant for use of the furniture moved into the Call house, reimbursement for the expense of its transportation from Oregon in the sum of $874.93, and allowance of interest thereon, the court found that appellant moved said furniture from a house he had purchased in the state of Oregon and that such furniture was "temporarily placed in the Call property and was not sold with said property; that said expenses were not reasonably incurred in maintaining, or effecting the sale of, the Call property, but were made for defendant's benefit." There was substantial evidence in the record justifying this finding and it cannot therefore be disturbed. The very fact that the furniture was not sold with the Call residence lends strength to the court's conclusion that its presence in the house was not for the purpose of inducing a sale of the premises, but as the court found, was for defendant's convenience and benefit.

[20-22] As a further ground of appeal, it is contended by appellant that the agreement of December 23, 1941, raised only a rebuttable presumption of consideration and that such presumption was overcome by the evidence and the finding that the exchange of the Call residence for the Beaconsfield

apartments was effected without any assistance or participation on the part of plaintiff. This claim is unavailing, because the agreement of December 23, 1941, was a different agreement from the one originally made. This is shown by the very language of the written document, which recites: "It is understood that *in lieu* of paying you a commission on the Call, Beaconsfield trade, I will pay you * * *." Appellant was under a moral obligation to pay respondent a commission for bringing appellant and Mr. Call together. This in itself was sufficient legal consideration for the subsequent written agreement of December 23, 1941. Civ.Code, secs. 1605, 1606; opinion by Supreme Court denying a hearing in Medberry v. Olcovich, 15 Cal.App.2d 263, 271, 59 P.2d 551, 60 P.2d 281. Furthermore, the issue of lack of consideration was raised for the first time on appeal. The answer does not plead lack of consideration. It was not urged in support of the motion for nonsuit or on motion for a new trial. Lack of consideration of a written instrument is an affirmative defense and must be pleaded. Bryan v. Banks 98 Cal.App. 748, 755, 277 P. 1075; Rivera v. Cappa, 29 Cal.App. 496, 156 P. 1016, 1017; California Standard Finance Corporation v. J. D. Millar R. Co., 118 Cal.App. 185, 189, 190, 191, 5 P.2d 41; Fierce v. Reed, 106 Cal.App. 673, 677, 289 P. 855. 6 Cal.Jur. 209, § 138.

[23] Appellant next asserts that respondent cannot recover on the second count of his complaint on the theory of quantum meruit. However, plaintiff has not attempted to state a cause of action on the theory of quantum meruit. The second cause of action is a common count for money had and received. It alleges that there came into the possession of defendant certain money for and on account of plaintiff for the latter's use and benefit and which belonged to him. This common count may properly be joined in the same complaint with other common counts or in a cause of action on an express contract. 17 Cal.Jur. 633, § 27.

Finally, appellant contends that the court erred in computing the amount found due as set forth in finding V, but in his reply brief concedes that "while the court's Finding V is somewhat confusing, the computation upon the theory adopted in respect to respondent's right to recover is apparently correct."

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

28 Cal.2d 276

## COLBERT v. COLBERT.

L. A. No. 19225.

Supreme Court of California, in Bank.

May 28, 1946.

1. Divorce ⇐209, 214(3), 221, 226
Husband and wife ⇐295

The existence of marriage is a jurisdictional prerequisite for right of court to order support, costs, and counsel fees pendente lite in an action for divorce or separate maintenance, and the invalidity of the marriage may be shown at any time.

2. Divorce ⇐214(3)
Husband and wife ⇐295

The evidence necessary to prove a marriage need not be as complete and satisfactory upon an application for temporary support in action for divorce or separate maintenance as that required at time of trial, to prove a marriage which is disputed by one of the parties.

3. Marriage ⇐3

Ordinarily, the law of the place of marriage controls the question of its validity, and such general rule has been adopted in California. Civ.Code, § 63.

4. Marriage ⇐3

California recognizes common-law marriages validly contracted in a sister state. Civ.Code, § 63.

5. Marriage ⇐20(1)

In Texas, "marriage" is a status, the living together of a man and woman as husband and wife, under an agreement, express or implied, which need not be solemnized by any ceremony or be under license from the state, where the agreement is made effective by the parties' living together publicly as husband and wife.

See Words and Phrases, Permanent Edition, for all other definitions of "Marriage".

6. Husband and wife ⇐295

Evidence showing that, after divorce in Texas, the parties continued to live together as husband and wife both in Texas and California and held themselves out to the public as having that relation, and that divorce was understood to be a mere formality to comply with employment regulations of federal government prohibiting a husband and wife from being employed by federal government in same establishment, was sufficient proof of marriage to support an order awarding temporary support, attorney's fees, and costs in wife's action for separate maintenance. Civ.Code, § 63.

7. Husband and wife ⇐295

The allegations of the complaint in wife's separate maintenance action respecting the marriage do not necessarily control disposition of application for support pendente lite, but it is sufficient if the marriage is established by the evidence.

8. Husband and wife ⇐296

Where there was no variance between allegations in pleading in wife's separate maintenance action respecting the marriage and proof which misled defendant to his prejudice, trial court was justified in finding according to the evidence in spite of alleged limited scope of the pleading. Code Civ.Proc. §§ 469, 470.

9. Pleading ⇐430(2)

The point of alleged variance between allegations in the pleading and the proof, not having been raised at the hearing in trial court, was waived.

10. Appeal and error ⇐907(3)

Where defendant in separate maintenance action, on his appeal from order directing him to make certain payments pendente lite, did not present a transcript of hearing upon return of the order to show cause, it would be presumed that order requiring defendant to pay stated amount pendente lite was supported by the evidence.

11. Appeal and error ⇐113(2)

An appeal would not lie from order denying a motion to vacate a prior order where grounds upon which moving party sought to have prior order vacated existed before its entry and were available on appeal therefrom.

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Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Ruth Colbert against Joseph W. Colbert for separate maintenance.

From an order directing payment of alimony pendente lite, attorney's fees, and costs, and from a second order denying defendant's motion to vacate the first order, the defendant appeals.

First order affirmed, and appeal from second order dismissed.

Prior opinion 162 P.2d 839.

Clarence Hansen, of Los Angeles, for appellant.

Michael Rudolph and Daly B. Robnett, both of Los Angeles, for respondent.

EDMONDS, Justice.

In an action for separate maintenance, Joseph W. Colbert was ordered to make certain payments pendente lite. Upon his appeal from that order, and also from a later one denying a motion to vacate it, the question for decision concerns the marital status of the parties.

The complaint of Ruth Colbert alleges that "she and defendant intermarried at Benton, Texas, May 3, 1940, and ever since have been and now are husband and wife." Conduct characterized as extreme cruelty is pleaded as a cause of action. Upon the hearing of an order to show cause, Colbert was required to pay, pendente lite, stated amounts for her support and for attorney's fees, and costs. A few days later, Colbert filed a motion to set aside the order upon the ground of lack of jurisdiction, asserting that there is no subsisting marriage between the parties. In an affidavit in support of this motion, he alleged that at the hearing in response to the order to show cause, the court was advised that, in a prior action between the parties, they had been divorced.

In the affidavit of Mrs. Colbert in opposition to the motion, she asserted that the decree of divorce was obtained with the understanding that the parties would continue as husband and wife. The necessity for the proceeding, the affiant explained, was that she and Colbert could not, as husband and wife, continue to be employed by the federal government in the same establishment. They then agreed that she would secure a decree of divorce from him, "but that their marital relations should not in [any] way be disturbed." After the divorce, the affidavit continued, she and Colbert, as husband and wife, lived in Texas for about two years and held themselves out to the public generally as husband and wife. They later lived together in Los Angeles where they separated in 1944. In conclusion, it was asserted that under the laws of the State of Texas, which recognize common law marriages, there is a valid and subsisting marriage between the parties.

At the hearing of the motion to vacate the order requiring Colbert to make specified payments, there was received in evidence a certified copy of the decree of divorce entered by the Texas court. Colbert testified that he separated from his wife at the time of the divorce and that he did not thereafter marry her. But he also testified that after the divorce they continued living together for "about half the time," that they held themselves out to the public as "Mr. and Mrs. Colbert," and that they "split the bills," Ruth Colbert testified to substantially the same facts as she stated in her affidavit. Upon this evidence the court denied the motion to vacate the order.

As grounds for his attack upon the two challenged orders, the appellant contends that in the absence of a marriage status, the court had no jurisdiction to order him to make any payments. Since the complaint alleges only a statutory marriage, the question as to whether or not there was a common law marriage is not in issue and cannot be substituted at will for a statutory marriage. In any event, Colbert concludes, the evidence is insufficient to establish a common law marriage.

In answer to these contentions, the respondent asserts that as there is no transcript of the evidence upon which the first order was based, there is a presumption that it is amply supported by the evidence. Concerning the appeal from the order denying the motion to vacate the original order, says the respondent, Colbert admits in his affidavit in support of the motion that the court had jurisdiction. The verified complaint states all the necessary jurisdictional facts. Colbert by personally appearing without objection at the hearing, waived the defense of lack of jurisdiction.

Furthermore, she says, the trial court had no authority to vacate the prior order and, in any event, a common law marriage under the law of Texas was proven. It is also contended that the allegations of the complaint are not controlling as to the date, place, or kind of marriage.

[1, 2] The existence of the marriage is a jurisdictional prerequisite for the right of the court to order support, costs, and counsel fees pendente lite in an action for divorce or separate maintenance. Carbone v. Superior Court, 18 Cal.2d 768, 771, 117 P.2d 872, 136 A.L.R. 1260; Talbot v. Talbot, 218 Cal. 1, 2, 21 P.2d 110; Parmann v. Parmann, 56 Cal.App.2d 67, 69, 132 P.2d 851; In re Cook, 42 Cal.App.2d 1, 3, 108 P. 2d 46. And the invalidity of the marriage, as is true of any jurisdictional prerequisite, may be shown at any time. Parmann v. Parmann, supra, 56 Cal.App.2d at page 69, 132 P.2d 851; In re Cook, supra, 42 Cal.App.2d at page 3, 108 P.2d 46. However, the evidence necessary to prove a marriage need not be as complete and satisfactory upon an application for temporary support as that required at the time of trial, to prove a marriage which is disputed by one of the parties. Carbone v. Superior Court, supra, 18 Cal.2d at page 772, 117 P.2d 872, 136 A. L.R. 1260.

[3, 4] Ordinarily, the law of the place of marriage controls the question of its validity. In re Estate of Keig, 59 Cal.App. 2d 812, 816, 140 P.2d 163; Rest., Conflicts, § 121; 18 R.C.L. 388; 133 A.L.R. 765; 94 A.L.R. 1006; 60 A.L.R. 546; 39 A.L.R. 559. This general rule has been adopted in California. Section 63 of the Civil Code provides that "all marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted are valid in this state." By this statute California recognizes common law marriages validly contracted in a sister state. McDonald v. McDonald, 6 Cal.2d 457, 58 P.2d 163, 104 A.L.R. 1290; In re Estate of Gosnell, 63 Cal.App.2d 38, 146 P.2d 42; In re Estate of Keig, supra.

[5, 6] The law of Texas concerning marriage has been stated as follows: "Marriage is a status, the living together of a man and a woman as husband and wife, under an agreement, express or implied, that such shall be their relation to each other. It is well settled in this state that the agreement need not be solemnized by any ceremony, or be under license from the state; but it is also settled that the agreement, in order to be effective, must be followed by the parties living together publicly as husband and wife." Bobbitt v. Bobbitt, Tex.Civ.App.1920, 223 S.W. 478, 482; see, also, Perales v. Flores, Tex.Civ. App.1941, 147 S.W.2d 974; Drummond v. Benson, Tex.Civ.App. 1939, 133 S.W.2d 154; Adams v. Adams, Tex.Civ.App. 1939, 132 S.W.2d 497. The uncontradicted evidence of the parties shows that after the divorce, they lived together as husband and wife both in Texas and California and held themselves out to the public as having that relationship. This evidence, and the testimony of Ruth Colbert "that such divorce was had with the understanding that the parties would continue as husband and wife, and that the divorce would be a mere formality to comply with the employment laws of the United States," is sufficient proof of marriage to support an order awarding temporary support, attorney's fees, and costs.

[7-9] The allegations of the complaint do not necessarily control the disposition of an application for support pendente lite. It is sufficient if the marriage is established by the evidence. See Walker v. Walker, 190 Cal. 575, 213 P. 967; Ex parte Joutsen, 154 Cal. 540, 98 P. 391; Langan v. Langan, 91 Cal. 654, 27 P. 1092; Thomas v. Thomas, 66 Cal.App.2d 818, 153 P.2d 389; Brinkley v. Brinkley, 50 N.Y. 184, 10 Am.Rep. 460. In the present case there is no variance between the allegations in the pleading and the proof which misled the appellant to his prejudice; thus the court was justified in finding according to the evidence in spite of the alleged limited scope of the pleading. Code.Civ.Proc., §§ 469, 470; see 21 Cal.Jur. 264. Furthermore, the point of alleged variance, not having been raised at the hearing, was waived. Cushing v. Pires, 124 Cal. 663, 665, 57 P. 572; Stockton, etc., Wks. v. Glens, etc., I. Co., 121 Cal. 167, 171, 53 P. 565; Baird v. Smith, 7 Cal.App.2d 597, 598, 46 P.2d 830; see 21 Cal.Jur. 276; 2 Cal.Jur. 239.

[10] The appellant has not presented a transcript of the hearing upon the return of the order to show cause, and it must therefore be presumed that the order requiring Colbert to pay stated amounts pendente lite is supported by the evidence. The evidence introduced by the parties upon the motion to vacate adds weight to this presumption. Undoubtedly the evidence at each of the hearings was substantially the same.

[11] An appeal does not lie from an order denying a motion to vacate a judgment if the grounds upon which the moving party sought to have the judgment vacated existed before its entry and were available on appeal therefrom. Litvinuk v. Litvinuk, 27 Cal.2d 38, 44, 162 P.2d 8; Mather v. Mather, 22 Cal.2d 713, 720, 140 P.2d 808. The appeal from the order denying the motion to vacate is therefore dismissed. The order for the temporary support of Ruth Colbert and the payment of specified amounts for attorney's fees and costs is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

SCHAUER, J., concurred in the judgment.




28 Cal.2d 207

## PEOPLE v. BERNARD.

Cr. 4685.

Supreme Court of California, in Bank.

May 17, 1946.

**1. Homicide ⇐253(1)**

Evidence sustained conviction for first-degree murder. Pen.Code, § 189.

**2. Homicide ⇐289**

Instruction that there are certain kinds of murder which carry with them conclusive evidence of premeditation, that where killing is perpetrated by means of poison, etc., the means used is held to be conclusive evidence of premeditation, and that, where killing is done in perpetration or attempt to perpetrate some one of the felonies enumerated in statute, the occasion is made conclusive evidence of premeditation, was erroneous. Pen.Code, § 189.

**3. Homicide ⇐18(1)**

Where killing is in perpetration, or attempted perpetration, of one of felonies named in statute, the offender is guilty of first-degree murder, even if the killing is unintended and accidental. Pen.Code, § 189.

**4. Homicide ⇐18(1)**

Where jury has found that killing was by poison, lying in wait, or torture, it is not their function to draw inferences as to the manner of the formation and carrying out of an intention to kill, but killings by such means or on such occasions are murders of the first degree because of the substantive statutory definition of the crime. Pen.Code, § 189.

**5. Homicide ⇐286(3)**

Instruction that there need be no appreciable space of time between intention to kill and act of killing, that a man may do a thing willfully, deliberately, and intentionally from a moment's reflection as well as after pondering over the subject for a month or year, and that a man can premeditate, that is, think before doing the act, the moment he conceives the purpose as well as if the act were the result of long preconcert or preparation, was misleading and erroneous. Pen.Code, § 189.

**6. Homicide ⇐308(1)**

Instructions regarding difference between first and second degree murder must not emphasize the element of haste to the exclusion of the element of preconceived design. Pen.Code, §§ 189, 190.

**7. Homicide ⇐340(1)**

Errors in instructions as to differences between degrees of murder were not prejudicial where the errors did not affect choice of penalty and that choice rested wholly in discretion of jury and where any verdict other than of first degree murder, in light of overwhelming evidence, would have been rationally impossible. Pen. Code, §§ 189, 190.

**8. Homicide ⇐308(1)**

First-degree murder instruction violated rules regarding voluntary manslaughter and differentiation between first and second degree murder. Pen.Code, §§ 189, 190.

**9. Homicide ⇐308(1)**

Instruction that it is not less murder because act is done suddenly, after intent to commit homicide is formed, was erroneous as applied to first-degree murder, since it destroys the statutory difference in degrees of murder. Pen.Code, §§ 189, 190.

**10. Homicide ⇐308(1)**

First-degree murder instruction, that it is sufficient that the malicious intent precedes and accompanies the act of homicide, was erroneous in that it destroyed statutory difference in degrees of murder. Pen.Code, §§ 189, 190.

**11. Homicide ⇐340(1)**

Erroneous instruction regarding murder committed in performance of unlawful act was not prejudicial to defendant who was admittedly engaged in perpetration of unlawful act of robbery at time of killing. Pen.Code, § 189.

**12. Homicide ⇐340(2)**

Errors in instructions relating to differences between degrees of murder were not prejudicial so far as charge of assault with a deadly weapon with intent to commit murder was concerned. Pen.Code, §§ 189, 217.

**13. Homicide ⇐308(2)**

Where the facts impel a conviction of murder of first degree, both because murder was committed in perpetration of robbery and because it was committed by means of lying in wait, and do not admit upon any view of evidence of a finding other than of murder of first degree, instructions regarding differences between degrees of murder are unnecessary. Pen.Code, §§ 189, 190.

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In Bank.

Appeal from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Edward R. Brand, Judge. Affirmed.

Charlie Bernard was convicted of first-degree murder and of assault with a deadly weapon with intent to commit murder, and he appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, and William B. Neeley and E. E. Cuff, Deputy Public Defenders, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

[1] A jury found defendant Charlie Bernard guilty of the first degree murder of John D. Abbott, without recommendation as to penalty (which verdict resulted in imposition of the death sentence), and of assault upon Grace Abbott with a deadly weapon with intent to commit murder. Defendant Bernard appeals from the judgments entered upon the jury verdicts and from an order denying his motion for new trial. At the trial no evidence was offered on behalf of Bernard or his codefendant, Moses Hawthorne. Hawthorne, who has not appealed, was found guilty of first degree murder with recommendation of life imprisonment and of assault with a deadly weapon with intent to commit murder. His sentence on the murder conviction recommends imprisonment for the remainder of his natural life without benefit of parole. The evidence, which without substantial conflict establishes the commission by defendants of the offenses of which they were convicted, is hereinafter summarized. We have concluded, as to the murder charge, that any verdict other than of murder in the first degree, in the light of the overwhelming evidence, would have been rationally impossible and that, therefore, certain errors in instructions hereinafter noted could not have prejudiced defendant Bernard. (The errors do not affect the choice of penalty and that choice rested wholly in the discretion of the jury (Pen.Code, § 190).)

John D. Abbott and his wife, Grace, resided near Chatsworth in the county of Los Angeles. Defendant Bernard had lived near Chatsworth from 1933 until 1937 or

1938 and during this period he worked for the Abbotts from time to time on various "odd jobs." On May 19, 1945, when the crimes charged were committed, Mr. Abbott was 76 years old and nearly blind; Mrs. Abbott was 70 years old.

On Friday, May 18, 1945, in Los Angeles, Bernard for the first time met defendant Hawthorne. Bernard told Hawthorne that he planned to go to Chatsworth, rob the Abbotts, "and leave them locked up so the police could find them." Hawthorne and Bernard went from Los Angeles to Chatsworth. On Friday night they hid near the Abbott residence. Hawthorne was armed with a club cut from a tree; Bernard was armed only with a pocket knife. Defendant saw Mr. Abbott come out of his house and stand for a few minutes on a small porch which adjoined his bedroom. They did nothing, Bernard said, because they were too far from the house to approach without attracting Mr. Abbott's attention. On Saturday night, May 19, defendants again hid near the Abbott residence. Each was armed with a club. Again they saw Abbott come out of the house and stand on the porch for a few minutes but they did nothing. When Abbott went into the house they stationed themselves on either side of the porch door and remained hidden by shrubbery until, about an hour later, Abbott once more came onto the porch. As Abbott turned to go into the house, Bernard stepped behind him and struck him on the head with the club. Abbott tried to cross his room, apparently to reach a gun which hung in a holster at the head of his bed Bernard struck him repeatedly over the head with the club, shattering his skull. Mrs. Abbott was in her bedroom at the other end of a hall which led from Abbott's room. The lights in her room were out but she was awake and heard a sound which she believed was Mr. Abbott falling. She called, heard no answer, started to get out of her bed, and the defendants came into her room. Bernard, whom she recognized, stood in the doorway while Hawthorne struck her four times over the head with his club, inflicting severe wounds, then pulled a pillow case over her head. The defendants went back and forth between Mr. and Mrs. Abbott's rooms several times. Bernard ransacked the rooms while Hawthorne tied a towel about Abbott's mouth, bound his hands and feet, placed him in the closet of his room, and locked the closet door. Hawthorne then tied Mrs. Abbott's hands and feet and locked her in the closet of her room. Mrs. Abbott, who did not lose consciousness, waited quietly in the closet until she believed the defendants had gone, then slipped out of her bonds, climbed out the closet window, and went around the house and into her husband's room. She called her husband, heard no answer, found his closet door locked, and went to a neighbor's house for aid. Neighbors who went to the Abbott house found no key to Mr. Abbott's closet, pried open the closet door, and found his body. (One of the neighbors, a doctor, testified that, although he did not touch Mr. Abbott, in his opinion Abbott was dead when they found him.) The police arrived soon after the body was found.

Defendants were arrested in Los Angeles on Sunday morning, May 20, 1945. In Bernard's possession were many articles of personal property, including jewelry, purses containing money, and a gun, which Mrs. Abbott identified as having belonged to her and Abbott. Defendants returned to Chatsworth with the police, pointed out the locations where they had hidden keys which they took from the Abbott house and the clubs which they had used, and reenacted their entrance into the Abbott house. Other evidence, including testimony showing many admissions of Bernard, and real evidence linking defendants with the crimes, needs no further specification.

[2-4] A confusing and erroneous stock instruction concerning the degrees of murder was given. It contained, among others, the following (italicized) erroneous statements of law: "There are *certain kinds of murder* which *carry with them conclusive evidence of premeditation.* * * * These cases are of two classes: First: *Where the killing is perpetrated by means of poison, etc. Here the means used is held to be conclusive evidence of premeditation.* Second: *Where the killing is done in the prepetration or attempt*

*to perpetrate, some one of the felonies enumerated in the statute* [Pen.Code, § 189], *here the occasion is made conclusive evidence of premeditation. Where the case comes within either of these classes the test question: Is the killing willful, deliberate and premeditated? is answered by the statute itself.* * * * But there is another and much larger class of cases included in the definition of murder in the first degree, which are of equal cruelty [etc.] * * *. In this last class of cases the legislature leaves the jury to determine, from all the evidence before them, the degree of the crime, but prescribes for the government of their deliberations *the same test* which has been *used* by itself *in determining the degree of the other two classes,* to wit: *Is the killing willful, deliberate, and premeditated?* * * *" (Italics added.) Of course the fact that a killing is committed in the perpetration of, or attempt to perpetrate, one of the five felonies enumerated in section 189 of the Penal Code is not conclusive, or necessarily any, evidence that such killing was willful, deliberate, and premeditated. Even where the killing in perpetration or attempted perpetration of one of the named felonies is unintended and accidental, nevertheless, as held in People v. Lindley, 1945, 26 Cal. 2d 780, 791, 161 P.2d 227, 233, "the offender 'is guilty of murder of the first degree by the force of the statute.' [Citations.] If the evidence establishes conclusively that the murder was so committed, then only a verdict of murder of the first degree may properly be rendered. And even where the showing is not conclusive, if the record affords substantial support for the conclusion that one of the enumerated felonies was perpetrated or attempted, and the killing was committed in such perpetration or attempt, the judgment must be affirmed. [Citations.]" Similarly the murderer who kills by torture or poison may intend only to inflict suffering, not death. Evidence of the means used might support an inference that the killing was willful, deliberate, and premeditated, but where the jury has found that the killing was by poison, lying in wait, or torture it is not their function to go farther and draw inferences as to the manner of the formation and carrying out of an intention to kill. In such a case the question which the statute (Pen. Code, § 189) answers affirmatively is not, "Is the killing willful, deliberate and premeditated?"; it is, "Is the killing murder of the first degree?" Killings by the means or on the occasions under discussion are murders of the first degree because of the substantive statutory definition of the crime. Attempts to explain the statute to the jury in terms of nonexistent "conclusive presumptions" tend more to confuse than to enlighten a jury unfamiliar with the inaccurate practice of stating rules of substantive law in terms of rules of evidence.

[5-7] The jury were instructed that there need be "no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind"; that "A man may do a thing willfully, deliberately and intentionally from a moment's reflection as well as after pondering over the subject for a month or year"; and that a man "can premeditate, that is, think before doing the act, the moment he conceives the purpose, as well as if the act were the result of long preconcert or preparation." The first of the three statements (that there need be "no appreciable space of time between the intention to kill and the act of killing * * *") is abstractly a correct enunciation of the law. As has been said before "It will be properly understood (at least upon *deliberation)* by those learned in the law as referring only to the interval between the fully formulated intent and its execution, *and as necessarily presupposing that true deliberation and premeditation characterized the process of, and preceded ultimate, formulation* of such intent." (People v. Bender (1945), Cal. Sup., 163 P.2d 8, 19; People v. Thomas (1945), 25 Cal.2d 880, 900, 156 P.2d 7.) But, as was also pointed out in the Bender case, holding that such declaration is a correct statement of an abstract principle is not a holding that the same declaration made to a jury without explanation is

not error. When it is coupled with the two other statements above quoted it becomes clearly misleading and erroneous. It excludes from the required showing any deliberation and premeditation between the intent and the act of killing and since the other statements eliminate any necessity for deliberation or premeditation in forming the intent ("He can premeditate * * * the moment he conceives the purpose," etc.), the effect of the whole instruction is to completely delete the only difference, in the type of murder to which the instruction is applicable, between first and second degree murder. Instructions on this subject must not emphasize the element of haste to the exclusion of the element of preconceived design. As held in the Bender case (163 P. 20), "while the jury may be told that the brain can function rapidly they must not be misled into thinking that an act can at the same time be hasty, hurried, and deliberate or impulsive, unstudied and premeditated." For reasons hereinafter stated, however, the error in giving the above quoted instructions is not, under the facts of this case, prejudicial.

[8-11] The jury were told, by a stock instruction, that "If the accused was engaged in the performance of an unlawful act, and if the deceased attempted in a lawful manner to prevent the performance of such unlawful act, and if, while so endeavoring to prevent the same, the defendant in anger and solely for the purpose of revenge, or to enable him to carry out his unlawful design, so interfered with by said deceased, attacked the latter with a deadly weapon, intending to kill said deceased, and did, under such circumstances, carry such intention into execution, the fact that defendant was in a passion would not mitigate or excuse such homicide, but the crime committed would in such case be murder in the first degree. It is not less murder because the act is done suddenly after the intent to commit the homicide is formed. It is sufficient that the *malicious* intention precedes and accompanies the act of homicide." (Italics added.) Under the first sentence of this instruction, if the accused was engaged in the performance of any unlawful act, whether battery or a traffic violation, and in an ensuing, sudden, violent quarrel growing out of the remonstrance of deceased against the commission of such unlawful act, killed deceased with a deadly weapon, the accused would be guilty of murder of the first degree. Such, of course, is not the law. The statement as made transgresses the rules both as they appertain to voluntary manslaughter and as they relate to differentiation between first and second degree murder. The second and third sentences of this instruction are manifestly erroneous if, as they apparently do, they refer to first degree murder. (People v. Thomas (1945), supra, 25 Cal.2d 880, 898, 156 P.2d 7; People v. Bender (1945), supra, Cal.Sup., 163 P.2d 8.) They destroy the statutory difference in the degrees of murder and would authorize conviction of first degree murder upon proof of facts amounting to only second degree murder. The instruction, however, could not have prejudiced defendant Bernard, who was admittedly engaged in the perpetration of the unlawful act of robbery at the time of the killing. But the instruction is erroneous, confusing, and in its literal application to possible factual situations absurd, and the practice of giving it should be wholly discontinued.

[12] Errors in the instructions relating to the differences between the degrees of murder were not, of course, prejudicial so far as the charge of assault with a deadly weapon with intent to commit murder is concerned, for the law (Pen.Code, § 217) recognizes no such offense as assault with intent to commit murder of the second, as opposed to the first, degree.

[13] So far as the murder charge is concerned, in a case such as this, where the facts impel a conviction of murder of the first degree both because the murder was committed in the perpetration of robbery and because it was committed by means of lying in wait, and do not admit upon any view of the evidence of a finding other than of murder of the first degree, there is no occasion whatsoever to give instructions as to the differences between the degrees of murder. Hence,

although the instructions as to such differences were manifestly erroneous, the errors cannot have prejudiced the appealing defendant.

The judgment and order appealed from are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

EDMONDS, J., concurred in the judgment.




28 Cal.2d 198

## ALFORD v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 19573.

Supreme Court of California, in Bank.

May 14, 1946.

**1. Time ⇐10(1)**

Generally, when the last day for performance of an act provided by law falls on a Sunday or a holiday, that day is excluded in computation of time and act may be performed on the next succeeding day. Civ.Code, §§ 10, 11; Code Civ.Proc. §§ 12, 13; Pol.Code, §§ 12, 13.

**2. Time ⇐10(1)**

As respects computation of time for performance of an act when last day for performance falls on a Sunday or holiday, considerations affecting construction of a statutory limitation upon power of a trial court to pass on matters such as a motion for a new trial have no bearing upon general rule governing procedure to be followed by party to an action. Civ.Code, §§ 10, 11; Code Civ.Proc. §§ 12, 13, 473, 660; Labor Code, § 5950; Pol.Code, §§ 12, 13.

**3. Time ⇐10(9)**

Where last day of limitation period for filing application for writ of review directed to award of Industrial Accident Commission fell on a Sunday, application filed with appellate court on the following day was timely. Civ.Code, §§ 10, 11; Code Civ.Proc. §§ 12, 13, 473, 660; Labor Code, § 5950; Pol.Code, §§ 12, 13.

**4. Workmen's compensation ⇐1280**

As respects limitations, in the case of a latent and progressive disease, date of injury should be deemed the time when accumulated effect culminates in a disability traceable to latent disease as primary cause and by exercise of reasonable care and diligence it is discoverable that a compensable injury was sustained in performance of duties of employment. Labor Code, § 5405.

**5. Workmen's compensation ⇐1939**

As respects limitations, the question regarding claimant's possession of knowledge of cause of ailment or as to whether disease has progressed to an extent which constitutes compensable disability is primarily one of fact for Industrial Accident Commission and Supreme Court will not interfere with commission's finding in that regard provided it is supported by substantial evidence or by reasonable inferences drawn from testimony adduced. Labor Code, § 5405.

**6. Workmen's compensation ⇐1682**

Substantial evidence sustained finding of Industrial Accident Commission that more than six months prior to date of filing of petitioner's claim, petitioner was aware that his respiratory disability was attributable to his employment and that hence his claim was barred by limitations. Labor Code, § 5405.

**7. Workmen's compensation ⇐1857**

Where compensation claimant did not raise question of Industrial Accident Commission's failure to adjudicate a particular issue in claimant's petition for rehearing before commission, the point of deficiency in the findings was waived and was not open to judicial review. Labor Code, § 5904.

Proceeding on petition of Edwin W. Alford to review an order of the Industrial Accident Commission denying compensation for personal injuries and to annul certain awards.

Awards affirmed.

Charles A. Son and David R. Rubin, both of Los Angeles, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, and Edward A. Sarkisian, Claude F. Weingand, and Herlihy & Herlihy, all of Los Angeles, for respondents.

SPENCE, Justice.

Petitioner seeks the annulment of certain adverse awards made by the respondent commission upon his several applications for compensation. His original petition for a writ of review was filed with the District Court of Appeal, Second District, Division Three, on July 9, 1945, and was thereafter denied without opinion. Petitioner then filed his petition for hearing in this court, which petition was granted and the writ was issued.

A preliminary question is raised by respondents concerning the jurisdiction of this court or of the District Court of Appeal to issue a writ of review because of the claimed failure of petitioner to file his petition for such writ within the time prescribed by law. The record shows that the commission's order denying a rehearing in this matter was made on June 8, 1945, and that thirty-one days thereafter—July 9, 1945—the petition for a writ of review was filed with the above-mentioned District Court of Appeal. Respondents maintain that the commission's awards are not now subject to judicial review because application therefor was not presented to the appellate court "within thirty days after the petition for a rehearing [was] denied," as provided by section 5950 of the Labor Code. The point is not well taken under the circumstances here prevailing.

[1, 2] The thirtieth day after the commission's denial of a rehearing in this matter was Sunday, July 8, 1945. Generally speaking, when the last day for the performance of an act provided by law falls on a Sunday or a holiday, that day is excluded in the computation of time, and the act may be performed on the next succeeding day. Civ.Code, §§ 10, 11; Code Civ. Proc. §§ 12, 13; Pol.Code, §§ 12, 13. This general rule has been applied in the case of serving a notice of appeal, In re Estate of Rose, 63 Cal. 346, filing a statement of the grounds of appeal, People v. Malone, 213 Cal. 406, 2 P.2d 332, filing an undertaking on appeal, Robinson v. Templar Lodge, 114 Cal. 41, 45 P. 998, serving or presenting a bill of exceptions, Derr v. Busick, 63 Cal. App. 134, 218 P. 280, filing points and authorities upon appeal, Troy Laundry Machinery Co., Ltd. v. Drivers' Independent Laundry Co., 13 Cal.App. 115, 109 P. 36, petitioning for relief under section 473 of the Code of Civil Procedure, Bell v. Krauss, 169 Cal. 387, 146 P. 874, and commencing an action to foreclose a mechanic's lien. Mox, Inc. v. Leventhal, 89 Cal. App. 253, 264 P. 562. The outstanding exception to this general rule is found in the interpretation of the limitation regulating the time for the granting of a motion for a new trial under section 660 of the Code of Civil Procedure prior to its amendment in 1933, by which amendment the holiday extension in question was expressly allowed. Stats.1933, p. 305. Accordingly, it was held in Bidwell v. Sonoma County Transportation Co., 1918, 39 Cal.App. 330, 178 P. 722, that even though the last day fell on a Sunday or a holiday, the time for performance was not extended since the code section specifically provided that if the trial court did not act within the stated period, the motion for a new trial was ipso facto denied. But considerations affecting the construction of a statutory limitation upon the power of the trial court to pass on a matter such as a motion for a new trial have no bearing upon the general rule governing the procedure to be followed by the parties to an action. People v. Malone, 1931, 213 Cal. 406, 409, 2 P.2d 332.

[3] The cases cited by respondents, as sustaining the general proposition that an appellate court's power to review an award of the commission depends upon timely filing of an application therefor, do not pass upon the further question of what constitutes timely application when the thirtieth day falls on a Sunday or a holiday. Thus a writ of review was denied in Neal v. Industrial Accident Comm., 36 Cal.App. 40, 171 P. 696, where the petition was filed three days late; and in National Automobile Insurance Co. v. Industrial Accident Comm., 58 Cal.App.2d 508, 136 P.2d 815,

816, where it only appears that the petition was filed "on the 31st day after the Commission [upon rehearing] made its award." Upon the basis of the distinguishing circumstances here, in that the thirtieth day fell on a Sunday, and in accordance with the general rule governing the computation of time in such case, it follows that petitioner's application for a writ of review filed with the appellate court on Monday, July 9, 1945, was within the period prescribed by law (Labor Code, § 5950) and that this proceeding is properly before this court for determination on the merits.

The following are the facts upon which petitioner's claims were based, as such facts appear from the allegations in his applications and from his testimony. Petitioner was employed as a plaster caster by respondent Fitch from October, 1942, through November, 1943. On January 4, 1943, while helping to load an airplane tank weighing about 200 pounds, petitioner sustained a wrenching of his right back in the sacroiliac region, for which injury he was paid temporary disability compensation to January 17, 1943. In June, 1943, while loading a B-29 tank, petitioner slipped, "threw his back out again" in the same sacroiliac area; and such injury, together with a "strep sore throat" and a cold, caused him to leave his work for about three weeks, during which period he was paid nonindustrial sickness benefits. In August, 1943, while unloading a freight car, petitioner "suffered recurrence of pain in the same place" in his back, as the result of which he was off work another three weeks, and he drew additional nonindustrial sickness benefits. Then on November 20, 1943, while wheeling a hand-truck loaded with about six to eight sacks of plaster, each sack weighing 100 pounds, petitioner sustained injury in the same sacroiliac region when the truck tipped and the top sacks fell on him. Despite alleged severe pain, petitioner "stuck out the rest of the shift doing light work" and, in fact, did not leave his work until November 29, 1943.

Applications for compensation covering these respective claims were filed with the commission. The first application was that filed February 23, 1943, alleging the back injury sustained January 4, 1943. With respect to this injury the commission on March 11, 1943, in pursuance of a release theretofore signed by petitioner, entered an order of dismissal which has never been set aside. The second application was that filed April 10, 1944, alleging petitioner's injury of November 20, 1943, "by heavy lifting and breathing plaster dust in cold, damp, unventilated plaster cast plant and factory," resulting in injury to the respiratory tract, "together with concurrent attacks of impetigo of face and feet, resulting in applicant being permanently unable to pursue his occupation as a plaster caster." Hearings were had on these two applications in June, August, and October, 1944; and in pursuance of facts adduced in evidence before the referee as to case history and medical treatment of petitioner during his period of employment at the plaster cast plant, three additional applications were filed on November 10, 1944, alleging as separate matters the back injuries sustained in June, August, and November, 1943, as above recited. This later-filed back injury application for November, 1943, rested on the same incident of November 20, 1943, that formed the basis for the earlier-filed application covering "injury to the respiratory tract" as of that date, the only difference in factual statement of the two applications being that the later-filed application added "injury to the back" to the recital of resulting injuries. At the consolidated hearing in February, 1945, the later-filed "back injury" application for November, 1943, was reported "lost" and it therefore was not made the subject of an award. It was discovered by petitioner's counsel "a few weeks ago" and was delivered to the commission. A photostatic copy of said application is attached to the record herein.

On April 25, 1945, the commission made findings on the four applications of record as follows: (1) January 4, 1943, back injury—"temporary total disability" caused from January 5 to January 17, 1943, for which compensation "has been fully paid"; (2) November 20, 1943, injury to respiratory tract—claimed "from breathing plaster dust and working in a cold, un-

ventilated plant" while "employed as a plaster caster from October, 1942, to November 29, 1943" ; "more than six months prior to the date of the filing of [application therefor, April 10, 1944, petitioner] became disabled by virtue of said injury, and was aware that his disability was attributable to his employment. The claim * * * is therefore barred by limitations of time" ; (3) June, 1943, injury, and (4) August, 1943, injury—each correlated with the respiratory tract and "barred by the limitations of time" for the same reason just quoted with respect to the denial of compensation for the injury of November 20, 1943. Upon issuance of awards on these four claims in accordance with the above findings, petitioner applied to the commission for a rehearing, which, as above stated, was denied.

Petitioner in this proceeding attacks the commission's findings on two grounds: (1) that the evidence does not sustain the decision that the claim for the respiratory injury was barred by the limitation of time under section 5405 of the Labor Code, requiring that "proceedings for the collection of medical, disability or other benefits" be commenced before the commission within "six months from the date of injury"; and (2) that no adjudication was made of the back injuries occurring subsequently to the first injury on January 4, 1943—the awards denying compensation for the June and August, 1943, injuries, each relating wholly to injury to the respiratory tract, and the claim for back injury on November 20, 1943, being "lost" and so not subject of an award. Petitioner's position cannot be sustained under the record here presented.

[4] The law with respect to the running of the statute of limitations in cases of occupational disease has become well settled in this state. The leading case is Marsh v. Industrial Accident Comm., 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563. The occupational disease there involved was pulmonary silicosis and the injury claim, as here, was based on exposure to a dust-laden atmosphere. In that case, after an exhaustive review of the cases from other jurisdictions concerning the start of the prescriptive period under similar conditions, the court announced at page 351 of 217 Cal. and at page 938 of 18 P.2d the following rule: "From our study of the subject we are brought to the conclusion that in the case of a latent and progressive disease * * * the date of the injury [should] be deemed the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of the employment." The rule of the Marsh case has been reaffirmed in Price v. Industrial Accident Comm., 9 Cal.App.2d 213, 49 P.2d 294; Argonaut Mining Co., Ltd. v. Industrial Accident Comm., 21 Cal.App.2d 492, 70 P.2d 216; Morrison v. Industrial Accident Comm., 29 Cal.App.2d 528, 85 P.2d 186; Travelers Insurance Co. v. Industrial Accident Comm., 32 Cal.App.2d 643, 90 P.2d 327; Faith v. Erhart, 52 Cal.App.2d 228, 126 P.2d 151; and Williams v. Industrial Accident Comm., Cal.App., 161 P.2d 979.

[5] The question regarding a claimant's possession of knowledge of the cause of his ailment, or as to whether the disease has progressed to an extent which constitutes compensable disability, is primarily one of fact to be determined by the commission. This court will not interfere with the commission's finding in that regard provided it is supported by substantial evidence or by reasonable inferences drawn from the testimony adduced. Morrison v. Industrial Accident Comm., supra, 29 Cal.App.2d 528, 533, 85 P.2d 186. So it is in the present case.

[6] Here first to be considered is the testimony of petitioner himself with respect to his knowledge of the nature and extent of his respiratory ailment. He testified that in February, 1943, soon after he had returned to his work following his back injury in January of that year, he told Fitch, his employer, that "they should have a hoist to lift * * * heavy objects, and also, there should be a ventilator to carry off the excess dust." He

stated that the desired ventilating equipment was never installed while he worked at the plaster cast plant, that he continued to have "colds almost every week," and that in June, 1943, he was forced to "take off a month" because of back trouble and a sinus condition, the latter having become "very acute" as the result of "coughing up plaster." In view of such state of his health, petitioner testified that in "the last part of June or July, 1943," he went to his employer's office seeking an "availability certificate"; that he told his employer that the work was "detrimental to [his] health" and that he wanted "a release from the plant," but that the release was refused him; that in the conversation he told his employer that "I am still suffering with my back, and also, I just got over this serious cold and I am afraid if I work under the same conditions in the plant that it might be fatal"; that his employer nevertheless was unwilling to make any concessions in the work that would be expected of him, and that within a few days he returned to his regular employment. Petitioner stated that he was absent again from the plant for three weeks in August, 1943, because of a cold, but that neither with respect to that occasion nor when he finally left his work on November 29, 1943, did he have any further conversation with his employer about his ailments. Generally in line with petitioner's recital of the character of his extended illness during the period in question is the testimony of petitioner's sister and that of one Cole. In particular, the latter testified that he had known petitioner for about eight years; that he visited petitioner after the January, 1943, injury when petitioner "was complaining of terrific pain in his back and that his throat was so inflamed that he couldn't speak, and that he had to be coughing up green material all the time"; and that he noticed the same condition of colds and back pains to prevail following petitioner's injuries of June and August, 1943. This undisputed evidence of petitioner's pronounced and continuing physical symptoms reaching an acute stage on occasion of his several absences from his employment prior to his final termination of work on November 29, 1943, is a material consideration justifying the determination of the commission that petitioner as a reasonable man was then aware, or in the exercise of ordinary care and diligence should have been aware, that he had a respiratory disability, that it was caused by his occupation as a plaster caster, and that it was seriously impairing the efficiency of his work.

While it does not appear in the record that prior to the permanent severance of his employment on November 29, 1943, petitioner was informed by a physician that his physical disabilities were caused by his work, yet beginning in January, 1943, petitioner was intermittently receiving medical treatment for the relief of his back, sore throat, successive colds, and sinus condition; and at least several months prior to his final termination of work, there is evidence that petitioner had correlated his impaired health with his occupation. Thus, in "the latter part of June or July, 1943," petitioner asked his employer for "a release from the plant" because the work was "detrimental to [his] health" and "it might be fatal" if he continued. From such conduct it could reasonably be inferred that petitioner in any event then knew that he had a compensable disability directly traceable to his work in the dust-laden atmosphere of the plant, and that he was not depending on a medical diagnosis to give him knowledge of the injurious character of his employment on his physical well-being. This was nine to ten months prior to petitioner's filing of his first application based on a claim for respiratory injury—April, 1944. Under these circumstances the record amply sustains the commission's finding that "more than six months prior to the date of [said] filing" petitioner "was aware that his [respiratory] disability was attributable to his employment"; and that "his claim" therefor "was barred by limitations of time."

[7] Turning now to petitioner's second objection, that the commission made no adjudication as to his back injuries occurring subsequently to the first injury on January 4, 1943, that is not a matter open for review here. Conceding that the issue

of compensable disability with relation to later back injuries was presented by petitioner through the filing of his successive applications, including the "lost" application which was discovered and delivered by petitioner's counsel to the commission only "a few weeks" prior to making petition for judicial review, petitioner does not dispute the fact that the failure to adjudicate this issue was not raised in the petition for rehearing before the commission. Such point of deficiency in the findings must therefore be deemed to have been waived. Labor Code, § 5904. The rule is so stated in Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 52, 53, 54, 151 P. 658; Great Western Power Co. of California v. Industrial Accident Comm., 196 Cal. 593, 599, 600, 238 P. 662; and County of Los Angeles v. Industrial Accident Comm., 109 Cal.App. 724, 726, 727, 293 P. 820.

The awards are, and each of them is, affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.




74 Cal.App.2d 773

## HAM v. LOS ANGELES CITY HIGH SCHOOL DIST. OF LOS ANGELES COUNTY et al.

Civ. 15123.

District Court of Appeal, Second District, Division 1, California.

May 31, 1946.

Hearing Denied July 29, 1946.

**Schools and school districts ⇐133**

Teacher who served as substitute teacher for more than three years was not "re-elected" by employment as a probationary teacher so as to be entitled under statute to be classified as permanent teacher, since "re-election" under the statute is one which results in retention of employee for another year in that class of employees to which employee belonged. Education Code, §§ 13081, 13099, 13100, 13103, 13104, 13611, 13807.

See Words and Phrases, Permanent Edition, for all other definitions of "Re-election".

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Proceeding by Charles Eldred Ham against Los Angeles City High School District of County of Los Angeles, State of California, a body corporate and politic, and others for a writ of mandate compelling the defendant to classify petitioner as a permanent teacher of defendant school district. From judgment denying writ of mandate, plaintiff appeals.

Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

Harold W. Kennedy, Co. Counsel, S. V. O. Prichard, First Asst. Co. Counsel, and Wm. E. Lamoreaux, Deputy Co. Counsel, all of Los Angeles, for respondents.

YORK, Presiding Justice.

This is an appeal by the plaintiff from a judgment by which he was denied a writ of mandate requiring defendants to classify him as a permanent teacher of defendant school district. It is here contended that the findings are against the evidence and do not support the judgment.

Prior to the opening of school in September, 1938, appellant, as the holder of a general secondary teacher's credential entitling him to teach any subject in the high schools of the state, qualified for a position as teacher of music in the Los Angeles City High School District, and was placed upon a list of persons available for appointment as a probationary teacher of music whenever such position became available.

On August 26, 1938, appellant was offered and accepted an appointment as a substitute teacher by which he was subject to be called to substitute from day to day for teachers who were absent from service in the school district. Instead of assigning him on day to day assignments of

teachers, who promptly returned to service, the personnel office of the respondent school district assigned appellant to substitute for a teacher who was on leave of absence for the entire school year of 1938–1939, and appellant taught as a substitute for such absent teacher for the entire school year. At the beginning of each school year thereafter, to and including the school year of 1944–1945, appellant was offered and accepted a renewal of the appointment as a substitute teacher in the place of a teacher absent from service on leave of absence, so that in each school year from 1938–1939 to and including 1944–1945, appellant taught continuously in the respondent school district more than 75% of the number of days the schools were operating.

Since the fall of 1939, appellant has taught continuously as a substitute at the Van Nuys High School, a high school of respondent district. Prior to 1943–1944, he taught band and instrumental music, and subsequent thereto, he taught mathematics.

On March 14, 1945, appellant was notified by respondents that he had been elected a probationary teacher effective as of January 29, 1945. He formally accepted a contract as such probationary teacher and at all times since then, he has been teaching as a probationary teacher and has been paid the salary therefor.

Appellant urges that having been employed at the Van Nuys High School for more than five years on a year to year, and not a day to day, basis, he is entitled to be classified as a permanent employee of the district, pursuant to section 13081 of the Education Code, to-wit:

"Employees reelected after three years' employment: School districts having average daily attendance of 850 or more. Every employee of a school district of any type or class having an average daily attendance of 850 or more, except a joint union or union high school district maintaining eight or more schools lying not less than six miles apart, who, after having been employed by the district for three complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the district."

In this connection appellant argues that "like many of the other so-called long-term substitutes," he has been assigned each year "to a regular position in the same manner as teachers with tenure," and the fact that he was called a "substitute" by the school board cannot defeat the purpose of section 13081, supra, "which was designed to give a measure of security to those who serve as teachers three complete consecutive years."

The Education Code recognizes four classifications of certified employees: (1) Permanent (Secs. 13081 et seq.); (2) probationary (Sec. 13100); (3) substitute (Sec. 13103); (4) temporary (Sec. 13104).

In addition to section 13081, supra, those provisions of the Education Code which govern appellant's rights appear to be as follows:

"13099. A probationary employee who, in any one school year, has served for at least 75 per cent of the number of days the regular schools of the district in which he is employed are maintained shall be deemed to have served a complete school year. * * *

"13103. Governing boards of school districts shall classify as substitute employees those persons employed in positions requiring certification qualifications, to fill positions of regularly employed persons absent from service. * * *

"13611. Governing boards of school districts may dismiss substitute employees at any time at the pleasure of the board. * * *

"13807. The governing board of any school district may employ such substitute employees of the district as it deems necessary from month to month and may adopt a salary schedule for substitute employees. * * *"

In Hogsett v. Beverly Hills School District, 11 Cal.App.2d 328, 53 P.2d 1009, the plaintiff had served three complete consecutive years as a probationary teacher and was then employed as a substitute teacher. Upon such record she sought to compel her classification as a permanent

teacher. It was there held (11 Cal.App.2d at page 332, 53 P.2d at page 1010): "It is necessary to determine what is meant by the word 'reelected' as that word is used in section 5.500 (now 13081, Ed.Code). There is a wide distinction between the status of probationary and permanent employees on the one hand, and substitute employees on the other; the former, as the classification indicates, have positions of their own from which they cannot be removed except for cause and after a hearing; the latter have no positions of their own but occupy, temporarily, positions belonging to probationary or permanent teachers. Furthermore, teaching as a substitute does not qualify one to become a permanent teacher. Wood v. Los Angeles City School Dist. [6 Cal. App.2d 400], 44 P.2d 644. Permanent or probationary teachers are employed for a year. Section 5.401. Substitute teachers are employed from day to day and may be dismissed at the pleasure of the board. * * * We think the re-election intended by the Legislature is one which would result in the retention of the employee for another year in that class of employees to which the employee re-elected belongs; in other words, that the employee must be elected to a position of his own, having previously held either a probationary or a permanent position. * * * The employment of a probationary teacher to render future services as a substitute teacher would not amount to 'reelection' within the meaning of the statute nor give the teacher a position of her own where she had been elected to fill only temporary vacancies in the positions of others. * * * Petitioner's status is governed by the law and by the conditions of her re-employment. The number of days she may have served as a substitute teacher has nothing to do with her classification. The fact that she was allowed to work two-thirds of each school day is a mere circumstance. The board was under no obligation to furnish her employment if there were employed in the district sufficient regular teachers to do the necessary teaching. Whether petitioner worked one day during the year or every day makes no difference. In either case she was merely a substitute teacher."

See, also, Wood v. Los Angeles City School Dist., 6 Cal.App.2d 400, 402, 44 P.2d 644, 645, where the court, after examining the various sections of the School Code practically identical to the sections of the Education Code, hereinbefore referred to, stated as follows: "The distinctions between the probationary classification and the substitute classification are obvious. The probationary teacher is employed for the full year. The substitute teacher is employed from day to day to serve at the option of the school district in the absence of the regular teacher."

Following the holding in the Hogsett case, supra, the legislature placed the same construction upon the character of substitute teaching by adding section 5.507 to the School Code (Stats. 1939, p. 1251, now section 13100 of the Education Code) to-wit: "13100. If an employee of a school district has served as a probationary employee of the district in a position requiring certification qualifications, for one complete school year, and in the year immediately preceding the service as probationary employee has served as a substitute employee, or as a substitute and probationary employee, serving in both capacities during the same school year in the schools of the district, at least 75 per cent of the number of days the regular schools of the district were maintained, the governing board of the district may count the year of employment as a substitute or as a substitute and probationary employee as one year of the probationary period which he is required by law to serve as a condition to being classified as a permanent employee of the district."

The evidence adduced herein, which is not disputed, shows that appellant was employed and actually taught as a substitute teacher during the period in question up to January 29, 1945, when he was elected a probationary teacher by respondent school board. In view of the interpretation placed upon the sections of the Education Code which are applicable to the instant cause, it is obvious that appellant is not entitled to the classification of a permanent employee by operation of law.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

74 Cal.App.2d 689

**PEOPLE v. CALE et al.**

Cr. 3944.

District Court of Appeal, Second District, Division 3, California.

May 27, 1946.

**1. Receiving stolen goods ⇐8(3)**

Evidence sustained conviction of receiving stolen property.

**2. Criminal law ⇐510**

Testimony of an accomplice must have satisfactory corroboration by such other evidence as shall tend to connect defendant with commission of offense. Pen.Code, § 1111.

**3. Criminal law ⇐511(7)**

In prosecution for receiving stolen goods, admissions of defendants as to trip into area where they obtained goods, the manner and conditions under which they were taken, together with testimony concerning the signing and delivery of hand made receipts, coupled with testimony of officer concerning recovery of the stolen goods sufficiently corroborated testimony of alleged accomplice to sustain conviction. Pen.Code, § 1111.

**4. Receiving stolen goods ⇐3**

Whether one charged with receiving stolen goods knew that the goods were stolen is to be determined by all the facts, and he need not have heard the facts from eyewitnesses, to be charged with knowledge, but he must use the circumspection usual with persons taking goods by private purchase, particularly in buying at greatly depreciated rates.

**5. Criminal law ⇐254**

Where trial judge who sat as a jury had declared that he heard the case without any regard to personalities and it clearly appeared that there was no hostility or ill-will toward defendant, a statement of trial judge on application for probation that he knew defendant personally through members of his family and that if he had looked at the case before it came in he didn't know whether he would have cared to handle it, concluding with remark that there was no question but that defendant was up against a pretty stiff proposition did not establish that judge had some personal feeling toward defendant which prevented defendant from having a fair and impartial trial.

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Appeals from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Albert E. Cale and Baldwin Davis Houghton were convicted jointly in a jury waived trial of receiving stolen property, and they appeal.

Affirmed.

Martin S. Ryan, of Los Angeles, for appellant Albert E. Cale.

Avery M. Blount, of Los Angeles, for appellant Baldwin Davis Houghton.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan and Robert Wheeler, Deputy Dist. Attys., all of Los Angeles, for respondent.

DESMOND, Presiding Justice.

Defendants Cale and Houghton were convicted jointly in a jury-waived trial of the crime of receiving stolen property. It was agreed when the case was called for trial that the court might consider the People's case as presented in the transcript of evidence taken at their preliminary hearing. A few days later the case was reopened for presentation of the defendants' case and for decision, at which hearing both defendants testified and the People offered rebuttal testimony. From the judgment of conviction the defendants have appealed.

They contend that the testimony upon which they were convicted was furnished by an accomplice and that there was no sufficient corroboration of that testimony to warrant their conviction.

Both Cale and Houghton were engaged in the upholstery business, the former being employed by the Bimini Upholstery Shop where Houghton at one time was also employed. In Houghton's opening brief the following appears: "Defendant's position in this appeal is that he admits that a crime has been committed and that the merchandise which he was accused of having re-

ceived, and which he freely and fully admitted having in his possession at the time of his arrest, was indeed stolen merchandise, but that he purchased the same in good faith and without knowledge or suspicion that it was stolen." Defendant Cale states in his opening brief: "It appeared from the evidence that certain bolts of woolen materials, as well as other bolts of similar materials, had been stolen in the City of Los Angeles, State of California, and that some of the bolts of material that were stolen were in the possession of one Harris who had them in a garage at the rear of the premises located at 1135 E. 49th Street, Los Angeles." It is apparent from these two excerpts that one appellant admits that the goods were stolen and the other states that the evidence disclosed that fact.

The facts relating to the theft of the merchandise in question need not be gone into at length but it is pertinent to state that the merchandise recovered at appellant Houghton's home and at the Bimini Upholstery Shop, where defendant Cale was employed, and at the garage on East 49th Street was all positively identified as having been shipped and invoiced from New York City to a firm in Los Angeles and received there and loaded onto a truck at Western Carloading Company and that thereafter the truck containing the merchandise was stolen while the driver was away from it and that the truck was later recovered without the merchandise in it.

Ralph Thomas Kronheimer appeared as the principal witness for the People. According to his testimony he had known Houghton for fifteen years and Cale for about three years; that on January 3, 1945, he met Houghton in a traffic court in Los Angeles and from there rode out on a street car toward Kronheimer's house; that Houghton had stated that he had just closed his business and "was in line for getting some upholstery goods"; that he had a backer and if Kronheimer could get the goods for him "he would be glad to pay for it." He stated that about a week later he told Houghton that he had not found any materials yet but had contacted another man on it; that Houghton stated "that he did not care how 'hot' they were as long as he got the materials he wanted," and Kronheimer then told him that he "would tell the guy what he said," referring to one Carl Harris, who with a man named Weston, was charged with the actual theft of the merchandise which these defendants were accused of receiving as stolen property. Another week later, on January 17th, Houghton, according to Kronheimer, stated that he needed materials very badly and simply must have some very soon; that he did not care how much they cost since he had plenty of backing and money to pay for them; that he then told Houghton that he "would go back and see the man again"; that on January 25th he talked with Carl Harris at a beer joint at Jefferson and Main Streets and on the following morning he telephoned Houghton saying that the man had upholstery materials. Kronheimer further testified that he told both Cale and Houghton that the materials were "plenty hot"; that "I told them I didn't know just exactly how hot it was, but they said they would buy any amount as long as they could get all they wanted." At an appointed time next day, January 26th, he and both defendants started in Houghton's car and went to the garage where the materials were stored. On the way they stopped and picked up Harris, the colored man whom Kronheimer had contacted, and all four of the men then proceeded by a devious route to the garage on East 49th Street where they drove onto a lot past two houses to the rear of a dilapidated shed about eight feet wide and about ten feet long. This garage was loaded with materials stacked therein, and consisting of boxes and bolts of material. They were unable to enter the garage by any doorway so, according to Kronheimer, Harris stripped a board from the side of the garage leaving a space through which they all entered. This witness testified that a few bundles were inspected by tearing off a portion of the paper wrappings and Cale said that the stuff was second grade materials and Houghton said that it was of no value to him. However, they agreed that they could use certain materials and Cale went out, turned Houghton's car around, and backed it into the side of the garage. Kronheimer testified that Cale

passed thirteen bolts of goods to him which he stored in Houghton's car. Harris remained in the garage while the other men drove away. On Commonwealth Avenue between Third and Sixth Streets, Cale got his own automobile and six or seven of the bundles were placed therein. Kronheimer stated that he told Houghton that he needed money at that time and they drove to the neighborhood of a bank at Sixth and Alexandria Streets; that Cale and Houghton went into the bank while he remained in the car; that shortly thereafter the two defendants emerged from the bank, crossed the street and Cale handed him $100 in money; that Cale also produced two receipts, one of them written upon the blank side of an application for money order, cashier's check or draft, and the other upon the blank side of a deposit slip of the Bank of America. These were admitted in evidence as Exhibits 14 and 15 and read as follows: "Jan 26, 1945

150.00

Received of B. D. Houghton ~~$550.00~~ for Items delivered in Material. John Hammerstein." "Rec of Bert Cale $100.00 One hundred items delivered. John Hammerstein." As to Exhibit 14 and the numerals thereon, Kronheimer testified that when he signed it $50 appeared there and that the figure had been raised or attempted to be raised after it left his hands. As to the signature "John Hammerstein" upon these exhibits, Kronheimer stated that Cale suggested the name of John Hammerstein. "He said he didn't want me to sign my own name but he said he did not care what name I signed on these slips. * * * He said he was going to use them as a matter of record in his business." The witness testified that he received a total of $100 in cash at that time, although he had asked Houghton for $150. He further testified that on the following day he received $50 from Houghton. "* * * [H]e said he felt that he had gyped me, so he brought this $50.00 over to me at that time."

Houghton, on the other hand, testified that when he entered the bank he had $50 and had to cash a check for $50 more; that Cale at the same time cashed a check on his firm for $100; that while they were in the bank they each made up a bill of sale, a term which he applied to the receipts above mentioned; that they then crossed the street and each of them handed Kronheimer $100 cash. He contradicted Kronheimer's testimony that he had paid the latter $50 at 10 a. m., January 27th, saying that it was impossible for him to do so for the reason that he was placed under arrest about 9:30 that morning and was then in the custody of officers Wise and McBride.

These officers had gone to the Bimini Upholstery Shop on the morning of January 27th. They found there three of the stolen rolls of goods. They then proceeded to Houghton's flat where they arrested him and seized altogether 13 bolts of the goods, two in a small closet off the front room and eleven in Houghton's Dodge car, which was parked in his garage. When Houghton was asked from whom he bought the materials he stated that he did not know the fellow, "He gave me a receipt with his name on it. I don't know him." He then showed the officers the receipt which was introduced as exhibit 14, upon which his own name appears. The officer testified that he asked him if he was in the habit of buying materials "like that" where "they don't have a bill or anything?" To this Houghton replied, "Well, I will tell you. A fellow called me up and said he had some material for me and wanted to know if I could use it? And I said, 'Yes'"; that he then stated that he met a fellow on Jefferson and Main. Officer Wise then called Houghton's attention to the fact that he had stated that he had gone to meet a man on a street corner who took him down to the colored part of town where there were no upholstery shops, that he had said he bought the material from a fellow that did not have a bill of sale to give, that he had said he bought the goods piled up in a garage. Under these circumstances, Wise propounded the question to Houghton, "Do you think you are buying it legitimate?" To this Houghton replied, "Us fellows in the upholstery business, we buy the material just wherever we can, whether it is in one roll or ten rolls, and we never question them how they get it

or whether it is 'hot', and 'As long as I can get a receipt, I thought I was in the clear,' and 'I saw that for the price I could buy it for, it was a chance for me to make a fortune.'" The officers then took Houghton over to the Bimini Upholstery Shop where a Mr. Matson, standing at the front door, inquired of Houghton, "What is the trouble, Buddy?", to which Houghton replied, "I guess that stuff I bought yesterday is hotter than I thought it."

Cale was arrested at the Bimini Upholstery Shop shortly before noon on January 27th as he entered the shop where Officer Wise was waiting for him, McBride having left taking Houghton with him. Wise told Cale that they wanted to know about the rolls of material, and the following ensued, according to the People: "Cale said, 'Well, here it is,' referring to three bolts of material the officers had found when they first went there before going to Houghton's the same morning. Wise said, 'That is not all of it?' 'Yes,' Cale said, 'that is all of it.' Wise said, 'No, now listen. That is not all of it. You bought five rolls and there are only three here.' 'Well,' Cale said, 'they should be here. I thought that was all I bought.' 'No,' Wise said, 'we are going to hunt this place over until we find it.' Cale said, 'Well, we will look around here and see if we can find them.' They went into the back room over to where there was an old davenport. Cale pulled back a curtain and said, 'This looks like it.' Wise said, 'Yes, this looks like the same kind of stuff.' Then Wise said, 'There is one more. Let's have it.' Cale looked around and said, 'Maybe it is over here,' and Cale went over in the northwest corner of the room and found another roll of white material there. That was the fifth roll of material." Cale, according to the officer, told him that he could not go to the wholesale houses or stores and buy materials; that they just laughed at him when he wanted to do so; that he had to go to the main building of Sears and Roebuck, pay retail prices, and buy material to use in the upholstery business; that "It might be hot. I expect it is from what you say." When the officer stated, "You tell me you have been an upholstery man and a buyer and know fabrics, and you tell me you can sit here in this car and tell me you can buy stuff like that for that money? * * * It don't sound right, fellow." Cale replied, according to officer Wise, "Well, * * * I guess I better stop trying to beat the O. P. A., and go out and buy in a legitimate market."

[1-3] Both Houghton and Cale told the officers that Kronheimer had never stated to them that the material which they purchased was "hot" or stolen and made the same statement when they appeared as witnesses in their own behalf. In their testimony they contradicted the statements of Kronheimer generally and, in particular, his version of signing the name "John Hammerstein" to the receipts which they had prepared. Incidentally, Cale's story of the transaction in and near the bank contradicted Houghton's recital concerning that incident. He stated that he loaned Houghton $100 while they were in the bank and that he took the five rolls of material which were found at the Bimini Upholstery Shop as security for that loan. Considering the various conflicting statements made by Kronheimer, Houghton and Cale, it is apparent that some lying was done, but there can be no doubt in the mind of anyone who carefully reads the transcript and notes the conditions and circumstances under which the goods were acquired by Houghton and Cale that they were guilty of receiving stolen property. It is true that evidence to that effect was offered by Kronheimer but if he was an accomplice in this case, (and we do not decide that point) that does not mean necessarily that his testimony is to be ignored. All the code requires in such a situation is satisfactory corroboration "by such other evidence as shall tend to connect the defendant with the commission of the offense" Penal Code, sec. 1111. This subject was treated at some length in People v. Negra, 1929, 208 Cal. 64 at page 69, 280 P. 354 at page 356, where it is stated: "While the jury may consider the circumstance that a witness is an accomplice, in passing upon his credibility as a witness

(People v. Clough, 73 Cal. 348, 354, 15 P. 5), his testimony is not to be rejected merely because he is an accomplice, and if there is other evidence which measures up to the requirement of the code (supra), tending to connect the defendant with the commission of the crime charged, then such testimony of the accomplice is to be considered by the jury, as is any other testimony, and must be given the weight to which the jurors may conclude that it is entitled. * * * Even though circumstantial and slight, the evidence is, nevertheless, sufficient if it tends to connect the accused with the commission of the offense. People v. Martin, 19 Cal.App. 295, 125 P. 919. The defendant's own statements and admissions, made in connection with other testimony, may afford corroboratory proof sufficient to sustain a verdict. [Citing cases.]" It is our opinion that in the present case the admissions of both defendants as to the trip into the area where they obtained the goods, and the manner and conditions under which they were taken, together with the testimony concerning the signing and delivery of the handmade receipts, euphemistically termed "bills of sale," furnished all the corroboration necessary to sustain the judgment. See, People v. Owens, 1946, Cal. Sup., 168 P.2d 945. In addition, of course, there was before the court the testimony of officer Wise concerning the recovery of the stolen goods and the statements of both defendants relative to the transaction.

[4] The argument is made in behalf of each appellant that to justify a conviction it was necessary to establish the fact that the property had been received from Harris with guilty knowledge that it had been stolen. On this point we refer to what has already been said and we rest upon the quotation from Wharton's Criminal Law, presented in People v. Clausen, 1898, 120 Cal. 381 at page 382, 52 P. 658 at page 659: "'Whether the defendant knew that the goods were stolen is to be determined by all the facts of the case. It is not necessary that he should have heard the facts from eyewitnesses. He is required to use the circumspection usual with persons taking goods by private purchase, and this is eminently the case with dealers buying at greatly depreciated rates. That which a man in the defendant's position ought to have suspected he must be regarded as having suspected, as far as was necessary to put him on guard and on his inquiries. * * * The proof in any case is to be inferential, and among the inferences prominent are inadequacy of price, irresponsibility of vendor or depositor.'"

[5] After the trial judge adjudged the defendants guilty he permitted both of them to file an application for probation, stating, however, "as far as Mr. Houghton is concerned, he is not legally eligible for probation." This was because of a prior conviction of a felony charged against Houghton in the complaint filed in this case and admitted by him. The court made a further statement as follows: "I am always glad to have all the information which is available, about any individual before pronouncing sentence. I might say that, as it has come up here before, I know of Mr. Houghton, or I knew him personally for a number of years through members of his family, and if I had looked at this case before it came in here I don't know if I would have cared to handle it, but it is here in a proper fashion and I have heard it, without any regard to any personalities at all; but, Mr. Houghton, as I said to Mr. Cale, there is no question but that you are up against a pretty stiff proposition here." Upon this statement defendant Houghton predicates a claim that the judge "indicated that he had some personal feeling toward defendant, and defendant was therefore prevented from having the fair and impartial trial to which he was entitled under the law." Inasmuch as the judge declared that he heard the case "without any regard to any personalities at all," we conclude that he considered the evidence with a fair and open mind and that defendant Houghton suffered no disadvantage whatever. It is said in Goodspeed v. Great Western P. Co., 1937, 19 Cal.App.2d 435, at page 450, 65 P.2d 1342 at page 1348, a case where affidavits were filed charging that the trial judge entertained bias or prejudice against certain defendants that "No knowledge, experience

or opinion can give rise to bias or prejudice unless it results in hostility or ill will * * *." It clearly appears that there was no hostility or ill will toward Houghton on the part of the trial judge.

The judgments are affirmed.

SHINN and WOOD, JJ., concur.




74 Cal.App.2d 785

## SCHELL v. SCHELL.

Civ. 3389.

District Court of Appeal, Fourth District, California.

June 3, 1946.

**1. Joint tenancy ⇐10**

One joint tenant may not maintain an action against his cotenant, who is in full possession of the property, to recover rent for the cotenant's occupancy of the property, or for profits derived from the property by means of the occupant's own labor.

**2. Joint tenancy ⇐10**

A joint tenant cannot maintain an equitable action for accounting against his cotenant, who is in the exclusive possession of the property, for rent or the profits of his own labor, except where the rents collected from the property were paid by a third party to whom the property was leased.

**3. Tenancy in common ⇐37**

Before an action for an accounting may be maintained by one cotenant against the other cotenant who was in sole possession of the entire premises, to recover a share of the profits received, the complaint must aver that the defendant occupied the premises upon some agreement with the plaintiff as receiver or bailiff of his share of the rents and profits.

**4. Divorce ⇐321½**

Where wife as result of court order in divorce action was entitled to live, rent free, in home owned as joint tenant with husband, and order was entered when court presumably knew that wife was renting rooms and which gave wife the full beneficial use of entire premises, husband was not entitled to an accounting of proceeds from rents from rooms rented out by wife.

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Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action for divorce or in the alternative for support by Louise F. Schell against Edwin W. Schell in which defendant filed a cross-complaint. After issue joined, the trial court denied each party a divorce, awarding custody of two daughters to plaintiff and two sons to defendant with reciprocal rights of visitation and found that plaintiff should be permitted to live in the home owned by the parties as joint tenants, rent free, with an award for maintenance of plaintiff and two daughters in addition. Defendant petitions for an accounting. From judgment of dismissal, defendant appeals.

Affirmed.

R. M. Switzler, of San Diego, for appellant.

Vincent Whelan, of San Diego, for respondent.

GRIFFIN, Justice.

Plaintiff wife originally filed an action for separate maintenance against defendant husband. In an amended complaint she asked for a divorce on the ground of extreme cruelty, or in the alternative for support for herself and four minor children.

Defendant answered, and by way of cross-complaint sought a divorce on the same ground and the custody of the children. The parties were living separate and apart at the time of the filing of the action.

After issue joined, the trial court found the allegations of each party to be untrue, denied each a divorce and awarded the custody of the two daughters to plaintiff and the two sons to defendant, with reciprocal rights of visitation. It found that defendant had an average monthly income

in excess of $650; that the parties owned, as joint tenants, a home in Coronado; and that plaintiff "should be permitted to continue to live * * * there * * * rent free", and that said minor daughters should live with her; that defendant pay $150 per month for maintenance of plaintiff and two daughters in addition to their right to occupy the home "together with its furniture and furnishings, without expense for the occupancy of said home" and defendant "shall pay the necessary expense of preserving said home * * *." Payments were to continue so long as plaintiff continued to occupy it. A judgment to this effect was entered on October 20, 1944.

On March 19, 1945, a complaint or petition for accounting was filed by defendant, alleging the proceedings and judgment above mentioned and that defendant had complied with its terms. It is then alleged that about September 1, 1944, plaintiff changed the form of the " 'family home' in that she converted the same into a partial rooming house or apartment house on a business basis, by the terms of which she is and has been, since said time, receiving rentals, the exact amount being unknown to defendant. That one-half of said rentals, less a proportion of the expenses in managing said business venture is the property of the defendant, a claim for which he has made to the plaintiff who refused and still refuses to account to Defendant or to in any way account to him for any of the proceeds derived from said venture". He prayed for an accounting "as to the use of said jointly owned property", and that plaintiff pay to him such sum as may be found due.

Plaintiff answered the petition and denied that she had substantially changed the form of her family home, or that she had converted the same into a rooming house or apartment house. She alleged that there was a critical shortage of living accommodations in the City of Coronado and that she considered it a proper thing that she should open her home to persons of respectability to use certain rooms which were not being used by herself and family. She denied that the defendant was entitled to any part of the income received by her, but alleged that she had no wish to make any concealment as to the amount of said income, or of the various items of cost in connection therewith, and that without admitting any obligation to share said income with the defendant, she annexed to the petition a list of expenses in connection with the necessary maintenance of the property and in preparing it for the renting of the rooms. The list of expenses was attached to the petition and shows expenditures in excess of $357 charged against an approximate income of $452. A claim of 25 per cent of the amount of receipts is made for management by the plaintiff.

The matter came on for hearing upon the pleadings thus filed. Objection was made to the reception of any evidence by the petitioner. The objection was sustained for the reason that the petition did not state facts sufficient to constitute a cause of action. Defendant appealed from a judgment of dismissal, and now argues that the husband, being a joint tenant, out of possession, can require his wife, as the other joint tenant in possession, to account for rents collected for the property from third persons to whom a part of the property was leased, citing McWhorter v. McWhorter, 99 Cal.App. 293, 278 P. 454; Robinson v. Robinson, 65 Cal.App.2d 118, 150 P.2d 7; Spahn v. Spahn, Cal.App., 162 P.2d 53; and Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003.

It is plaintiff's contention that the provision of the judgment entitled her to occupy the real property described exclusively, so far as the defendant is concerned; that such right of occupancy is not consistent with the right of defendant to make any claim for rents of the premises, for the reason that the right of possession or occupancy connotes a right to enjoy the rents, issues and profits thereof; that the plaintiff took roomers in the family home and there was not created between plaintiff and such roomers any relation of landlord and tenant and that the occupancy by plaintiff of the premises continued to be exclusive and personal; that the right to the use and occupancy of the premises included the right to let or assign it, and was not confined to the personal use or occupancy of the property by the plaintiff, citing Russell v. Andrews, 120 Ala. 222, 24 So.

573; Tobias v. Cohn, 36 N.Y. 363; and Wilson v. Curtis, 90 Me. 463, 38 A. 365.

[1, 2] The case of McWhorter v. McWhorter, supra, relied on by defendant, was an action in partition where the parties held title in joint tenancy. It was there held that the defendant was not liable to plaintiff for the rental value of the premises while defendant was using them for his benefit alone, and that one tenant may not maintain an action against his cotenant, who is in sole possession of the property, to recover rent for the cotenant's occupancy of the property, or for profits derived from the property by means of the occupant's own labor, nor can a tenant maintain an equitable action for accounting against his cotenant, who is in the exclusive possession of the property, for rents or the profits of his own labor. It was likewise held that there was an exception to the general rule where the rents collected from the property were paid by a third party to whom the property was *leased*. The question here presented is whether the undisputed facts set forth in the pleadings bring defendant's case within the exception noted. It is apparent in this case that there was only a letting of a small portion of the premises which plaintiff was entitled to occupy, to the exclusion of her cotenant, under the court order. There was no *leasing* of the property in its entirety to third persons. Plaintiff continued to occupy the premises as a "family home". It cannot be said that the nature of plaintiff's occupancy has been modified or changed. Housing conditions during the war period and the expense of maintaining herself and minor children during that period prompted her to make certain expenditures on the common property and to take in a few roomers to pay for the improvements made to the property and to enhance the income of herself and children.

In Roberts v. Casey, 36 Cal.App.Supp.2d 767, 93 P.2d 654, 659, the court reviewed the nature of the relationship between a lodger or guest in the home of another as distinguished from the relationship created by a lease between a landlord and tenant. The court quoted from 1 McAdam on Landlord and Tenant, 5th Ed., page 229, to the effect that "Guests in a hotel, boarders in a boarding house, and roomers or lodgers, so called, are generally mere licensees and not tenants. They have only a personal contract and no interest in the realty." In the instant case the presence of such roomers in the premises was not, in t strict sense, either a possession or occupancy of such premises. The plaintiff, therefore, at all times, in strictness, retained possession and occupancy of the entire premises.

[3] Before an action for an accounting may be maintained by one cotenant against the other cotenant, who is in sole possession of the entire premises, to recover a share of the profits received, the complaint must show or aver that the defendant occupied the premises upon some agreement with the plaintiff as receiver or bailiff of his share of the rents and profits. Pico v. Columbet, 12 Cal. 414, 73 Am.Dec. 550; Howard v. Throckmorton, 59 Cal. 79.

[4] The decree in this action does not place any special limitation on the occupancy of the premises by plaintiff other than to live there "rent free". Defendant had no right of occupancy to any part of the home or to any rooms therein under the decree, or to any income produced therefrom. The court, undoubtedly, intended to give plaintiff full beneficial use of the entire premises so that she would have the right to permit the presence of guests who might be nonpaying, or guests or roomers who might pay, so long as their presence was not inconsistent with the purposes of the court in making its judgment.

In the petition for accounting petitioner alleged that on or about September 1, 1944, plaintiff converted the premises into a partial rooming house and rented some of the rooms therein. It likewise averred that a judgment was entered on October 20, 1944, awarding plaintiff the exclusive right of occupancy of the entire premises; and that judgment has become final. It therefore appears from the pleadings that at the time that judgment was entered the trial judge must have taken into consideration the state of facts alleged to have existed on or about September 1, 1944, when plaintiff was already renting rooms and appropriating the rents and income there-

from for herself and minor children. There is no proper allegation that defendant, the petitioner herein, is entitled to a proportionate share of that income or that plaintiff is legally obligated to account to him in regard to it. Pico v. Columbet, supra.

Judgment affirmed.

BARNARD, P. J., concur.




74 Cal.App.2d 713

## KOBLIK v. LOS ANGELES CITY JUNIOR COLLEGE DIST. OF LOS ANGELES COUNTY et al.

Civ. 15148.

District Court of Appeal, Second District, Division 3, California.

May 28, 1946.

Rehearing Denied June 21, 1946.

Hearing Denied July 24, 1946.

**1. Schools and school districts ⇐133**

Where permanent teacher employed by Junior College District was dismissed on account of an alleged decrease in enrollment, the subsequent employment of teacher as a substitute teacher for senior teachers on leave of absence or in the military service was not a "reappointment", within statute, as a permanent teacher. Education Code, § 13654.

See Words and Phrases, Permanent Edition, for all other definitions of "Reappointment".

**2. Schools and school districts ⇐133**

The right granted by statute providing that permanent school employees dismissed because of the wars in which the United States was engaged should have a preferred right to "reappointment" was preference in reappointment to a regular position in the order of original employment when a regular position was available. Education Code, § 13654.

**3. Schools and school districts ⇐133**

Junior College District was not required under statute in effect at the time, to offer dismissed permanent teacher the opportunity for substitute service prior to offering it to one who had not held such a permanent position, but could have declined to offer him any employment until date on which his name was high enough on re-employment list to entitle him to be reappointed to a permanent position. Education Code, §§ 13651, 13652, 13654.

**4. Schools and school districts ⇐141(4)**

Where board of education was required to make decision regarding dismissal of teachers because of decrease in enrollment before close of the school year and, at time such decision was made, enrollment in army specialized training program had been reduced to nothing, enrollment in regular program was decreasing, war conditions were getting worse, and great uncertainty prevailed as to the effect of the wars upon enrollment in the next year, dismissal of teacher on account of decreased enrollment was not abuse of discretion. Education Code §§ 13651, 13652, 13654.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus proceeding by I. H. Koblik against Los Angeles City Junior College District of Los Angeles County and others to compel classification of petitioner as a permanent teacher of the Los Angeles City Junior College District. Judgment for petitioner, and defendants appeal.

Reversed.

Harold W. Kennedy, Co. Counsel, and Wm. E. Lamoreaux, Deputy Co. Counsel, both of Los Angeles, for appellants.

Ray C. Eberhard, Elisabeth Eberhard Zeigler, Tanner, Odell & Taft, and Robert A. Odell, all of Los Angeles, for respondent.

WOOD, Justice.

Petition for writ of mandate requiring defendants to classify petitioner as a permanent teacher of the Los Angeles Junior College District, and to pay him the difference between the salary of a permanent teacher and the salary of a substitute teacher.

Petitioner had been classified, and had taught, as a permanent teacher in said district for more than ten years continuously preceding the close of the school year 1943–44. On May 8, 1944, he and 96 other teachers (23 probationary and 74 permanent) were dismissed by defendants on account of an alleged decrease in enrollment. In taking such action the defendants acted, as to the permanent teachers, under the provisions of Section 13651 of the Education Code, which provided in part: "Whenever it becomes necessary to decrease the number of permanent employees in a school district on account of * * * a decrease in the number of pupils attending the school of the district * * * the governing board may dismiss so many of the employees as may be necessary at the close of the school year. In making dismissals employees shall be dismissed in the inverse of the order in which they were employed * * *."

Prior to the opening of the school year 1943–44 the United States Army entered into a contract with the defendant board of education for an army specialized training program whereby a large number of enlisted men were admitted as students at said junior college. Prior to said May 8th, when the teachers were dismissed, the army cancelled said contract, thereby causing a decrease in enrollment. After March, 1944, that is during the remaining three months of the school term, none of the students enrolled in the army program remained in the school.

Thirty-two of the total of 97 teachers, who were dismissed, were assigned to teach full time in the army program, and two were assigned to teach one-half time therein and one-half in the ordinary program of the school. Thirteen of those assigned to the army program were probationary teachers, and the others were permanent teachers.

The petitioner herein was not assigned to the army program, but during the whole period of his service at that school, which commenced September 19, 1932, he was a teacher of art in the regular program of the school. At the end of the 1943–44 term only one teacher of art was retained for the 1944–45 term, and that one (not the petitioner) had the highest seniority of the art teachers. Petitioner was classified as a teacher of art at his request, being the only department to which he had requested assignment.

On August 28, 1944, the board of education promulgated a reemployment list of dismissed junior college teachers, listing said teachers in their various educational fields according to their seniority ratings, the petitioner being listed as third in order of seniority in the art department. On said day a large number of the teachers on said reemployment list were reemployed, and some of them were classified as permanent teachers, and others including the petitioner were classified as substitutes. All teachers classified upon such reemployment as permanent had a higher seniority than petitioner, Those classified as permanent were reappointed in the order of their original employment. At that time, and under that method of employment, the available permanent positions were filled before the petitioner's name, on the reemployment list, was reached. Also at that time 25 permanent teachers, who had not been dismissed and who had higher seniority than those who had been dismissed, were on leave of absence. In addition thereto seven dismissed permanent teachers of higher seniority than petitioner were in the armed services. In making the teaching assignments for the 1944–45 term, the permanent teachers on leave of absence were assigned to certain vacant positions, and substitute teachers were employed to serve in their places. Also at that time, dismissed teachers who were then in the armed services and had such seniority that their names were high enough on the reemployment list to be included in the number of permanent positions to be filled, were reemployed and assigned to certain vacant positions, and substitutes were employed to serve in their places.

In accordance with such plan of making assignments, a permanent teacher who was on leave of absence, or a dismissed teacher who was in the armed forces and reemployed as a permanent teacher, was as-

signed to the position in the art department formerly held by petitioner, and petitioner was employed, at the beginning of the term on September 4, 1944, as a substitute for the permanent teacher so assigned. The monthly salary of a permanent teacher of the rank of petitioner was $385, and the salary of a substitute in such position was $298.

On January 29, 1945, it became necessary to reemploy ten permanent teachers. At that time petitioner's name was high enough on the reemployment list to be included in the number of permanent positions to be filled, and on that date he was reemployed as a permanent teacher, and ever since said date has been serving in the art department as such permanent teacher.

The complaint herein was filed on February 15, 1945, after petitioner had been reemployed as a permanent teacher, but the fact that he had been so reemployed does not appear therein. The question, presented by the complaint, as to whether a writ of mandate should issue directing defendants to classify petitioner as a permanent teacher is moot, except as to whether the defendants should classify him on their records as a permanent teacher for the period from September 4, 1944, to January 29, 1945.

Petitioner contends that his dismissal as a permanent teacher was by reason of the effect of the recent wars upon the enrollment, and therefore under the provisions of Section 13654 of the Education Code he was entitled when "reappointed" to be classified as a permanent teacher and to be treated as having been on a leave of absence, with no break in the continuity of his service. That Section provides in part: "Notwithstanding the provisions of Section 13651 [the Section under which defendants dismissed petitioner], permanent employees dismissed because of the effect of the wars in which the United States is presently engaged upon enrollment or upon the maintenance of a particular kind of services shall have the preferred right to reappointment, in the order of their original employment * * * if the number of employees be increased, or such service is reestablished within two years after cessation of hostilities in such wars. As to any employee who is so reemployed the period of his absence shall be treated as a leave of absence and shall not be considered as a break in the continuity of his service * * *." He states that at the beginning of the 1944-45 term, when he was selected on the asserted theory that he was a substitute, he was reappointed in fact as a permanent teacher within the meaning of the word "reappointment" as used in that Section. He argues that having been appointed theretofore as a permanent teacher, a reappointment could be an appointment only to the same kind of position as that which he had held theretofore, namely, a permanent position; that when he was reappointed he had "a vested right to be classified as permanent"; that even though such a construction might place the board of education in the position of having to employ two permanent teachers when only one was necessary, that is, in the event a permanent teacher should return from war after another permanent teacher had been appointed, such a situation would have no bearing on the case, since it is no part of the court's responsibility to make the law, but only to enforce the law as it is written. His argument, therefore, is in effect that by virtue of that section a permanent teacher, who has been dismissed by reason of a decrease in enrollment caused by the recent wars, can be reemployed only as a permanent teacher and in no other capacity. According to petitioner's contention if the board of education, in an attempt to furnish temporary employment to a permanent teacher who had been dismissed on account of decreased enrollment, should notify him that it would employ him as a substitute while he was awaiting his turn for reappointment as a permanent teacher, and if he should then enter upon the performance of the duties assigned to him, he would not be a substitute, as contemplated by the board of education, but would be in fact a permanent teacher, even though at that time there was no permanent position to be filled. In other words, according to his contention, the board of education, pending the creation of additional permanent positions to

which it might assign a dismissed permanent teacher, could not employ effectually a substitute teacher from the list of dismissed permanent teachers, but in order to accomplish the employment of a substitute it would be necessary to employ a person other than a dismissed permanent teacher.

[1, 2] The contention of petitioner is not sustained. The employment of petitioner as a substitute teacher was not a reappointment within the meaning of the provisions of said section 13654. Reappointment within the meaning of that section is a reappointment to a regular position. The right granted by that section is preference in reappointment to a regular position in the order of original employment when a regular position is available.

[3] The appellants were not required, under the statute then in effect, to offer to petitioner, as a dismissed permanent teacher, the opportunity for substitute service prior to offering it to one who had not held such a permanent position. They could have declined to offer him any employment until January 29, 1945, when his name was high enough on the reemployment list to be reappointed to a permanent position. Section 13652 of the Education Code, as amended in 1945, included a provision that, "During the period of his preferred right to reappointment any such employee [a dismissed permanent teacher] shall, in the order of original employment, be offered prior opportunity for substitute service during the absence of any other employee who has been granted a leave of absence or who is temporarily absent from duty; provided * * * that the compensation he receives shall not be less than that which he was receiving at the time his services were terminated * * *." Even though such amendment was not in effect when appellants employed petitioner in 1944 as a substitute, the appellants voluntarily followed such procedure as therein directed, except as to compensation, and petitioner was the beneficiary of that gratuitous act on their part. Said amendment of Section 13652 indicates that the word "reappointment," as used in Section 13654 previously enacted, was not intended by the Legislature to mean that the reemployment of a dismissed permanent teacher as a substitute was in fact the reappointment of him as a permanent teacher.

[4] Petitioner rests his case on appeal upon his contention above mentioned, but asserts, in addition thereto that the facts controvert appellants' argument that the board of education did not abuse its discretion in dismissing petitioner on the ground of decreased enrollment. The average daily attendance of students in the army program during each of the ten months of said period was as follows: 601; 450; 1130; 1220; 643; 637; 153; O; O; O. The number of teachers assigned to said program in each of those respective months was as follows: 41; 61; 62; 63; 62; 50; 50; 50; 27; 19. The average daily attendance of pupils in the school during each of the ten months of the 1943–44 term, excluding those in the army program, was as follows: 1960; 1894; 1829; 1555; 1426; 2174; 2253; 2203; 2138; 1897. The average daily attendance of pupils in the school during each of the first two months of the 1944–45 term was as follows: 2448; 2382. The principal decrease in enrollment was, as above indicated, in the army program where petitioner was not a teacher. It appears, however, that during each of the three last months of the year there was a decrease in enrollment in the regular program of the school, and that in the last month the enrollment therein had decreased 356 from the highest enrollment for the year. The decision of the board of education to dismiss teachers on account of decreased enrollment was required to be made before the close of the year, and at the time such decision was made the enrollment in the army program had been reduced to nothing, the enrollment in the regular program was decreasing, the war conditions were getting worse, and great uncertainty prevailed as to the effect of the wars upon enrollment in the next year. It does appear that at the beginning of the next year the enrollment increased, but it also appears that many of the dismissed teachers were then reemployed as permanent teachers to meet the requirements of such increase. It should

not be concluded from the record here that the board of education abused its discretion in dismissing petitioner on account of decreased enrollment.

The judgment is reversed.

DESMOND, P. J., and SHINN, J., concur.




74 Cal.App.2d 936

## FORBES v. FORBES.

Civ. 13038.

District Court of Appeal, First District, Division 2, California.

June 18, 1946.

**1. Trusts ⇐110**

In action to quiet title to realty, alleged to have been purchased by defendant for plaintiff with money advanced by her, evidence supported finding that defendant held title to realty in trust for plaintiff.

**2. Trusts ⇐371(8)**

There was no fatal variance between complaint, alleging that defendant agreed to take and hold realty, purchased by him with money advanced by plaintiff, in defendant's name for plaintiff's benefit, and plaintiff's testimony that she and defendant did not discuss matter of defendant taking title to realty in his name, but that defendant promised to use money advanced to buy the property for plaintiff.

**3. Trusts ⇐110**

In action to quiet title to realty purchased by defendant with money advanced by plaintiff, evidence, that defendant promised to hold title, taken in his name, for plaintiff's benefit, that sole consideration for purchase was money furnished by plaintiff at defendant's special request, and that defendant was plaintiff's agent, representative and confidential adviser in all transactions respecting purchase of property, supported adjudication that property was held in trust by defendant for plaintiff.

**4. Trusts ⇐99**

Where a person, undertaking as agent to purchase property for another with money furnished by principal for such purpose, takes title in himself, a trust results in principal's favor. Civ.Code, § 2224.

**5. Trusts ⇐110**

In action to establish trust in and quiet title to realty purchased by defendant with money advanced by plaintiff, evidence supported trial judge's conclusion that defendant's brother lent part of such money to plaintiff, not to defendant.

**6. Husband and wife ⇐249**

The surrender value of insurance policy on life of divorced wife, who paid all premiums from her earnings since entry of interlocutory divorce decree, was her "separate property", not "community property". Civ.Code, § 169.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property" and "Separate Property".

**7. Trusts ⇐366(1)**

The fact that portion of money advanced by divorced wife to her former husband for purchase of realty by him for her benefit came from bank account held in trust by her for her minor daughter, who was not party to wife's action to establish trust in and quiet title to realty, constituted no defense, as judgment for plaintiff would not bar daughter's assertion of any legal rights against her mother arising from use of such trust money.

**8. Appeal and error ⇐1012(1)**

The weight of evidence is for trial court trying case without jury.

**9. Appeal and error ⇐1010(1)**

Substantial evidence supporting trial court's findings in case tried without jury is sufficient to sustain them on appeal.

**10. Appeal and error ⇐1073(1)**

In action to quiet title to realty purchased by defendant with moneys advanced by plaintiff, where answer did not pray protection of defendant against his person-

al liability on purchase-money note and he failed to prove terms of such note and mortgage securing it or amount remaining unpaid thereon, judgment for plaintiff will not be reversed on appeal because it contains no provision for defendant's protection against such liability.

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Appeal from Superior Court, San Francisco County; Thomas M. Foley, Judge.

Action by Winifred Forbes against Alexander Forbes to establish a trust in and quiet title to realty. Judgment for plaintiff, and defendant appeals.

Affirmed.

Walter H. Duane, of San Francisco, for appellant.

Abraham M. Dresow, of San Francisco, for respondent.

DOOLING, Justice.

Defendant appeals from a judgment decreeing that defendant held certain real property in trust for plaintiff and quieting plaintiff's title.

Stating the facts most favorably to the judgment: The parties were married in 1924 and had two minor daughters. They were divorced (an interlocutory decree of divorce having been entered in 1930 and a final decree in 1937) and defendant had remarried. Defendant remained on friendly terms with plaintiff and frequently visited at the home in which plaintiff and their daughters lived. Defendant's brother lived in plaintiff's home as a paying guest. In 1941 plaintiff and defendant discussed the possibility of plaintiff buying a home for herself and their daughters, and in October of that year defendant took plaintiff to look at the house which was afterwards purchased. The house contained three flats and was priced at $4,100. Defendant told plaintiff that at least $1,000 was needed for a down payment. The brother-in-law promised to lend plaintiff $450 and plaintiff gave defendant $100, $50 of which was lent to her by her brother-in-law, to be used as a deposit on the purchase. Plaintiff later withdrew $300 from a bank account, in her name as trustee for one of the daughters, and gave $250 of that amount to defendant. The brother-in-law lent her the additional $400 which he had promised and she delivered that sum to defendant. Finally the parties surrendered certain life insurance policies, three on her life and one on his, and received a total of $636 therefor, which sum was also delivered to defendant. Of this sum of $636, $98 was the surrender value of the policy on defendant's life and the balance of $538 accrued from the plaintiff's policies. Defendant told plaintiff that with the money so delivered to him he would make the down payment on the property and buy it for her. Without the knowledge of plaintiff defendant took title in his own name, executing a note and mortgage in the principal sum of $3,000 to secure the balance of the purchase price.

After the purchase plaintiff and her daughters moved into one of the flats. Plaintiff collected all of the rents from the other two flats, and paid taxes, instalments on the mortgage and other expenses of the property therefrom. Defendant gave plaintiff a statement, in his own handwriting, showing a total amount of $1,389.33 received and $1,341.67 paid out in connection with the purchase. The discrepancy of $3.33 between the total of the amounts testified to have been delivered by plaintiff to defendant and the amount shown on the statement was not explained. Presumably the total surrender value of the policies was $639.33, rather than $636.

When plaintiff learned that title had been taken in defendant's name she several times requested him to deliver her a deed to the property. Without denying her right thereto he put her off with excuses until July, 1943, when he demanded of her that she pay him rent for the flat occupied by herself and the children and turn the collection of the rents from the other flats over to a realtor. This action was commenced shortly thereafter.

[1-3] This evidence was ample to support the trial court's finding that defendant held the property in trust for plaintiff. The complaint charges that the defendant agreed to take and hold the prop-

erty in his name for the benefit of the plaintiff. On the trial the plaintiff testified that they did not discuss the matter of defendant taking title in his name but only that defendant promised to use the money advanced by her to buy the property for her. The findings were made by reference to the complaint. Defendant claims a fatal variance. We do not agree. Defendant's promise to buy the property for plaintiff with money advanced by her supports the inference drawn by the trial court of a promise to hold the title which he took in his name for her benefit, as alleged and found. In any event the complaint also alleges and the court found "that the sole consideration for the purchase of said property was the monies furnished by this plaintiff at the special instance and request of defendant" and that "defendant was the agent and representative of said plaintiff in and for all transactions with respect to the purchase of the * * * property, and was the confidential adviser of the plaintiff with respect to the same." The evidence supports these latter findings and, without regard to the finding first discussed, they are sufficient to support the adjudication that the property was held in trust.

[4] Where one as agent undertakes to purchase property for another with money furnished by his principal for that purpose and takes title in himself a trust results in favor of the principal. Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732; Viner v. Untrecht, 26 Cal.2d 261, 158 P.2d 3; Hidden v. Jordan, 21 Cal. 92; 3 Scott on Trusts, sec. 499; 54 Am.Jur. 164; Rest.Agency, sec. 414(2); Rest.Restitution, sec. 194; Civ. Code, sec. 2224.

[5] Defendant's main attack is on the sufficiency of the evidence to support the findings and judgment. He and his brother testified that the $450 was lent to defendant and not to plaintiff. Plaintiff, at one point, testified that her brother-in-law agreed to "lend us the four hundred and fifty." Defendant seizes upon the pronoun "us" as corroborative of the evidence that the loan was to him and not to plaintiff. But plaintiff testified unequivocally on several occasions that the $450 was lent by her brother-in-law to her and not to defendant; she admittedly gave her brother-in-law a receipt for the money; $400 was admittedly delivered to her by her brother-in-law and by her in turn delivered to defendant; and she repaid $100 to her brother-in-law for which she received a receipt from him in his own handwriting. The weight of this evidence was for the trial judge and it fully supports his conclusion that this money was lent to plaintiff and not to defendant.

[6] Defendant argues that the proceeds of the insurance policies was community property. The interlocutory decree of divorce was entered in 1930. Plaintiff had been working ever since that date and she testified that she paid all the premiums. The court was justified in concluding that the surrender value of her policies was her separate property. Civ.Code sec. 169.

[7-9] Defendant also complains that $250 came from a bank account held in trust by plaintiff for her daughter. The daughter's rights are not involved in this action to which she is not a party. The money was given by plaintiff to defendant to use in the purchase of this property. It did not belong to defendant, and if the daughter has any legal rights against her mother arising from the use of this $250 the judgment in this action will not bar her from asserting them. The weight of the evidence is always for the trial court and it is sufficient if there is substantial evidence to support the findings. Watson v. Poore, 18 Cal.2d 302, 311, 115 P.2d 478; Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P.2d 583; Viner v. Untrecht, supra, 26 Cal.2d 261, 267, 273, 158 P.2d 3.

[10] Defendant's final complaint is that no provision is made in the decree for the protection of defendant against his personal liability on the purchase price note. Defendant did not pray in his answer for any relief in this respect and he failed to prove the terms of the note and mortgage or the amount remaining unpaid thereon. We do not feel justified in reversing an otherwise proper judgment because it fails to contain a provision neither prayed for nor supported by adequate proof at the trial.

The mortgage must first be foreclosed in the event of any default before defendant

would be liable for any deficiency and if he should be held for a deficiency (which seems extremely unlikely in the present state of the real estate market) he will have only his own conduct to blame. In such a contingency there is nothing in the judgment appealed from which would prevent him from seeking recoupment from the plaintiff.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.




74 Cal.App.2d 810

**In re ORTIZ.**

**Cr. 3978.**

District Court of Appeal, Second District, Division 3, California.

June 6, 1946.

**1. Infants ⇐16**

In proceeding to have a person under 21 years of age declared a ward of juvenile court and committed to the Youth Authority, evidence sustained judgment that he had committed crime of robbery. Penal Code, §§ 31, 211; Welfare and Institutions Code, § 700(m).

**2. Infants ⇐16**

In proceeding to have a person under 21 years of age declared a ward of juvenile court and committed to the Youth Authority, where petition alleged that defendant was 17 years of age on March 17, 1945, and that he was a person defined in statute regarding jurisdiction of juvenile court and paragraph III charged that he committed robbery on June 19, 1945, minute order reciting that allegations contained in paragraph III were true and that the minor was a ward of the juvenile court was sufficient compliance with statutory requirements regarding findings as to age and as to facts on which court could exercise jurisdiction over defendant as ward. Welfare and Institutions Code, § 700(m).

**3. Infants ⇐16**

In proceeding to declare a person under 21 years of age a ward of juvenile court and to commit him to the Youth Authority, statements of court during proceedings and prior to commitment constituted a sufficient finding that welfare of the boy required that he be taken from custody of his parents. Welfare and Institutions Code, §§ 700(m), 739.

Appeal from Superior Court, Los Angeles County, sitting as The Juvenile Court; William B. McKesson, Judge.

Proceedings in the matter of Emanuel J. Ortiz, a person under the age of 21 years. Emanuel J. Ortiz was declared a ward of the court and committed to the Youth Authority of the State of California, and he appeals.

Affirmed.

S. C. Stoner, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

DESMOND, Presiding Justice.

Emanuel Joe Ortiz, after a hearing in the Juvenile Court of Los Angeles County, was declared a ward of that court under subdivision (m), section 700, of the Juvenile Court Law, Welfare and Institutions Code, and committed to the Youth Authority of the State of California. He appeals, claiming that the judgment of the court was contrary to the law and to the evidence submitted to the trial court.

Subdivision (m) of section 700 provides that the jurisdiction of the Juvenile Court extends to any person under the age of 21 years "who violates any law of this State or any ordinance of any town, city or county, of this State defining crime."

The petition upon which this young man was brought before the Juvenile Court was filed by a deputy sheriff alleging, in paragraph I, that Ortiz was "a person defined in Subdivision M of Section 700" and that he "was 17 years of age on the 17th day of March, 1945," and, in paragraph III, that

on or about the 19th day of June, 1945, he committed the crime of robbery by taking from a corporal of the United States Marine Corps $3 in cash, the robbery "being accomplished by means of force and fear through the use of a revolver, in violation of Section 211 of the Penal Code."

It appears from the record that this defendant on the night of June 19, 1945, was in the company of four other youths, three of them minors and one, Besserra, past the age of 21 years. The other minors are named Garcia, Bermudez and Ledesma. The five boys congregated at a grocery store and started to ride around in the neighborhood where they resided, Besserra driving the automobile in which they traveled. They finally parked on a blind street and in a little while noticed another automobile drive onto that street not far from the river where occasionally they went swimming at night. They saw the lights turned off on that car and one of the boys, according to this defendant's testimony, suggested that they go down to the car to see what was going on. Bermudez testified that before they approached the other car they moved their car to another point estimated at two or three blocks away. Another of the boys, Garcia, testified that he heard somebody say, "Let us go see if we can get some money from this fellow." They then walked back to the other car, Besserra, Garcia and Ledesma in the lead. Garcia at that time was carrying a club and the trio just mentioned approached the car from the left-hand side, the other two, Bermudez and this appellant approached from the right-hand side. They found the car occupied by a marine and a young woman acquaintance of his.

The marine testified that as he sat in the dark, in the back seat of the automobile, the door opened and Besserra "struck a .45 in my face," saying. "This is a holdup." He further testified that Garcia told him to "Stand up; come on out"; that Garcia searched him, "went through my pockets. I had my blouse laying over the back seat of the car. He went through that. Took what was in that. Then he ordered me out of the car. * * * He had a club, and then I think he threw it down later and ordered me out of the car. After I got out of the car he, Besserra, took me about sixteen paces behind the car. Held me there at gun point, while Garcia went in the car." The marine was asked, "Did they take anything from you?," and answered, "Yes, sir, they took my liberty card and I. D. card, cigarette ration card and two or three packs of cigarettes I had on me. I don't know just how many. I had approximately two or three dollars in my pocket." He stated that there were at least five boys in the party, two or three on the right-hand side of the car who opened the car door. He identified Ortiz as one of the boys who was on the right-hand side. Under cross-examination he stated that when they opened the door on the right side they leaned in the car and went through his pockets, "there were hands going everywhere."

According to Garcia, Besserra "opened up the door and we put the gun in the seat. Then said to this marine, 'This is a holdup.' "

Appellant denied that he had heard any statement concerning the getting of money by any of the boys prior to their approach to the car and denied that he knew that Besserra had a gun before they got to the car, but admitted that he had seen the gun in Besserra's hand when Besserra was at the open left-hand door. He also denied that he opened the door on the right-hand side of the car or that he took any money or cigarettes. It does not appear, however, that he withdrew from the scene of operations or that he made any effort to persuade his companions to desist from the robbery. Although he stated that he did not hear any comment on the subject of money, the court, in view of Garcia's testimony, could conclude that Ortiz heard the same conversation and, further, would have been justified in believing that appellant saw the club in Garcia's hands as the boys approached the car and, therefore, knew that an act of violence was contemplated.

[1] Contrary to the claim of counsel that Ortiz violated no law but merely went over to the car to see what was going on or as part of a boyish prank, we believe that the foregoing resume is sufficient to sustain the judgment of the trial court that the allegations of paragraph III,

charging robbery, were sustained. Penal Code, section 31, provides that "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission * * * are principals in any crime so committed." People v. Wilson, 1920, 93 Cal.App. 632, 636, 269 P. 951.

[2] The appellant claims, however, that the court erred in three particulars relating to his commitment to the California Youth Authority: namely, (a) ordering the commitment without making a finding as to his age; (b) ordering it without making a finding of the facts upon which it exercised its jurisdiction over him as a ward of the Juvenile Court; (c) ordering it without making a finding that his welfare required his being taken from the custody of his parents. We are not cited to any statute, nor do we find any, which requires findings upon these matters to be in writing or signed by the trial judge. The case, In re Brodie, 1917, 33 Cal.App. 751, 166 P. 605, upon which appellant relies, turned upon the provisions of section 9b of the Juvenile Court Act, which are in all respects the same as now appear in section 739, Welfare and Institutions Code, hereinafter set forth. The court, in the Brodie case, said (33 Cal.App. at page 753, 166 P. at page 606): "Section 9b of the act provides as follows: 'No ward of the juvenile court as defined in this act shall be taken from the custody of his parent or legal guardian, without the consent of such parent or guardian * * * unless the court shall find that the welfare of said person requires that his custody be taken from said parent or guardian.' It will be noted by the provisions of this section that where the parent or guardian of a minor is deprived of his or her custody, certain findings must be made by the juvenile court. * * * As we view the provisions of the act, it is essential that the court make such findings as are required by section 9b and in writing," etc. The opinion discloses that "The complete record of the testimony heard, together with the various orders and findings of the court, are brought up under the alternative method of appeal." Another case upon which the appellant relies, In re Pierce, 1932, 127 Cal. App. 773, 16 P.2d 765, 767, quotes from In re Brodie, supra, the following: "'[I]t is essential that the court make such findings as are required by said section 9b and in writing.'" For lack of such a finding that the minor's welfare required that his custody be taken from his parents a reversal was entered and the matter remanded to the Juvenile Court for appropriate action. The opinion in the latter case, however, states that "It appears that no phonographic reporter was present at the hearing, hence no transcript of the proceedings could be prepared." From this it is clear that there was no material available on the appeal from which the finding of the necessity of taking the custody of the child from his parents might be derived. In this, it differs very materially from the Brodie case and also from the present case, In re Ortiz, because in both those cases a hearing was held and a complete record was available. We are not satisfied, however, that the court ruled correctly in the Brodie case when it decided that the required finding must be in writing. On this point we take the view advanced by the People that "the rule * * * is dictum, as nowhere does it appear there that any findings, either oral or written, were made." We feel that the minute order entered in the instant case is a sufficient compliance with the statutory requirements as to findings questioned by specifications (a) and (b) above. The allegations of the petition, recited at the opening of this opinion, definitely stated that this boy was 17 years of age on March 17, 1945, and in paragraph III charged that he committed robbery on the 19th day of June, 1945. They also stated, as we have indicated, that the appellant was "a person defined in Subdivision (M) of section 700 [Welfare and Institutions Code]." The minute order to which we have referred contained the statement that the "Allegations of petition as to Paragraphs I and II [relating to crimes other than robbery] are not sustained; as to Paragraph III, are true." Cf. In re Gutierrez, 1920, 46 Cal.App. 94, 95, 188 P. 1004. Then followed the statement "Minor

is declared a ward of the Juvenile Court under Subdivision (M), Section 700 of the Juvenile Court Law."

[3] We are satisfied also that a sufficient finding was made during the proceedings and prior to commitment, as hereinafter quoted from the transcript, to justify the order of the court that the appellant be taken from the custody of his parents. Section 739 of the Juvenile Court Law (now part of the Welfare and Institutions Code) states that "no ward of the juvenile court shall be taken from the custody of his parent or legal guardian without the consent of the parent or guardian, unless the court finds one of the following facts: (a) That the parent or guardian is incapable of providing or has failed or neglected to provide proper maintenance, training, and education for the person. (b) That the person has been tried on probation in such custody and has failed to reform. (c) That the person has been convicted of crime by a jury. (d) That the welfare of the person requires that his custody be taken from his parent or guardian." At the hearing a probation officer reported upon the conduct and character of appellant and it appeared conclusively that he had never been on probation previously; neither had he been convicted of a crime by a jury; nor was there any evidence that his parents were incapable of providing for his proper maintenance, training and education or that they had failed or neglected to provide for the same. Therefore, the question which the court was called upon to determine was whether, under subsection (d) above, the welfare of the boy required that his custody be taken from his parents. They were both in court and his mother testified that she had never had any trouble with him previously; that he stayed home and minded her; that he was industrious and turned over all his earnings to the family. Counsel for appellant suggested to the court that the boy might be returned to his parents for a year to keep him outside the state of California. The court asked the probation officer what he found with reference to the home life of appellant and, in reply thereto, the officer made the following statement: "I think Ortiz comes from a very good family. The family has small means. No money, but are doing a good deal. That is more than you can say for a lot of people these days. The family say that if we will give the boy a change, give them a chance, they will take the boy out of the state for a year or two. They work half the year in agricultural fields in Montana and other states. A half a year in Los Angeles. But they agree to stay out of the state, even though they bought their home in El Monte, if we let him go out. The department's recommendation is for C. Y. A. [California Youth Authority]. I think he is a good boy." He stated that the parents of Ortiz had discussed with him the proposal to take the boy to Montana where they expected to work for the Great Western Sugar Company and the court, noting the reference to the Probation Department and its recommendation for commitment to the California Youth Authority for Ortiz, asked the officer what he thought of the proposal to take him to Montana. He answered: "I think we have to take into consideration the effect of acts like this on the public in general. Especially upon the other Mexican boys. If they see a Mexican boy getting by with things like this, it sets a bad precedent." Later, in commenting on the facts in the case, the court stated, "It is perfectly apparent to me that they [the boys] could not help but know there was going to be a stick up, robbery or hold-up, or at least blackmail to be used to obtain some money. * * * I don't think these boys will benefit by having that kind of conduct excused," saying "I feel it is necessary for the Court to make a statement at this time. I agree with counsel for these boys that perhaps the surprising thing to me about these boys is that they have been going on those 16 or 17 years without having gotten into difficulties. As the Father indicates, they are in an area without recreational facilities. Society is to blame for that and not these boys. Therefore, there isn't any question in the Court's mind that these kids, as one of counsel has said, are worth saving. But the Court considers further and feels that

that same statement could be made about 99 percent of the boys that are in this Court, or we would not be here as a court. That does not lessen the obligation of society, however, to aid these boys if they can be aided in the development of better conduct and habits which will not get them into more serious difficulty just after they pass their 18th birthday, because then they would be tried in the adult court for the very same things for which they are brought into the Juvenile Court for allegedly committing * * *." The court then stated certain facts concerning the crimes charged against the boys, and continued: "In view of that fact—to make my finding—as far as Ortiz is concerned, as to the allegations of Paragraphs 1 and 2,—I find there is not sufficient evidence. Therefore, those paragraphs will not be sustained. But as to Paragraph 3, I find the allegations there sustained and therefore declare him to be a ward of this Court under Subdivision M, Section 700, of the Welfare and Institution Code." The trial judge stated further that "I should like very much to give first consideration, Mr. Stoner, to the portions of the proposition which you and Mr. and Mrs. Ortiz have submitted. I feel I cannot do so, however, without being troubled in my own mind that I may have discriminated in favor of one of these boys and not the others, because that boy may have parents who could take him out of the state. Personally, it has never been my disposition to believe that we solve any criminal problem by letting boys go out of the state. I think we have here the machinery to take care of our own boys. Perhaps better machinery than they have in some other jurisdictions." The court stated at another point that he asked for a recommendation from the Probation Department, but regardless of that he felt that he had the right, if he chose, to make a different placement where "the ends of justice and the protection of these boys as well as the protection of society, could better be served * * *." He did not, however, find that a placement other than that recommended by the Probation Department was preferable. Instead, he followed the recommendation and ordered all four boys committed to the California Youth Authority, saying, "I have taken what I believe to be the best course * * * as far as my own conscience is concerned and my own feeling in the matter." From the various statements which we have quoted, it is clear, as the People claim, "that the court found as a fact that the welfare of these boys required that they be taken from the custody of their parents, in order that they receive training in better conduct and habits, which would not be afforded them in the environment in which they had been living, in order to avoid future trouble, and in the case of the appellant, also because his parents were going out of the state and the court believed that the machinery for taking care of minors was better in this jurisdiction than it would be in another."

The judgment is affirmed.

SHINN and WOOD, JJ., concur.




74 Cal.App.2d 877

## HEATH v. KEYSER.

Civ. 15181.

District Court of Appeal, Second District, Division 1, California.

June 12, 1946.

**1. Automobiles ⇐243(4)**

In action against parking lot owner for injuries sustained when owner directed driver to "park the car right over there yourself" and driver backed automobile into her mother, who had theretofore alighted and was standing at the rear of and with her back to the automobile, evidence of alleged custom followed by parking lot owners of not allowing customers to park their own automobiles in lot was properly rejected.

**2. Negligence ⇐134(3)**

In action against parking lot owner for injuries sustained when owner direct-

ed driver to "park the car right over there yourself" and driver backed automobile into her mother, who had theretofore alighted and was standing at the rear of and with her back to the automobile, liability of owner could not be predicated on alleged obligation of the keeper of a public place of business to keep his premises and passageways in a safe condition and to use ordinary care to avoid accidents to invitees, in absence of evidence that the premises were in an unsafe condition.

**3. Automobiles ⇐197(1)**

Parking lot owner's direction to driver of automobile that "you park the car right over there yourself" created no agency upon which could be predicated liability of owner for injuries sustained when driver backed automobile into her mother, who had theretofore alighted and was standing at the rear of and with her back to the automobile.

**4. Automobiles ⇐197(1)**

Where parking lot owner directed driver to "park the car right over there yourself" and driver backed automobile into her mother, who had theretofore alighted and was standing at the rear of and with her back to the automobile, parking lot owner could not be held liable for injuries sustained by the mother on theory that a relation of bailor and bailee had been established.

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Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Ola A. Heath against Louis Keyser to recover damages for personal injuries. From a judgment entered on a directed verdict for defendant, the plaintiff appeals.

Affirmed.

Samuel P. Young, of Los Angeles, for appellant.

Jennings & Belcher and Louis E. Kearney, all of Los Angeles, for respondent.

DORAN, Justice.

In an action for damages for personal injuries plaintiff appeals from a judgment entered on a directed verdict for defendant.

From the agreed statement in lieu of a reporter's transcript, it appears that defendant owned and operated a parking lot in downtown Los Angeles; that about 8:00 P. M., October 17, 1944, "Plaintiff and her daughter were on their way by auto to a lecture at the Trinity Auditorium in downtown Los Angeles, which lecture was scheduled to commence at 8:00 P. M. Defendant's parking lot was immediately west of this auditorium. Plaintiff's daughter drove the automobile into defendant's parking lot at about 8:00 p. m. The auto entered the parking lot by way of the westernmost driveway at Ninth Street, driving north, and at a point approximately 20 to 30 feet north inside the lot the daughter made a right turn facing the car easterly, and came to a stop a short distance east of the driveway by which they had entered.

While the motor was running and the headlights lighted, plaintiff and her daughter alighted from the automobile, plaintiff getting out on the right side and the daughter getting out on the left side, and each of them walked towards the rear of their automobile.

When the daughter reached a point approximately one or two feet to the rear of the auto at its left side, the defendant walked up to the daughter and the daughter said to defendant: 'I left the key in the car; will you park the car for me?', and the daughter handed defendant some money, part of the parking fee, and asked plaintiff if she had the balance of the fee, whereupon defendant walked over to plaintiff who had stopped at a point approximately several feet to the right side and four to five feet to the back of the auto, to wait for her daughter. As defendant walked over to where plaintiff was standing, another auto drove onto the lot from Ninth Street, and defendant pointed to the northwest in the parking lot (to the rear and to the left of the plaintiff's automobile) and said to plaintiff's daughter, 'You park the car right over there yourself.' Plaintiff heard her daughter reply

that she and plaintiff were in a hurry. Plaintiff did not see her daughter after that, and did not know that her daughter was going to park the car.

"Plaintiff, in looking in her purse for the balance of the parking fee, turned partially around so that she was facing the light at the station, and her back was then to the automobile; the defendant was facing her and was in front of and near her at that time.

"Unbeknown to plaintiff, while plaintiff was looking in her purse for the balance of the parking lot fee with her back to the automobile, and without any warning to plaintiff, the daughter had re-entered the auto and slowly started backing up the automobile and at the same time executing a turn, causing the rear of the car to turn to her left, and the front of the auto to swing to its right, and as a result the right side of the auto hit plaintiff, throwing her to the ground."

In addition to the foregoing, quoted from appellant's brief, it is agreed by the parties that "There is no dispute that plaintiff was an invitee of the defendant at the time and place of the accident." Plaintiff offered to prove "a prevailing custom of care and conduct followed by operators of parking lots in the operation of public parking lots, including defendant's public parking lot, at the time of the accident, which custom was known to plaintiff and relied upon by her, and which custom was not followed by defendant at the time of the accident." An objection to such offer was sustained.

[1] It is contended by appellant that the refusal of defendant to permit evidence of custom, was error. In that connection it is argued:

"As stated in the offer of proof, the custom of not allowing customers to park their own cars was 'for the reason that they (parking lot owners) have found that accidents would be caused (if this custom were not followed) and damage (would be caused) to property or persons on the lot'.

"The custom was distinctly one that was followed for the safety of customers and invitees such as plaintiff herein. Ordinarily a parking lot owner or attendant does not know how careful or skillful the driver of a car will be in parking a car, especially backwards."

The cases cited both by appellant and respondent on the question of "custom" are of no help. On account of a lack of sufficient resemblance between the facts in the cited cases and the facts in the within action, they are of little value.

Obviously, what constitutes the best method of parking automobiles in a parking lot is simply a matter of opinion and one parking lot owner is not bound by the opinions of others in that regard. Indeed, some automobile owners might advocate the owner's privilege to park the car as the best and safest method. Hence, so-called "custom," in the circumstances, was evidence of neither negligence nor diligence. The objection was properly sustained. Moreover, so far as the record discloses, appellant's daughter was licensed to operate an automobile and suffered no visible physical impediments that would tend to interfere with such operation at the time of the accident.

[2-4] It is also contended that: "A. A Keeper of a Public Place of Business Is Bound to Keep His Premises and the Passageways in a Safe Condition and to Use Ordinary Care to Avoid Accidents to Invitees." "B. Defendant, Having Possession of the Auto as a Bailee, Was Liable for Damages Caused to Plaintiff by Reason of the Negligent Handling of the Automobile, the Subject of the Bailment." "C. The Evidence Was Sufficient to Support an Implied Finding That the Plaintiff's Daughter Was Acting as the Agent of the Defendant at the Time Plaintiff Received Her Injuries." And that the evidence of defendant's acts and omissions with regard to these three above mentioned contentions established negligence.

The foregoing contentions and arguments in support thereof are only plausible. Actually, there is no evidence that the premises were in an unsafe condition and defendant's directions to plaintiff's daughter, "you park the car right over there

yourself," manifestly created no agency. It may be true, and may be conceded for the sake of argument, that upon the delivery of an automobile in a parking lot and the complete surrender of its operation to the parking lot owner or attendant, who thereafter is in exclusive possession of the property, the relation of bailor and bailee may exist, but no such situation is presented here. Appellant's contentions therefore cannot be upheld.

For the foregoing reasons, the judgment appealed from is affirmed.

YORK, P. J., and WHITE, J., concur.




74 Cal.App.2d 932

## IMPERIAL–YUMA PRODUCTION CREDIT ASS'N v. SHIELDS et ux.

Civ. 3398.

District Court of Appeal, Fourth District, California.

June 17, 1946.

As Modified on Denial of Rehearing July 10, 1946.

Hearing Denied Aug. 15, 1946.

**1. Appeal and error ⇐1050(1)**
**Bills and notes ⇐442**

Where renewal note recited that it was executed, delivered, and accepted, not in payment of, but for purpose of renewing, certain described note, the holder was not obliged to sue on original note but could maintain action on renewal note, and admission of renewal note in evidence was not prejudicial error.

**2. Appeal and error ⇐979(2)**

The granting of a new trial on ground of insufficiency of evidence will not be disturbed except on a manifest and unmistakable abuse of discretion by trial court.

**3. New trial ⇐72**

Where trial judge heard evidence and had ample opportunity to judge as to demeanor, manner, and credibility of witnesses, if he was dissatisfied with verdict and was of opinion that it was clearly against weight of evidence, he was authorized to grant a new trial.

**4. New trial ⇐76(3)**

In action on note wherein makers filed a cross-complaint for additional credit as to returns from wheat crop and pasture damage and jury returned a verdict for makers in the sum of $2,033.78 over and above the $3,422.28 claimed by plaintiff, granting of new trial because of insufficiency of evidence was not an abuse of discretion.

Appeal from Superior Court, Imperial County; Elmer W. Heald, Judge.

Action by Imperial-Yuma Production Credit Association, a corporation, formerly El Centro Production Credit Association, a corporation, against E. S. Shields and wife on a note, wherein the defendants filed a cross-complaint. The jury returned a verdict for defendants and cross-complainants. Plaintiff's motion for new trial was granted, and defendants appeal.

Order granting new trial affirmed.

Leslie L. Burr, of Imperial, for appellants.

George R. Kirk, of El Centro, for respondent.

GRIFFIN, Justice.

On February 28, 1944, plaintiff instituted this action alleging that a promissory note in the sum of $6,281.12, payable August 8, 1940, was made and executed by defendants; that the sum of $2,858.64 had been paid thereon, and that there was a past due balance of $3,422.48 and interest from June 26, 1943; that defendant executed a crop and chattel mortgage as security therefor and that all the crops secured thereby were disposed of and no security for the payment of the note was available. Judgment was sought for the balance due.

Defendants answered, admitted the execution of the note, but denied that there was any balance due and owing. In a

cross-complaint they alleged that the note was given as part of a "farming finance arrangement" based upon an "estimated advance budget system"; that it was the practice of plaintiff, under its arrangement, to take possession of crops grown by defendants, store and market them at plaintiff's pleasure and credit defendants on their note; that on one occasion plaintiff took 1,010 sacks of wheat, of an estimated value of $2,220, and sold them, but only credited defendants with $299.78; that defendants planted a crop of barley for pasture and that plaintiff failed to pasture the crop at the proper time but later pastured 120 acres and only credited defendants with $298.88 as income therefrom; that by the neglect of the plaintiff, defendants lost approximately $3,500 and were therefore entitled to an additional credit of $3,201.14; and that certain stock in plaintiff company, owned by defendants, was sold for $650 without crediting defendants' account therewith. Defendants and cross-complainants prayed that plaintiff take nothing and that they recover $3,470.24.

Plaintiff denied generally the allegations of the cross-complaint. After trial, the jury returned a verdict as follows: "We * * * find for the defendants and cross-complainants * * * in the sum of $2,033.78 over and above $3,422.48 claimed by plaintiff * * *."

Judgment was entered accordingly. Plaintiff moved for a new trial on all the statutory grounds (including insufficiency of the evidence) which motion was granted.

[1] Two points are involved on this appeal. Defendants argue first that plaintiff had no right to sue on the note in question since it had written on it: "This note is executed, delivered and accepted, not in payment of, but for the purpose of renewing the following described note: Note for $7,118.00 dated August 9, 1938." The renewal note sued upon was offered in evidence. Defendants' counsel objected "because it is not the instrument the suit was brought on." As we construe the contention, it is now argued that since the note sued upon is a renewal note, it only extended the time of payment and therefore plaintiff was obliged to sue upon the original note which was the "real obligation" i. e. "the debt." Counsel for defendants frankly admits that he has "searched diligently for some authority directly in point" supporting his argument but that "the search has been without avail".

Bridge v. Connecticut Mutual Life Ins. Co., 167 Cal. 774, 141 P. 375; McArthur v. Wellman, 20 Cal.App.2d 379, 66 P.2d 1226; and Selig Cahn, Inc., v. California Wrecking Co., 9 Cal.2d 617, 71 P.2d 1113, are cited as supporting the general proposition that a note given in consideration of an antecedent indebtedness does not per se discharge the debt but suspends the creditor's right to recover until the maturity of the note. Plaintiff does not quarrel with these citations but points out that the McArthur case, supra, supports plaintiff's contention. That was an action predicated upon and directly involving a renewal note. See, also, First National Bank of Santa Ana v. Kinslow, 2 Cal.App. 2d 456, 38 P.2d 163. We see no merit to defendants' argument. The court committed no prejudicial error in overruling defendants' objection to the admission of the renewal note in evidence.

The argument that the trial court erred in granting a new trial is likewise untenable. It was argued, on the motion for a new trial, that the jury, by its verdict, intended to give defendants, on their cross-complaint, $2,033.78 over and above $3,422.48, or a total of $5,456.26. They now ask that this court instruct the trial court to enter judgment for that amount and that since the evidence in support of the cross-complaint is "in effect uncontradicted and unopposed," the trial court had no discretion and was therefore obligated to deny the motion for new trial on the ground of insufficiency of the evidence.

The law in this respect has been stated and restated on many occasions. In an early case, Green v. Soule, 145 Cal. 96, at page 102, 78 P. 337, at page 340, it is said:

"We frequently have cause to believe that the judges of the superior court are too reluctant to exercise their power of granting a new trial for insufficiency of

the evidence, and too much inclined to acquiesce in a verdict of the jury which does not meet with their own approval. There is a clear and obvious distinction between the duty of a trial court and the duty of an appellate court with respect to the decision of such questions, and it is well established by the decisions of this court. The trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. 'Where the decision is against the weight of the evidence, it is the duty of that court to grant a new trial.' * * * If the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. He has had the same opportunity as the jury to observe the manner of the witnesses, and to decide upon their credibility, and it is his duty to see that the verdict is not clearly against the weight of the evidence. He must exercise a wholesome and discreet supervision over the jury in this respect." See, also, Brush v. Pacific Electric R. Co., 58 Cal.App. 501, 507, 208 P. 997; Whitfield v. De Brincat, 35 Cal.App.2d 476, 96 P.2d 156.

[2] The granting of a new trial on the ground of insufficiency of the evidence will not be disturbed except on a manifest and unmistakable abuse of discretion by the trial court. Pettigrew v. O'Donnell, 32 Cal.App.2d 502, 90 P.2d 93.

The evidence given by defendants as to the returns from wheat crops and the claimed pasture damage was based upon their oral testimony. Plaintiff offered in evidence certain written documents which clearly indicate that defendants' oral testimony was not supported and that no definite arrangements for pasturing had been made. The evidence shows that defendants were given credit for $610 for the sale of their stock and that defendants authorized its sale.

[3, 4] The trial judge heard the evidence and had ample opportunity to judge as to the demeanor, manner and credibility of the witnesses, and if he was dissatisfied with the verdict and was of the opinion that it was clearly against the weight of the evidence, he was authorized to set it aside and grant a new trial. Hunt v. Pacific Electric R. Co., 51 Cal.App.2d 11, 124 P.2d 89. As the order granting a new trial on that ground must be sustained, it becomes unnecessary to consider the merits of the other grounds which plaintiff contends support the order.

Order granting a new trial affirmed.

BARNARD, P. J., concurs.




74 Cal.App.2d 881

## LIMITED MUT. COMPENSATION INS. CO. v. BILLINGS et al.

Civ. 3387.

District Court of Appeal, Fourth District, California.

June 12, 1946.

**1. Workmen's compensation ⇐2158, 2216**

Statute providing that claim of an employee for workman's compensation does not affect his right of action for damages against any third person who may have caused his injury creates no new right of action, but recognizes continuance of a long established right which is subject to one-year statute of limitations. Labor Code, § 3852; Code Civ.Proc. § 340, subd. 3.

**2. Workmen's compensation ⇐2188**

The right of action against a third person given an employer who has become obligated to employee for compensation is a new one created by the Workmen's Compensation Act and later carried into the Labor Code. Labor Code, § 3852.

**3. Workmen's compensation ⇐2188**

Statutory provisions relating to workman's compensation for injury caused by a third person establish a right of action in favor of employer who has become obli-

gated to employee for compensation and make third party directly liable to employer. Labor Code, §§ 3850–3854.

**4. Workmen's compensation ⇐2245, 2249**

The statutory provisions relating to workman's compensation for injury caused by a third person permit employer who has become obligated to employee for compensation to include in an action against third party elements of damage which are personal to the employee, but the employer may not retain and must account to the employee for any excess over his own special damage which he may recover, and no double recovery will be permitted because of the overlapping of items of injury to the employee which are also an injury to the employer because of the compensation or other payments he is required to make. Labor Code, §§ 3850–3862.

**5. Workmen's compensation ⇐2188**

The right of action against a third party who may have caused injury to employee which, in turn, has caused an injury to employer or his insurance carrier, who has been obligated by law to compensate employee to a certain extent, is not only a statutory right of employer and insurance carrier, based upon a statutory liability, but is one entirely distinct from the right of action long enjoyed by the employee. Labor Code, §§ 3850, 3852, 3854.

**6. Workmen's compensation ⇐2216**

The statutes creating new cause of action in employer and insurance carrier against third party who has caused injury for which employer and insurance carrier have become liable for compensation make no provision limiting time within which new action must be commenced, and hence general statutes in that regard must prevail. Labor Code, §§ 3850, 3852, 3854; Code Civ.Proc. § 338, subds. 1, 3; § 340, subd. 3.

**7. Workmen's compensation ⇐2216**

An action by employer's insurance carrier against third parties to recover amount paid as compensation and medical benefits to two injured employees, brought more than one year but less than three years after happening of accident in which employees were injured, was not barred by limitations. Labor Code, §§ 3850, 3852, 3854; Code Civ.Proc. § 338, subds. 1, 3; § 340, subd. 3.

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Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by the Limited Mutual Compensation Insurance Company, as insurance carrier for an employer, against Arthur W. Billings and others, doing business under the fictitious name and firm style of Billings Truck Company, to recover the amount paid as compensation and medical benefits to two injured employees. From a judgment of dismissal, the plaintiff appeals.

Reversed.

Stickney & Stickney and Edward Strop, all of San Diego, for appellant.

Luce, Forward, Lee & Kunzel, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action by the insurance carrier for an employer, to recover amounts paid as compensation and medical benefits to two injured employees, on the ground that their injuries resulted from the negligence of the third party defendants.

This appeal is from a judgment of dismissal after a demurrer to the complaint was sustained. The action was brought more than one year but less than three years after the happening of the accident in which the employees were injured. The sole question presented on this appeal is whether such an action is governed by subdiv. 3 of section 340 of the Code of Civil Procedure providing that an action "* * * for injury to or for the death of one caused by the wrongful act or neglect of another * * *" must be commenced within one year, or whether one or more provisions of section 338 of that code are applicable.

[1, 2] The material provisions of the law governing Workmen's Compensation and Insurance are now set forth in Chapter 5 of Pt. 1, Div. 4 of the Labor Code. Section 3850 provides that the word "employer," as used therein, includes the insurance carrier for the employer. Section 3851 pro-

vides that the death of the employee, or of any other person, does not abate any right of action "established by this chapter." Section 3852 provides that the claim of an employee for compensation does not affect his right of action for damages against any third person who may have caused his injury. This creates no new right of action but recognizes the continuance of a right which had been long established and which, of course, would be subject to the limitation imposed by section 340, C.C.P. Section 3852 then further provides that any employer who becomes obligated to the employee for compensation, or the like, may also bring an action against such a third person and recover therein, among other things, the compensation which he has paid. This right of action, thus given to the employer, is a new one which did not formerly exist and was created by the Workmen's Compensation Act and later carried into the Labor Code. Section 3853 provides that if either the employee or the employer brings an action against such a third person the other may, at any time before trial, join as party plaintiff or shall consolidate his action if brought separately. This latter provision that the other "shall consolidate his action" obviously applies only when two actions have been filed. Section 3854 provides, in effect, that if the action is prosecuted by the employer alone the expenditures which he has become obligated to make because of the disability suffered by the employee shall be considered as proximately resulting from the injury caused by the third party, in addition to any other items of damage proximately resulting therefrom. In other words, the provision is that the injury caused by the third party shall be considered as including the financial injury resulting to the employer in addition to any injury suffered by the employee.

[3, 4] These provisions establish a right of action in favor of the employer and make the third party directly liable to the employer where such an action is brought. While this right of action and this liability are clearly established, some confusion results because the provisions of this chapter (Secs. 3850–3862) permit the employer to include in his action elements of damage which are personal to the employee (State Comp. Ins. Fund v. Matulich, 55 Cal.App. 2d 528, 131 P.2d 21) with provisions that he may not retain, and must account to the employee for, any excess over his own special damage which he may recover. However, no double recovery will be permitted because of the overlapping of items of injury to the employee which are also an injury to the employer because of the compensation or other payments he is required to make. Eckman v. Arnold Taxi Co., 64 Cal.App.2d 229, 148 P.2d 677.

[5]• The appellant contends that this new right of action, thus given to the employer by these sections, is based entirely upon these statutes and that such an action is one "upon a liability created by statute" and governed by subd. 1 of section 338, C.C.P., and, further, that it is an action based upon an injury to a property right, thus also coming within the provisions of subd. 3 of section 338, C.C.P. On the other hand, the respondents contend that these sections of the Labor Code, and their predecessors, impose no new liability upon the negligent third party, that the employer is merely subrogated to, or substituted in, the long established right of the employee to sue the third party, and that it follows that the employer or his insurance carrier, like the employee, is subject to the one year limitation imposed by subd. 3 of section 340, C.C.P.

While some cases may involve a mere matter of subrogation without independent rights sections 3850, 3852 and 3854 give a new and specific right to the employer and his insurance carrier. That this right of action against a third party who may have caused the injury to the employee which, in turn, has caused an injury to the employer or his insurance carrier, who has been obligated by law to compensate the employee to a certain extent, is not only a statutory right which is based upon a statutory liability, but one entirely separate and distinct from the right of action long enjoyed by the employee, has been recognized in several decisions in this state.

In Jacobsen v. Ind.Acc.Comm., 212 Cal. 440, 299 P. 66, 68, the court pointed out that "The right of subrogation as such con-

tained in the earlier statute is not contained in the new." but that in lieu thereof "the employer is granted the right to sue or to acquire a lien for his expenditures in the event the employee sues and recovers judgment." In Merino v. Pacific Coast Borax Co., 124 Cal.App. 336, 12 P.2d 458, 461, in discussing the right to bring an action given to the employer by section 26 of the Workmen's Compensation Act, now found in Section 3852 of the Labor Code, the court said: "The right of recovery is statutory and is to be distinguished from cases involving subrogation."

In De La Torre v. Johnson, 200 Cal. 754, 254 P. 1105, 1107, the court, in considering some of the provisions of the former Workmen's Compensation Insurance and Safety Act, distinguished between the right of the employee to sue the third party who caused his injury and the new right of action given to the employer, and said: "The right of the employer to prosecute a suit against the tort-feasor to recover any compensation which he has paid or has become obligated to pay is a new right created by the act." In Morris v. Standard Oil Co., 200 Cal. 210, 252 P. 605, 607, the action against the third party was brought about twenty-three months after the date of the injury to the employee. While that case involved somewhat different issues, relating to the assignability of a claim, some of the reasoning therein seems applicable here. The court there said:

"The cause of action here assigned is not one arising in favor of the employee by reason of his injuries, but out of the obligation imposed by the Workmen's Compensation Act on the oil company, which caused a property injury to the employer, to reimburse the employer or its subrogated insurance carrier for the amount of disability indemnity paid the employee. It must not be confused with those peculiarly personal causes of action arising out of injuries to the body or feelings of the person injured, which are not assignable.

"The action on the assignment was not barred by the statute of limitations. Being one based upon a liability created by statute, it was properly commenced within three years from the time the insurance company paid the disability indemnity to the injured employee."

[6] The new and separate cause of action thus created is based upon a liability expressly created by statute. While a third party was formerly liable to the employee he was not liable to the employer prior to the adoption of these statutory provisions. Although the new liability covers elements which were included in the old it runs in favor of a different party who, by operation of law, has been put in a position where he has also been injured, and it includes elements which the employee is no longer entitled to retain if he recovers them. A new and different liability has therefore been created in favor of another interested party, with provisions designed to prevent a double recovery. The statutes creating the new cause of action and the new liability make no provision limiting the time within which the new action must be commenced, and the general statutes in that regard must prevail.

[7] There are sound reasons for providing a different time limitation for the bringing of such an action by an employer than that governing an action by an employee against the same third party. The employee knows at once that he has been injured but, as a practical matter, the employer does not know whether or not he has been injured by the act of the third party until his liability for compensation to the employee has been determined. He has a right to contest that matter and, in contested cases, more than a year will usually elapse before it is finally settled by the commission and the courts. In the meantime, the employer should not be compelled to file an action claiming he has become liable for compensation while at the same time, in other forums, he is earnestly maintaining that he has not become so liable.

The judgment is reversed.

GRIFFIN, J., concurs.

74 Cal.App.2d 834

## PEOPLE v. CARSON.

Cr. 1958.

District Court of Appeal, Third District, California.

June 7, 1946.

Hearing Denied July 2, 1946.

1. Homicide ⇐300(3)

In prosecution for an assault on defendant had right to use all force necesder, an instruction that in repelling violence of persons other than his wife defendants had right to use all force necessary, even to the taking of some one else's life, was properly refused.

2. Homicide ⇐300(9)

In prosecution for an assault upon defendant's wife with intent to commit murder, where defendant denied that he had made any assault upon wife, either in self-defense or otherwise, and proof showed that the defendant was the aggressor and that wife had made no assault on him, refusal of an instruction on self-defense was proper.

3. Criminal law ⇐829(15)

The refusal of an alleged instruction on circumstantial evidence was not error where instruction given on such subject fully covered the matter.

4. Criminal law ⇐814(17)

In prosecution for assault with intent to commit murder where evidence of guilt was direct rather than circumstantial, court was not required to give a so-called instruction on circumstantial evidence.

5. Criminal law ⇐1186(4)

Where proof of defendant's guilt of assault with a deadly weapon was clear and convincing, refusal to give requested instructions would not justify a reversal. Const. art. 6, § 4½.

6. Criminal law ⇐1186(4)

Where defendant's guilt of assault on wife with a deadly weapon was clear and convincing, and defendant's cross-examination of his wife covered 75 pages of the record and cross-examination of wife's two sons by a former marriage covered 39 pages and 59 pages respectively, and the only question that was unanswered was whether one of the boys had driven defendant's automobile after the assault, alleged curtailment of cross-examination resulted in no prejudicial error. Const. art. 6, § 4½.

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Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

George B. Carson was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Gumpert & Mazzera and J. Calvert Snyder, all of Stockton, for appellant.

Robt. W. Kenny, Atty. Gen., Jas. O. Reavis, Deputy Atty. Gen. and Chester Watson, Dist. Atty., and Anthony J. Chargin, Asst. Dist. Atty., both of Stockton, for respondent.

ADAMS, Presiding Justice.

In an indictment returned by the grand jury of San Joaquin County, defendant was charged with the commission of an assault upon Mildred Carson (his wife) with intent to commit murder. He pleaded not guilty, and not guilty by reason of insanity. He was tried by a jury which found him guilty of assault with a deadly weapon. The plea of not guilty by reason of insanity was withdrawn, and a motion for a new trial interposed. That motion was denied and defendant was sentenced to imprisonment in the county jail for a period of nine months and fined $1,000.

On appeal from the aforesaid judgment defendant urges three grounds for reversal: One, the failure of the trial court to give a requested instruction on self-defense; two, the failure of that court to give a requested instruction regarding *circumstantial evidence;* and, three, error on the part of the trial court in restricting defendant's cross-examination of certain witnesses for the prosecution.

The instruction on self-defense requested by defendant reads: "You are instructed that if you find from the evidence that the defendant George Carson, in repelling an attempt to use force or violence upon him-

self by Glen Martin or any other person, said George Carson, as a reasonable man, was justified in believing that the persons attempting to use force or violence upon him intended to inflict serious injury upon him, then, and in that event, George Carson had a right, in defense of his person, to use all force necessary to repel the attempt to use force or violence upon him, even to the taking of someone else's life, if necessary."

The requested instruction which appellant designates as one on circumstantial evidence reads:

"I charge you that in order to convict the defendant George B. Carson of the crime of assault with intent to commit murder, or of the crime of assault with a deadly weapon, or simple assault, the facts proved must be consistent with the theory of his guilt and inconsistent with the theory of his innocence.

"I further instruct you that any theory of his guilt must not only be rational, i. e., based upon reason, but founded upon and limited within the evidence admitted in the case; and such theory cannot be based upon mere guess or surmise, nor upon conjecture or supposition."

On this subject the court did instruct as follows:

"There are two kinds of evidence recognized and admitted in courts of justice, upon either or both of which the jury may lawfully find the accused guilty of crime. One is the direct and positive testimony of a witness or witnesses to the actual commission of a crime; and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and may consist of admissions by the defendant, plans laid for the commission of the crime, such as putting himself in any position to commit it, statements made previous to the commission of the crime tending to show intent or motive; or in short, any act, declaration or circumstance admitted in evidence tending to connect the defendant with the commission of the crime.

"In order to convict on circumstantial evidence, there must be produced the same degree of certainty as that which arises from direct testimony and excludes all rational probability of innocence. The circumstances must be of such a nature as not to be reasonably accounted for on the theory of the defendant's innocence, but perfectly reconcilable with the theory of the defendant's guilt."

Appellant's argument in support of the first of these proposed instructions, as stated in his brief, is: "The testimony and theory of appellant's case was that whatever forces he used upon Mrs. Carson he did it in protecting himself from an assault upon his person by Mrs. Carson and her sons. The evidence so far as the appellant's case is concerned establishes that Mrs. Carson participated in the fray and that the appellant in protecting himself from the boys did use force upon her."

This calls for a consideration of the evidence adduced at the trial. It shows that defendant and his wife were married about 1934; that on July 21, 1945, they were living in Stockton, the household including Glenn and Clifford Martin, sons of Mrs. Carson, aged 17 and 19 years, respectively, Josephine Martin, the wife of Glenn Martin, Irene Carson, the daughter of defendant by a former marriage, and Johnny White, a friend of the Martin boys. About a month prior to the assault, dissension having developed between Mr. and Mrs. Carson, they entered into a property settlement under the terms of which defendant conveyed the home to Mrs. Carson, and the parties agreed to live separate and apart. Defendant had not, however, departed from the home on July 21st when the assault occurred.

On the afternoon of July 20th defendant called for Mrs. Carson at a beauty parlor, and on their way home, according to her testimony, Carson complained that he had found whiskey and gin in the automobile of one of the Martin boys, and made threats to kill not only Mrs. Carson but the other members of the family. After arriving at the home, Mr. and Mrs. Carson went into the back yard, where, according to her testimony, Carson's threats to murder her and the rest of the family were repeated. She said that on previous occasions he had made similar threats, and that when they went through the house to the yard on the

afternoon of July 20th, on seeing Glenn's wife, Josephine, defendant became enraged, called Josephine vile names and said he was going to kill her right then. Mrs. Carson went into the house and conveyed this information to Josephine and Irene who left the house. Later she heard them in the kitchen with Glenn, whereupon she entered again, but returned to the yard. Glenn then came out and asked Carson when he was going to quit threatening his mother and his wife. Carson jumped up as though he were going to strike Glenn, and Mrs. Carson ran and called Clifford and White. An altercation then ensued during which Glenn and Clifford asked defendant when he was going to leave, and Carson replied, "None of your G— d— business." Mrs. Carson then asked defendant to leave the house and go to a hotel, which he finally consented to do, and thereafter left.

Later, according to Mrs. Carson's testimony, he telephoned her saying first that he had not secured a room, and then that he had found one and would come out in the morning. Mrs. Carson, being in fear, locked the doors of the house and retired to her bedroom. Not long afterwards she heard footsteps outside the house, and through a window saw Carson. He talked to her through the window, said he had not been able to get a room, and asked to sleep in the basement. She agreed but said he could not come into the house. She thereupon locked the door of her room, and again retired. After 1 o'clock in the morning she again heard footsteps and the door of her room was burst open by Carson. She jumped from her bed and was attempting to open the door of her bath room when Carson caught her by the shoulder and began striking her. She said that he was not hitting her with his hands but with a hammer; that she fell to the floor and Carson kicked her; and that while he was leaning over her and she was trying to ward off his blows, her son Glenn ran into the room and engaged in a struggle with Carson, whereupon Mrs. Carson ran from the room. At this juncture her son Clifford appeared, followed by White, and Clifford assisted his brother in subduing Carson who assumed a position on the floor with his back against the wall, and his hands under the foot of the bed.

As to the extent of Mrs. Carson's injuries she testified that she was struck eight or nine times—once on the chin, once on the cheek, once on the throat, three times on the chest, and several times on her arm. The physician who examined her after the assault reported that she had "multiple contusions," the skin being broken on the chin and hand; that she had three loose teeth, and that "she was bruised up considerably all over." He stated that in his opinion the injuries were caused by a blunt instrument. Photographs showing her injuries were introduced in evidence.

According to the testimony of Glenn regarding his conversation with Carson in the back yard earlier in the evening, he asked Carson when he was going to leave and the latter said it was none of his G— d— business, and "took a swing" at him; that Mrs. Carson asked Carson to go down town, and that after Carson had departed Glenn and his wife went to a show; that on their return about 1 a.m. they saw Carson standing by a front window; that Mrs. Carson let them in; that after they had retired they heard footsteps outside the house, and again saw Carson; that Glenn then went to his mother's room, turned on the light in the living room, and returned to bed; that shortly afterwards he heard the door to his mother's room crash and heard his mother scream, whereupon he ran to her room and saw her lying on the floor and Carson standing over her; that he jumped on Carson, knocking him over, and while they were struggling he took a hammer away from Carson and struck him with it; that as Carson fell Mrs. Carson ran from the room, and Clifford and White came in; that he then handed the hammer to Clifford, and, as he had entered previously without any clothes on, put on some garment which his wife brought him.

Clifford testified that he and White were sleeping on a porch off the dining room when he heard his mother scream; that he burst through the locked door into the dining room, and as he did so heard Carson say, "I will kill you"; that as he reached the door of his mother's room his mother

was just coming out; that he hit Carson, who was struggling with Glenn, and that Carson fell and crawled against the wall with his hands under the bed; that Glenn then had the hammer in his hand, and later, when the police arrived, handed it to one of the officers.

In the meantime Irene, at Mrs. Carson's request, had attempted to telephone the police but found the telephone dead, later investigation showing that it had been disconnected in the basement. Irene then ran to a neighbor's and telephoned, and two police officers appeared almost immediately.

White testified that he heard a scream, saw Clifford burst through the dining room door, and followed him to Mrs. Carson's bedroom; that Mrs. Carson was "kind of staggering out, holding her face on her arm"; that he found Carson on the floor; that when the police arrived Carson first said that he was sorry, that he did not mean to do it, and that he wanted to die, then became abusive and called his wife "some names."

As Clifford and Glenn had sustained some injuries they, with their mother and Carson, were taken to the emergency hospital. After having their wounds dressed all but Carson returned home. They found Irene trying to clean up blood on the floor of Mrs. Carson's bedroom; and Clifford and White both testified they were present when Irene found an open knife—which she later testified was her father's—in a pool of blood under the bed where her father's hands had been.

Carson, testifying in his own behalf, stated that he had found liquor in Clifford's car the afternoon of the 20th and that he had a conversation with Mrs. Carson about it on their way home from the beauty parlor. He denied that he had made any threats then or at any other time except that he had playfully told his wife that he "would throw her in the lake," or something of that sort. Regarding the conversations in the back yard he denied that he made any threatening gestures, but said that Glenn, and later Clifford, asked him "When in the hell are you getting out," told him to get out immediately, and made other remarks about getting him out. He admitted that the liquor in Clifford's car was referred to and that White stated that it was his and not Clifford's or Glenn's. Regarding the later events of the evening he said that he had phoned Mrs. Carson from downtown that he was unable to get a room; that he came to the house and talked to her through the bedroom window and she told him she did not want him around; that he then went and sat in his car, which he had parked a half block away, but finally decided to sleep on the chesterfield in a room in the house which he called his office; that to gain access thereto he cut the screen and entered through the window, and seeing a light in the living room he unlocked the office door and saw Mrs. Carson enter her bedroom and close the door; that contemplating that she would lock it he "went against" it and broke it. As to what transpired thereafter his story differed from that of the other witnesses. He said that he took hold of Mrs. Carson's shoulder and sat her on the bed; that she jumped up and screamed and dropped at his feet; that he stepped over to assist her to rise, and while stooped over her some one entered and began hitting him on the back; that he found Glenn hitting at him with a hammer; that he prevented him from striking him only on the arms; that Mrs. Carson was also pushing and shoving him; that he finally grasped the hammer and fell in front of the dresser; that they had not struck him until Clifford ran in with something in his hand, and made a lunge at him; that he (Carson) had the hammer in one hand "to protect" himself, and as Glenn grabbed the hammer kicked Mrs. Carson in doing that, and Clifford then struck him over the head, and that he had no remembrance of anything further except that he dimly remembered asking his daughter Irene to take his wallet out of his pocket. He said that he did not strike Mrs. Carson with the hammer or otherwise, except that he hit her with his elbow "to get her out of our way during the struggle," after Glenn came in. On cross-examination he said that he thought that Glenn hit him four blows with the hammer, that he turned and saw him with it in his hand, and tried to grab it. He then denied that he kicked Mrs.

Carson or that he ever succeeded in taking the hammer from Glenn. He denied that he owned or had ever seen before the pearl handled pocket knife which Irene found in the room and identified as his, but admitted he owned two pearl handled knives.

[1, 2] Returning now to consideration of appellant's proposed instruction regarding self-defense, it becomes apparent that same was properly refused for two reasons, one that the instruction itself is erroneous; and, two, that defendant himself was the aggressor, that his wife made no assault that called for any self-defense from her, and that, as matter of fact, he denied that he made any assault upon her either in self-defense or otherwise.

Appellant defends the requested instruction itself by saying that it was taken from People v. Zuckerman, 56 Cal.App.2d 366, at page 372, 132 P.2d 545, at page 549, in which this court approved an instruction which read: "You are further instructed that if you find from the evidence that the defendant in repelling an assault by either or both of the Danders made upon him [the defendant], the defendant as a reasonable man was justified in believing that either or both of the Danders intended to inflict serious injury upon him, the defendant, the defendant had a right in defense of his person to use all force necessary to repel the assault upon him, even to the taking of the life of either or both of the Danders."

But the foregoing instruction does not state that even in defense of his person one may use force necessary to repel the attempt to use force and violence upon him even to the taking of *some one else's life;* and had the instruction requested been given it would have told the jury, in effect, that if they believed that in repelling an attack upon him by Glenn or Clifford, defendant as a reasonable man was justified in believing that *they* intended to inflict serious injury upon him, then he had a right, in defense of his person, to repel the attack even to the taking of Mrs. Carson's life. No authority for such an instruction is cited, and we know of none.

Appellant, tacitly admitting that the proffered instruction was improper, asserts that nevertheless the court of its own volition should have given an instruction on self-defense, citing People v. Leslie, 9 Cal. App.2d 177, 48 P.2d 995, which he refers to as a similar case. But in the Leslie case the appellate court said that the evidence was conflicting as to whether defendant, in committing the assault upon Mrs. Zurndorfer, the victim thereof, was defending himself from an attack *by her.* The evidence in that case is not comparable to that before us. Here defendant does not contend that he struck Mrs. Carson in repelling an attack made by her or that he considered himself in danger from her. He denies that he struck her at all, except that he struck her with his elbow to get her out of the way during the struggle.

Furthermore, the evidence is sufficient to show that the defendant was aggressor in this affray; that after making threats he broke into the house, forced his way into his wife's bedroom, and thus precipitated the struggle with her two young sons when they came to their mother's defense. Under such circumstances no instruction on self-defense was called for. In People v. Holt, 25 Cal.2d 59, 65, 153 P.2d 21, it was urged that on defendant's version of the homicide with which he was charged, he had a right to stand his ground, and that it was error not to instruct the jury on self-defense. The court said, 25 Cal.2d at page 65, 153 P.2d at page 25, that other evidence in the case overwhelmingly established that defendant was not without fault, that he himself invited the encounter, and that as a reasonable man he was not warranted in believing that he was in such imminent danger of great bodily injury as to justify the commission of a homicide, and that under those circumstances it was not prejudicial error to fail to instruct on this phase of the matter in question. The court there quoted from People v. Westlake, 62 Cal. 303, 307, as to the pertinent principles governing the right of self-defense. People v. Soules, 41 Cal.App.2d 298, 314, 106 P.2d 639, was also cited, and 1 Wharton's Crim. Law, 828–832, secs. 614 and 615, was quoted to the effect that if the

defendant in any way challenged the fight and went to it armed, he could not afterward maintain that in taking his assailant's life he acted in self-defense. And finally the court said in the Holt case, 25 Cal.2d at page 67, 153 P.2d at page 26: "The overwhelming weight of the evidence, including defendant's own testimony and extrajudicial statements, establishes that defendant was not an innocent person suddenly confronted with imminent danger of great bodily harm. On the contrary, the evidence shows that he was the 'first wrongdoer' in that by his quarrelsome and challenging attitude, not only toward deceased but others in touch with him a short time prior to the homicide, he had created an atmosphere of antagonism that might naturally lead to physical combat if he continued, as he did, in his quarrelsome pursuit of trouble. Defendant, therefore, was not without substantial fault, a condition essential under the authorities to permit an accused to stand his ground and slay his adversary without first having sought to retire from the combat. Under all the circumstances, it cannot be said that the trial court erred to defendant's prejudice by failing to give an instruction on the right to stand one's ground and slay an adversary." Also see 13 Cal.Jur., sec. 45, pp. 644, 645; People v. Hecker, 109 Cal. 451, 42 P. 307, 30 L.R.A. 403; People v. Barber, 62 Cal.App.2d 206, 213, 144 P.2d 371.

[3] Regarding the second of the requested instructions, while appellant refers to it as one on circumstantial evidence, it does not, in fact, refer to circumstantial evidence at all. It merely states that the facts proved must be consistent with the theory of guilt and inconsistent with the theory of innocence. But if it was intended to be one on circumstantial evidence its substance was included in the instruction which the court did give, and in a form much more favorable to defendant, for the court defined circumstantial evidence and stated that to convict thereon, the "circumstances must be of such a nature as not to be reasonably accounted for on the theory of defendant's innocence, but perfectly reconcilable with the theory of defendant's guilt." Defendant finds no fault with the instruction given, and it is obvious that the requested one would have added nothing regarding the degree of proof necessary to convict on circumstantial evidence—the only ground upon which appellant's argument is based.

[4] Furthermore, where, as here, the evidence of guilt is direct rather than circumstantial, it has been held in numerous cases that failure to instruct on circumstantial evidence is not reversible error. In People v. Marvich, 44 Cal.App.2d 858, 861, 113 P.2d 223 (hearing in Supreme Court denied), the court said that as the evidence was direct, there was no occasion for giving an instruction that in the case of two theories, one pointing to innocence and the other to guilt, they should adopt the theory pointing to innocence. In People v. Ortiz, 63 Cal.App. 662, 667, 219 P. 1024, 1026, also an instruction was proposed to the effect that if circumstantial evidence leads to two opposite conclusions, one consistent with guilt and the other with innocence, the jury should acquit. The court held that the refusal to give such instruction was not error, saying: "The evidence was not circumstantial, but the positive testimony of eyewitnesses. The court instructed the jury fully on the question of burden of proof and reasonable doubt and it was not error to refuse the proposed instruction," citing People v. Plumeyer, 54 Cal.App. 786, 202 P. 888. In People v. Savage, 66 Cal.App.2d 237, 247, 152 P.2d 240 (hearing in Supreme Court denied), the court said that where the proof is not entirely circumstantial it is not error to refuse an instruction requiring the jury to adopt that interpretation which would admit of defendant's innocence and to reject that which would point to his guilt.

[5] But even if the requested instructions had been proper in the case, the evidence of defendant's guilt was clear and convincing, and failure to give them would not justify reversal. Const. Art. VI, sec. 4½; People v. Kelso, 25 Cal.2d 848, 853, 155 P.2d 819, and cases there cited.

Appellant's final ground for reversal is that the trial court unduly limited the cross-examination of Mrs. Carson and her two sons, "as to circumstances surround-

ing the keys, the car, the bonds, and other items of value belonging to the appellant which appellant maintained these witnesses took." Appellant's own testimony was that in the room in the home which he referred to as his office, there was a "strong box" which contained insurance and other papers and three $1,000 bonds which "we" kept locked, and that the key of same, together with the key to the office and desk therein, and his car key he kept on a key ring, which he had in his pocket with his wallet when he went down town in the evening; that after the events of July 21st he asked Mrs. Carson for some papers that were in the box and for the bonds and she said she did not have the keys, and could not open the box; but that she subsequently gave him some papers that came out of the box.

In the first cross-examination of Mrs. Carson she testified that there was no "strong box" in the office, but was a little tin box in which "we" kept insurance papers and things of that sort. She was then asked if she did not go and get this box as soon as appellant was taken away, and she answered that she was in no condition to do so. An objection by the prosecution was then sustained, and permission was given defendant to recall the witness for further cross-examination if the subject matter became material. In his cross-examination of Clifford appellant's counsel asked him if, after Carson was in the hospital, Clifford had not taken defendant's car for a trip to Los Angeles, and if he had not gone through Carson's pockets when he was on the floor. To the latter question he made denial, and objection to the former was sustained with final ruling reserved.

Subsequently Mrs. Carson was recalled for further cross-examination and was again asked if she did not get some keys from Carson's person and if she did not then have any of the keys, to which she replied in the negative. She was then asked if the boys had not been driving the car, and objection was sustained. She was then asked if she had "that strong box" and answered that she had a little tin box, that she opened it without a key by breaking it open; and that, at his request, she delivered all of the contents to Carson. She was then asked what she did with the bonds and if she still had them in her possession, but objection to said questions was sustained. She said she had opened the desk, and when again asked if she had not the keys and if she had not taken them out of Carson's pocket, said that she had been unable to locate the keys. She was then asked if she went through Carson's office but objection was sustained.

Clifford was called for further cross-examination and asked if he took any keys out of Carson's pocket that night and if he had a key to the car. He answered no. Objection to a question as to whether he took the car and drove it to Los Angeles was sustained. Mr. Snyder then said, "I don't think I reserved the right to call Glenn; perhaps I should have; I think it was Glenn and not Clifford." Glenn was then called, was asked if he did not go through Carson's office that night before he was taken to the hospital, if he saw any one take any keys or if he took any keys out of his pocket, to which he replied that he did not. No other question was asked of the witness.

[6] It is apparent from the foregoing that the only questions asked which were unanswered were those pertaining to whether one of the boys drove Carson's car to Los Angeles. Clifford only was asked this question, and though Mr. Snyder said he thought it was Glenn, the latter was not further interrogated on this point. Furthermore, we agree with the trial court that whether they did or did not was immaterial. As for the questions asked Mrs. Carson about the keys and the bonds, she answered the same; and finally we can find no testimony by Carson that he did not himself have both keys and the bonds—if there were any—in his possession. In fact, he was asked on cross-examination if he did not generally have the key to the office. He replied: "Yes, I have the only key." Defendant's counsel's cross-examination of Mrs. Carson covers 75 pages of the record, his cross-examination of Clifford 39 pages, and that of Glenn 59 pages, so it is apparent that suffi-

cient latitude was given him in that respect. He does not point out a ruling on any specific question asked by his counsel which he contends constituted prejudicial error, and in view of the fact that the evidence of his guilt is clear and convincing we are satisfied that there was not any such error.

The judgment and the order denying a new trial are affirmed.

PEEK and THOMPSON, JJ., concur.

Hearing denied; CARTER, J., dissenting.




74 Cal.App.2d 854

**GOSSETT et al. v. SCHABELITZ et al.**

**Civ. 3377.**

District Court of Appeal, Fourth District, California.

June 7, 1946.

**1. Licenses ⇐39**

Evidence did not sustain finding that agreement by operators of a research laboratory to form a corporation was illegal or in violation of Corporate Securities Act where the agreement specifically provided for the issuance of stock only when the stock should be authorized by the Commissioner of Corporations. Gen.Laws, Act 3814.

**2. Corporations ⇐30(3)**

Evidence was insufficient to sustain finding that by reason of a pre-organization agreement by operators of a research laboratory and the subsequent filing of articles of incorporation, that the alleged corporation became the equitable owner of the property which one of the operators had conditionally agreed to convey to the corporation, where it appeared that all parties treated the property merely as belonging to the business which they were thus conducting by mutual agreement and the business was conducted in exactly the same way both before and after the corporate idea was abandoned.

**3. Corporations ⇐32(11)**
**Joint adventures ⇐1**

Evidence that operators of a research laboratory agreed to form a corporation and file articles of incorporation and agreed to apply for permission to sell stock and that the idea of forming the corporation was later abandoned and the business was conducted in exactly the same way both before and after such abandonment and that no stock was ever issued and no assets were turned over to the proposed corporation established that the business was conducted as a joint venture and not as a corporation.

**4. Joint adventures ⇐4(1)**

Since a joint adventure is similar to a partnership, the right to an accounting of profits in accordance with the agreement therefor and the obligations growing out of such agreement between the parties are governed by the same rules of law.

**5. Joint adventures ⇐5(2)**

Evidence established that the parties to a joint venture in the operation of a research laboratory were entitled to an accounting.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Rex Gossett, Herbert L. Hahn, executor of the estate of James E. McMurray, deceased, and Roger T. Smith against E. J. Schabelitz, Schabelitz Research Laboratories, Inc., a corporation, and others for declaratory relief, to determine whether a certain business was operated as a corporation, a partnership, or a joint venture, to determine the respective interests of the parties in the business, and for an accounting. From adverse judgment, defendant Schabelitz appeals.

Reversed.

Luce, Forward, Lee & Kunzel, of San Diego, for appellant.

Walker, Adams & Duque, of Los Angeles, and Gray, Cary, Ames & Driscoll, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for declaratory relief, to determine whether a certain business

was operated as a corporation, a partnership or a joint venture, to determine the respective interests of the parties in this business, and for an accounting.

For some years E. J. Schabelitz conducted a business in San Diego under the name of Schabelitz Research Laboratories. On May 10, 1941, he entered into a written partnership agreement with one Morgan and from that time until about February 1, 1942, the business was carried on by that partnership. More money was then needed to finance the manufacture and sale of a certain prophylactic which had been developed by Schabelitz, and which had been accepted by the army and the navy. About that time James E. McMurray and his stepson, Roger T. Smith, entered the picture. McMurray suggested the formation of a corporation and gave Smith a check for $2,500, which was put in a special account in a bank in Smith's name to be used in the business.

On February 14, 1942, an agreement was signed by Schabelitz, Smith and Morgan, which provided that a corporation should be organized to be known as Schabelitz Research Laboratories, Inc.; that Schabelitz should convey to the corporation the personal property theretofore used in the business, including formulas, chemicals, etc., in return for 50 shares of the common stock of the corporation; that Morgan should convey his interest in this property to the corporation in return for 50 shares of preferred stock; that Smith should pay to the corporation $5,000 for 50 shares of common stock; and that the agreement was conditional upon the corporation being "incorporated" within ninety days, and upon the application with reasonable diligence for a permit authorizing the issuance of the shares thus conditionally subscribed for.

On March 5, 1942, articles of incorporation were filed in the office of the secretary of state which were signed by McMurray, Schabelitz, Smith and two others who are not material here. The franchise tax was paid for the year 1942 and some stationery bearing the corporate name was "used in the trade." However, no transfer of the property previously used in the business was ever made to the corporation by Schabelitz or by Morgan, no application for permission to issue stock was ever filed with the commissioner of corporations, no permit to issue stock was ever given, and there was never any meeting of the stockholders or election of directors.

The business of operating the laboratories and the manufacture and sale of the prophylactic was continued with Smith taking an active part therein and furnishing more money from time to time. About June, 1942, the plaintiff Gossett joined the business, putting in his time and later putting in money. On July 24, 1942, an agreement was signed by Schabelitz, Smith and Gossett which, after declaring an intention to apply to the corporation commissioner for permission to sell shares of stock, provided that Schabelitz agreed to purchase $^{19}/_{37}$ of the first block of stock of the Schabelitz Research Laboratories, Inc., which the commissioner should authorize to be sold and in return therefor to convey to the corporation the properties known as the Schabelitz Research Laboratories, with all formulae and equipment involved in the manufacture of prophylactics; that Smith agreed to purchase $^{17}/_{37}$ of the first block of stock thus authorized to be issued and to pay therefor the sum of $8,500 or to cancel indebtedness in an equivalent amount; and that Gossett agreed to purchase $^{1}/_{37}$ of the stock so authorized to be issued, and to pay $5,000 for the same.

On July 30, 1942, Smith, Schabelitz and Gossett signed an agreement agreeing that they thereby elected themselves as temporary officers of the corporation. About this time these parties discussed Morgan's interest in the assets of this business and some sort of an account was set up purporting to show that the corporation owed Morgan $5,000.

After July 24, 1942, Gossett, Smith and Schabelitz continued to operate the business. Shortly after that date they agreed that it would be better to abandon their plan of operating this business as a corporation and planned to undertake to form a partnership for the conduct of the business. Several drafts of proposed partnership agreements were prepared over a

period of two or three months, but the parties were unable to agree on the terms and no such agreement was ever signed. Serious differences arose between these parties over the way in which the business was, and should be, carried on and they were also unable to raise sufficient money with which to manufacture goods and handle orders which were coming in. During October, 1942, as the court found, "the said business enterprise was without funds" and owed bills amounting to about $7,000, and by December, 1942, the indebtedness had increased to $12,638.88. As the court found, Gossett and Smith have not taken any part in conducting the business since October, 1942, and since that time the business has been conducted by Schabelitz. It further appears that Schabelitz borrowed on his own credit sufficient sums to pay off substantially all of the unpaid debts of the enterprise and that these amounts have since been repaid to him out of the business.

In June, 1943, Gossett and Smith brought an action in the United States District Court against Schabelitz seeking to dissolve a partnership known as "Schabelitz Research Laboratories, Inc." and asking for an accounting. By its judgment, which has become final, that court adjudged and decreed that no partnership existed between these parties and that "plaintiffs are not entitled to any decree dissolving any partnership, or to any decree dispelling the defendant from any partnership, or permitting the plaintiffs or either of them to continue the operation of any partnership, or for any partnership accounting."

Thereafter, this action was filed. The court found most of the facts above set forth and in addition made a number of findings to which brief reference may be made. It was found that the preorganization agreement of February 14, 1942, was executed with the intention of forming a corporation and having stock issued in accordance with its terms; that this agreement is a valid and binding agreement and was not made in violation of law; that by reason of said preorganization agreement and the subsequent filing of articles of incorporation of Schabelitz Research Laboratories, Inc., said corporation "came into being and became the equitable owner" of the property described in that agreement which was to be conveyed to the corporation by Schabelitz; that the corporation then "assumed control of the assets theretofore owned by the Schabelitz Research Laboratories, a partnership, and received and disbursed funds furnished by plaintiff Smith"; that while no property was transferred to the corporation by Schabelitz or by any one else Schabelitz has, by his acts and conduct, treated "said described property" as belonging to said corporation and is estopped to deny that this property is the property of the corporation; and that the corporation is the owner of the property described in the agreements of February 14 and July 24, 1942.

It was also found that, in entering into the purported agreement of July 24, 1942, the plaintiffs and the defendant conspired together to evade and violate the Corporate Securities Acts, Gen.Laws, Act 3814; that neither at that time nor later did they intend to apply to the corporation commissioner for any permit for the issuance of such stock; that they depended upon that purported agreement to obviate the necessity of any such permit; that this was a device by which these three parties attempted to effect a transfer of the interest of Morgan to Gossett; and that the transaction represented in said purported agreement of July 24, 1942, is illegal and void.

It was further found that on or before November, 1942, Smith advanced $8,500 for 17/37 of the corporate assets, Schabelitz turned over property of the value of $5,000 for 10/37 of the corporate assets, and Gossett advanced to the corporation $5,000 for 10/37 of its capital assets; that these contributions were made without a permit from the corporation commissioner; that in addition to such contributions Gossett advanced $278.04 to the corporation and Smith advanced to it $6,772.77; and that the corporation received these sums from these plaintiffs. As conclusions of law it was found that no partnership ever existed; that all of the parties are estopped to deny that the corporation is the owner of the property which was to be conveyed to the corporation under

the terms of the agreement of February 14, 1942; that the agreement of July 24, 1942, is illegal and void; that neither Smith, Gossett nor Schabelitz are entitled to any redress on account of any funds or property they contributed "for any share of the corporate assets", but that Gossett is entitled to recover $278.04 and Smith to recover $6,772.77, with interest, these being the amounts they contributed in excess of the amount of their subscriptions for stock in the corporation. Judgment was entered that Gossett and Smith recover these respective amounts from the corporation, that Schabelitz is estopped from denying that the corporation is the owner of all the property used in this business, that he has no right, title or interest in or to any of these properties, and that nothing contained in the judgment shall prejudice the right of any party to the action to later perfect his right to become a shareholder in the corporation. The defendant Schabelitz has appealed from the judgment contending, among other things, that the findings and judgment are not supported by the evidence and that the judgment is contrary to law.

[1] A number of the court's findings and conclusions are entirely unsupported by the evidence in the record. There is nothing in the agreement of July 24, 1942, which on its face discloses that it is illegal or in violation of the Corporate Securities Act. It specifically provided for the issuance of stock only when the same should be authorized by the commissioner of corporations. While it does not mention Morgan's interest not only was he to receive preferred stock, instead of common stock, but it does not appear that other arrangements had not been made which were satisfactory to him. And there is no other evidence that the parties did not intend to apply for a permit, as provided in that agreement, or that in entering into it they conspired to evade the Corporate Securities Act. The evidence discloses, without conflict, that at that time the parties did intend to secure a permit for the issuance of the stock.

[2] The finding that by reason of the preorganization agreement of February 14, 1942, and the subsequent filing of articles of incorporation, this corporation became the equitable owner of the property which Schabelitz had conditionally agreed to convey to the corporation, is entirely unsupported. The agreement to convey on certain conditions would not, if itself, constitute an equitable conveyance. The filing of articles of incorporation was but one step in meeting the conditions and was not sufficient, of itself, to pass any equitable interest in the property. The finding that the corporation then assumed control of the assets theretofore used in the business and received and disbursed funds supplied by Smith, is also without evidentiary support. While stationery may have been printed with the corporate name, and may have been "used in the trade", we are not here concerned with any one who may have been deceived thereby. As between the parties themselves, it merely appears that for some reason which is not disclosed they delayed the completion of the corporation proceedings, and the transfer of the various assets to it in return for stock. In the meantime they continued the existing business by at least an implied mutual agreement. No attempt was made to convey anything to the proposed corporation and the parties, as individuals, continued to carry on the business. At first the money advanced and used for carrying on the business was carried in a bank account under the name of "Robert T. Smith Special" and withdrawn as needed, and later was handled through another bank account in the name of "Schabelitz Research Laboratories", with a provision that checks should be signed by any two of the three parties, Smith, Schabelitz and Gossett, as individuals. There is no evidence that during the period in question Schabelitz, or any one else, by acts or conduct treated the property used in the business as belonging to the corporation. It appears that they all treated it merely as belonging to the business which they were conducting by mutual agreement. While the evidence indicates that these parties originally intended to complete the formation of the corporation, and that the business should eventually be conducted in that form, this is the most that appears, and even that idea was later abandoned. It

clearly appears that the business was conducted in exactly the same way, both before and after the corporate idea was abandoned. There is no evidence that the amounts paid in by these parties, which were paid at intervals over a period of about eight months, were paid "for corporate assets" under the two agreements, or that the amounts paid by Smith and Gossett in excess of their conditional preorganization subscriptions were on any different basis, with respect to legality, than the prior payments made by them. Some of these payments were made before the idea of completing the corporation to carry on the business was abandoned, and some thereafter. All were made for the purpose of keeping the business going, and there is no evidence that any were made as payment for corporate assets.

[3-5] While there may have been a de facto or a de jure corporation for some purposes, as the respondents contend, it not only clearly appears that no assets were turned over to that corporation but that the parties, by mutual agreement, very definitely intended to and did carry on the business during the period in question in some other form. Assuming that this was not a partnership, as established by the prior judgment in the federal court, it does not necessarily follow that the business was conducted as a corporation. While the relationship between these parties may have lacked some of the elements of a partnership, it was a joint venture in which each of them had rights and assumed obligations. Butler v. Union Trust Co., 178 Cal. 195, 172 P. 601, 602. In that case, the court said: "A joint adventure, however, is similar to a partnership, and, being of a similar nature, the right to an accounting of profits in accordance with the agreement therefor and the obligations growing out of such agreement between the parties are governed by the same rules of law. * * * Since the facts alleged and found entitled the plaintiff to an accounting for the purpose of determining what were the net profits of the venture, the fact that the agreement and transactions had between the parties did not, as found by the court, constitute a copartnership in the strict sense, is wholly immaterial." In the case before us, disregarding the findings which are unsupported by the evidence, the material facts found disclose a joint venture and called for an accounting, and the court should have so held. That accounting should cover the period from approximately February 1, 1942 to October 31, 1942, during which these parties by mutual agreement were carrying on this business together, and should include the interest, if any, of Morgan, whose exact position in the enterprise during that period does not very clearly appear in the record before us.

The judgment is reversed.

GRIFFIN, J., concurs.




74 Cal.App.2d 711

## SCHWARTZ v. SCHWARTZ.

Civ. 15238.

District Court of Appeal, Second District, Division 1, California.

May 28, 1946.

**1. Pleading ⇐35, 150**

A purported answer to cross-complaint was surplusage, where defendant filed only an answer containing general denial and separate affirmative defense without asking any affirmative relief.

**2. Pleading ⇐350(3)**

Where complaint stated a cause of action in husband for divorce on ground of extreme cruelty, wife was not entitled to judgment on the pleadings on ground that answer setting up separate maintenance decree previously obtained by wife established recrimination barring husband's cause of divorce, since answer could not be considered in passing on wife's motion for judgment on the pleadings. Civ.Code, §§ 111, 122.

**3. Pleading ⇐350(3)**

All facts alleged in complaint are admitted for the purposes of defendant's motion for judgment on the pleadings and court must determine whether such facts state a cause of action without considering any matter outside of complaint or any defense thereto in the answer, the motion being determined upon the same principles as a demurrer to complaint upon the same ground.

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Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action for divorce by David Schwartz against Sofie Schwartz. From a judgment on the pleadings in favor of defendant, plaintiff appeals.

Judgment reversed.

John B. Barta, of Los Angeles, for appellant.

Paul R. Matthews, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment on the pleadings in an action for divorce.

[1] The complaint by the husband is in the usual form and based on extreme cruelty. No specific dates are alleged. The answer is a general denial. A separate defense is also alleged setting forth the fact that several years before, the wife had filed an action for separate maintenance in which the husband had answered and, in a cross-complaint, had sought a divorce on the grounds of extreme cruelty; that the wife had prevailed in said action and that "said judgment among other things ordered and adjudged and decreed that said David Schwartz take nothing by his cross-complaint for divorce". No affirmative relief, admissible in such circumstances, is sought by the answer in the within action. The plaintiff filed what is entitled, "Answer to Cross-Complaint" wherein it is alleged that the course of conduct on the part of defendant wife, which constituted extreme cruelty, occurred since the entry of the judgment in the former action. Technically, the so-called "Answer to Cross-Complaint", is surplusage and out of place in the pleadings; there is no cross-complaint.

Shortly after the trial commenced and while the plaintiff was on the stand the Court commented as follows:

"That brings a question up that I wondered about as I read the pleadings. Now, you have a separation decree; you have not filed any action to change the award that is fixed by that decree. Here you are defending an action for divorce, and I have found nothing further than affirmative defenses and denials in the Answer that has been filed."

And later continued, "Now during the recess the Court called counsel's attention to the fact that it appears from the Answer of the defendant, and the Answer to that, which is headed 'Answer to "Cross-Complaint",' by plaintiff, and by the statement of counsel here, that this defendant was granted separate maintenance by Judge Kincaid; and it must have been because the plaintiff—this plaintiff—had been guilty of acts which constituted ground for divorce; and the plaintiff in that action did not seek the divorce but only separate maintenance. It therefore having been pleaded, and being an established fact, that it establishes recrimination in so far as this action is concerned; so that even if the plaintiff in this action was successful and established that the defendant had been guilty of extreme cruelty to him since October of 1943, that the Court would be forced to deny a decree of divorce to him, since section 111 of the Civil Code provides that 'Divorces must be denied upon showing'—among other things—'recrimination;' and sec. 122 provides that 'Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce.'" During the discussion, defendant's counsel moved for judgment on the pleadings, which was granted with the following comment by the Court and plaintiff's counsel:

"The Court: I will grant your motion, because I am convinced that under the pleadings, recrimination is admitted.

"Mr. Barta: Well, we couldn't deny that."

[2, 3] Although it appears likely, from an examination of the record, that defendant would have prevailed at the trial in any event (See Comfort v. Comfort, 17 Cal.2d 736, 112 P.2d 259), nevertheless, it was error for the court to grant the defendant's motion for a judgment on the pleadings. Upon such a motion, "the court cannot consider any matter outside of the complaint, or any defense thereto in the answer, but the motion is to be determined upon the same principles as would be a demurrer to the complaint upon the same ground. All the facts alleged in the complaint are admitted for the purposes of the motion, and the court is to determine whether these facts constitute a cause of action". Hibernia Savings & Loan Soc. v. Thornton, 117 Cal. 481, 482, 49 P. 573, 574. "But where judgment has been entered for defendants on the pleadings the sole question is whether the complaint states a cause of action." Union Flower Market, Ltd., v. Southern Cal. F. M., Inc., 10 Cal.2d 671, 673, 76 P.2d 503, 504.

There can be no question that all of the facts stated in the complaint in the within action state a cause of action.

The judgment therefore must be reversed and it is so ordered.

YORK, P.J., and WHITE, J., concur.




## JOHNSTON v. BOARD OF SUP'RS OF MARIN COUNTY et al. (ALIOTO, Intervener).*

No. 13000.

District Court of Appeal, First District, Division 1, California.

May 28, 1946.

Rehearing Denied June 27, 1946.

Hearing Granted July 24, 1946.

**1. Injunction ⇐135**

The granting or refusal to grant a temporary injunction is matter resting in sound discretion of trial court.

**2. Appeal and error ⇐954(1)**

On appeal, trial court's ruling on application for temporary injunction will not be disturbed in absence of a showing of abuse of discretion.

**3. Appeal and error ⇐954(1)**

Trial court's ruling on application for temporary injunction will be sustained if appellate court finds any reasonable support for discretion which trial court has exercised.

**4. Injunction ⇐135**

Where effect of proposed ordinance, if it became operative, would be to completely nullify vital provisions of existing zoning ordinance which had been enacted pursuant to and in conformity with mandatory terms of State Planning Act, but proposed ordinance allegedly had not been properly enacted, trial court acted within its discretionary powers in issuing temporary injunction to restrain county supervisors from taking any further proceedings in matter pending trial and determination of action on merits. Gen.Laws, Act 5211b, §§ 1, 2, 4–6, 9.

**5. Counties ⇐21½**

Where neither county zoning ordinance nor State Planning Act authorized county board of supervisors to reject or reverse decision of planning commission and direct issuance of a use permit after commission in lawful exercise of its powers had denied application therefor, action of majority members of county board in rejecting decision of planning board, which denied application, and directing issuance of a use permit, was illegal. Gen. Laws, Act 5211b, §§ 1, 2, 4–6, 9.

**6. Counties ⇐21½**

Where county zoning ordinance authorized county board of supervisors to approve or disapprove decision of planning commission in cases where the commission had directed the issuance of a use permit, but neither zoning ordinance nor State Planning Act, pursuant to which zoning ordinance was adopted, authorized county board to reject or reverse decision of commission and direct issuance of a use permit after commission in lawful exercise of its power had denied application

* Subsequent opinion 187 P.2d 686.

therefor, the maxim "exclusio unius est exclusio alterius" was applicable and the board did not have authority to reverse decision of commission denying issuance of permit. Gen.Laws, Act 5211b, §§ 1, 2, 4–6, 9.

**7. Counties ⇐21½**

The purpose of provision of State Planning Act regarding submission of matters to planning commission is to authorize legislative body of county to require officers thereof having jurisdiction over matters which might affect county planning and which are not covered by existing ordinance to submit such matters to commission for a report before officers act thereon, and the provision does not interfere with discretionary powers that may be exercised by the commission under provisions of zoning ordinance. Gen.Laws, Act 5211b, § 10.

**8. Statutes ⇐218**

The rule of contemporaneous construction may not be applied where the plain wording of statute calls for a different construction.

**9. Counties ⇐50**

Where State Planning Act reserved to county board of supervisors legislative power to enact and amend all zoning ordinances necessary to carry out the purpose of the act, provision of county zoning ordinance which precluded county board of commissioners from granting use permit after decision of planning commission denying application for permit was not invalid as depriving the county board of legislative power conferred on it by statute. Gen.Laws, Act 5211b, §§ 1, 2, 4–6, 9.

**10. Counties ⇐50**

Legislative power of county board of supervisors may not be legally delegated or renounced.

**11. Counties ⇐50**

The function of issuing a use permit pursuant to provisions of county zoning ordinance duly enacted by county board of supervisors involves a purely administrative act which may be delegated. Gen. Laws, Act 5211b, §§ 1, 2, 4–6, 9.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by B. G. Johnston against the Board of Supervisors of Marin County and others to restrain the supervisors of the county from taking any further proceedings toward the issuance of a use permit to construct and operate a fish cannery and reduction plant and to restrain the supervisors from taking further proceedings toward the enactment of an ordinance purporting to regulate the establishment and operation of reduction plants in the county and to repeal all existing ordinances and parts of ordinances in conflict therewith. Defendants Vito B. Alioto and Benicia Food Products Company were dismissed as defendants, and thereafter Vito B. Alioto, individually and doing business as the Benicia Food Products Company, intervened. From an order granting a temporary injunction, the defendants and intervener appeal.

Affirmed.

A. E. Bagshaw, Dist. Atty., and Harold Jos. Haley, Deputy Dist. Atty., both of San Rafael, for appellants Board of Supervisors and individual Supervisors (other than R. A. Thompson) and Geo. S Jones, County Clerk.

Natalie J. Holly, of San Rafael, for appellant R. A. Thompson.

George Olshausen, of San Francisco, for intervener and appellant.

Paul S. Marrin, Howard C. Ellis, and Sterling Carr, all of San Francisco, for respondent.

KNIGHT, Justice.

This is an appeal from an order granting a temporary injunction. The action was brought by a taxpayer and resident of Marin County to restrain the supervisors of that county from taking any further proceedings toward the issuance of a use permit to construct and operate a fish cannery and reduction plant at Waldo Point, on the westerly shore of Richardson Bay, after the county planning commission in the lawful exercise of the discretionary authority conferred upon it by the zoning laws governing in that county had con-

sidered and denied the application for the use permit; also to restrain the supervisors from taking further proceedings toward the enactment of an ordinance purporting to regulate the establishment, maintenance and operation of reduction plants in that county and to repeal all existing ordinances and parts of ordinances in conflict therewith. The proceedings of the board of supervisors complained of were taken by a three-fifths majority of the members of the board, the other two members having opposed the same.

The parties named as defendants and served with summons were the board of supervisors, the five members thereof, the county clerk, and Benicia Food Products Company, in whose behalf the application for the permit was filed. Later Vito B. Alioto, part owner of the Benicia Food Products Company, and who signed the application for the permit, was made a party defendant and served with summons. The order granting the temporary injunction was made after a hearing had in response to an order to show cause, and the matter was submitted for determination on a record consisting of the verified complaint, a demurrer and answer filed jointly by Benicia Food Products Company, Alioto and Supervisor Thompson; a demurrer filed jointly by the other members of the board of supervisors and the county clerk; and two affidavits. The several grounds of the two demurrers were that the complaint failed to state facts constituting a cause of action, misjoinder of two causes of action, and that the complaint contained two causes of action without separately stating them. The joint answer filed by Benicia Food Products Company Supervisor Thompson and Alioto, consisted mainly of admissions and denials of certain allegations of the complaint. One of the affidavits was made by Alioto and was devoted chiefly to averments as to the amount of damages he claimed he would suffer if the temporary injunction were issued; and the other affidavit was made by Attorney Natalie J. Holly, representing Supervisor Thompson and appearing also in the trial court as associate attorney for Alioto. Her affidavit sets forth excerpts from the minutes of the board of supervisors showing that on a few prior occasions the board had issued permits after denial of applications therefor by the county planning commission. At the hearing of the application for the temporary injunction the plaintiff dismissed as to the defendants Alioto and Benicia Food Products Company; whereupon those defendants asked for and were granted leave to come in as interveners, and they rested their opposition to the granting of injunctive relief on the demurrer and answer and the affidavits theretofore filed by them. On June 14, 1945, the trial court made its order directing the issuance of the temporary injunction upon the giving of indemnifying bonds in the amounts fixed by the court. Such bonds were furnished, and on June 29, 1945, the injunction was issued; whereupon the defendants and the interveners gave notice of appeal, and they present the appeal on a clerk's transcript.

The statutory background of the case and the underlying facts appearing from the record show the following: During the year 1937, the Legislature revised the then existing State Planning Act by amending nearly all of the sections thereof, adding two new ones and repealing a few others; and all of the changes so made have since remained in effect. See Act 5211b, Deering's General Laws; Stats. 1929, p. 1805; Stats.1937, p. 1817. Section 1 was amended to read: "Every city and every county shall adopt and establish as herein provided a master plan of said city and county, and official plans based thereon. Such plans are hereby declared to be established to conserve and promote the public health, safety and general welfare"; and section 2 as amended reads: "The legislative body of each city may, and of each county shall, create by ordinance a planning commission to consist of nine members, as follows: * * *" Then follows the set up for the selection and appointment of such members. Further on the act lays down a definite procedure that shall be followed in framing the ordinance, in the enactment thereof, and in making any subsequent changes therein. The procedure prescribed for the enactment of the ordinance provides that first a draft of the proposed ordinance shall be prepared and adopted by the planning commission; that

before its adoption the commission shall hold at least one public meeting, notice of which shall be given by newspaper publication; that after its adoption by the commission an attested copy shall be certified to the legislative body of the city or county, upon the receipt of which the legislative body, if it approves the same, shall adopt the proposed ordinance, but only after holding at least one public meeting, notice of which shall be given by newspaper publication. (See sections 4 to 6 inclusive of the act.) And in connection therewith section 6 provides: "* * * No change in or addition to the master plan or any part thereof, as adopted by the planning commission, shall be made by the legislative body in adopting the same until the said proposed change or addition shall have been referred to the planning commission for a report thereon and an attested copy of such report shall have been filed with the legislative body." A limitation of time is fixed within which the commission must make its report; otherwise it shall be deemed that it has approved such change or addition. Section 9 of the act deals with procedure relating to amendments and changes. It provides that the legislative body may, whenever and as often as it may deem fit for the public interest, change or add to the master plan as theretofore adopted by the commission, but that it shall first refer the proposed change or addition to the planning commission for a report thereon; and that before making such report the planning commission shall hold hearings and give notice thereof, in accordance with the procedure specified for the adoption by the planning commission of the master plan; and that if the commission fails to make such report within the time fixed by the section it will be deemed that the commission approved such change or addition.

In 1938 the County of Marin, complying with the mandatory terms of the state act, enacted Ordinance Number 264. It is based on the state master plan and sets up a comprehensive zoning system for the county covering all territory therein outside of incorporated cities and towns. By its provisions the county is zoned into various districts, including residential, commercial, light and heavy industrial, the uses to which the land lying within the various districts can be put are specified, and the county planning commission is made the administrative board to carry out the provisions and the aims and purposes of the ordinance and the state act. The ordinance also lays down a definite procedure that shall be followed in applying for and in granting use permits necessary to be obtained for operations of different kinds of businesses in certain districts.

Following the requirements of the procedure thus laid down and on February 7, 1945, the application was filed with the commission for the use permit to construct and operate the fish canning and reduction plant at Waldo Point, which lies within the territory embraced in district M-2 (heavy industrial). Section 11.19 of the ordinance declares: "The following regulations shall apply in all 'M–2' districts * * * (a) Uses Permitted: All uses not otherwise prohibited by law; provided, however, that none of the following uses shall be established in any 'M–2' district unless and until a use permit in each case shall first have been secured for such use: Distillation of bones * * * Dumps, Fat rendering * * * *Reduction, canning, processing or treatment of fish or of animal products of any kind* * * * All other uses similarly objectionable, in the opinion of the Planning Commission, by reason of odor, dust, smoke, fumes, gas or noise." (Italics added.)

Section 20 provides that use permits shall be issued under the same procedure as that specified in section 19 except that no public hearing need be held thereon if the planning commission deems such hearings unnecessary; and section 19 provides that at the hearing of the application, the applicant shall present a statement and adequate evidence in such form as the planning commission may require, showing that there are special circumstances or conditions applicable to the land, building or use referred to in the application; that the granting of the application is necessary for the preservation and enjoyment of substantial property rights; that it will not

materially affect adversely the health or safety of persons residing or working in the neighborhood of the property of the applicant and will not be materially detrimental to the public welfare or injurious to property or improvements in said neighborhood. Continuing, section 19 provides: "The Commission shall make its decision on the said application and shall report such decision to the Board of Supervisors. * * * No permit shall be issued under the provisions of this section unless and until a decision of the Planning Commission, as aforesaid, approving the same, is approved and confirmed by the Board of Supervisors." The section then provides: "* * * Upon receipt of such report, *if the decision of the Planning Commission approved the granting of the application,* the Board of Supervisors either shall, by resolution, approve and confirm said decision, whereupon the permit as applied for may issue; or shall refuse to approve and confirm such decision." (Italics added.) The parties hereto agree that under the provision last quoted the board of supervisors is authorized to approve the decision of the commission or to refuse approval thereof *in cases where the commission has granted the application for the use permit,* but that neither the ordinance nor the State Planning Act contains any provision authorizing the board to reject the commission's decision and thereupon to grant a use permit *in cases where the commission has denied the application therefor.*

In the present case the application for the use permit came on for hearing before the commission on February 23, 1945, at a public meeting, after due notice thereof, and the application was denied. On February 26, 1945, the commission transmitted its report and decision thereon to the board of supervisors, and on that same date the board ordered that consideration of the report and decision be postponed for 30 days to permit the members of the board to make an examination of the same. However, before the expiration of the 30 day period and on March 5, 1945, the board called a special meeting which was attended by a number of interested citizens; and at the conclusion of the meeting there was submitted to the board for adoption a proposed ordinance entitled "An ordinance of the County of Marin regulating the establishment, maintenance and operation of reduction plants, prohibiting the escape of offensive or obnoxious odors therefrom, providing penalties for the violation of any of the provisions hereof, and repealing all conflicting ordinances and parts of ordinances." Supervisor Thompson moved the adoption of the ordinance, and by a three to two vote the motion was carried; whereupon, for parlimentary reasons only, one of the supervisors who had cast a negative vote changed his vote to the affirmative and moved for a reconsideration, which resulted in postponing further action one week. Immediately after the disposal of the matter of the adoption of the proposed ordinance, Supervisor Thompson moved that the report and decision of the planning commission be rejected and that the application for the use permit to construct and operate the fish cannery and reduction plant at the location mentioned be granted, subject to the provisions of the proposed ordinance, which it will be noted was not then in effect. The motion was carried also by a three to two vote, whereupon the same parlimentary strategy was invoked to postpone further action for one week. Prior to the expiration of that time, however, and on March 10, 1945, the plaintiff B. G. Johnston brought this action for injunctive relief, alleging that the proceedings taken by the three-fifths majority of the board of supervisors on March 5, 1945, were, for the reasons hereinafter stated, illegal and void; that the construction and operation of a fish cannery and reduction plant at the location mentioned would constitute a nuisance, and that his property and other residential properties situate in that vicinity would be irreparably damaged thereby.

As shown by the allegations of the verified complaint, the cause of action set forth therein is based on two principal grounds: (1) That the action taken by the three-fifths majority of the board of supervisors on March 5, 1945, toward the enactment of the proposed ordinance was without any

legal authority and in direct violation of the provisions of the state act; and (2) that the proceedings taken by the three-fifths majority of the board in directing the issuance of the use permit after the planning commission had duly denied the application therefor were illegal and void for two reasons: (a) That they were taken without any authority of law and in violation of the provisions of the county ordinance, and (b) that Supervisor Thompson was disqualified from participating in any matter connected therewith, and that therefore since he cast the deciding vote to reject the commission's decision and to grant the use permit the affirmative action taken thereon is not supported by three legal votes.

[1-3] The law is well settled that the granting or refusal to grant a temporary injunction is a matter that rests in the sound discretion of the trial court, upon a consideration of all the circumstances of each case, and that on appeal its ruling will not be disturbed in the absence of a showing of abuse. In other words, its ruling will be sustained if the appellate court finds any reasonable support for the discretion which the trial court has exercised. See 14 Cal.Jur. p. 180, and cases cited therein. And in this connection it is held that, notwithstanding the contrary general rule, circumstances may justify the issuance of a temporary injunction regardless of absolute denials in the answer; and that to grant such an injunction against a nuisance upon sufficient allegations contained in a verified complaint cannot be said in all cases to constitute an abuse of discretion. Monterey Club v. Superior Court of Los Angeles, 48 Cal.App.2d 131, 119 P.2d 349.

[4] In the present case no abuse of discretion has been shown. On the contrary the circumstances disclosed by the record fully justified the trial court in granting the temporary injunction. Directing attention first to the proceedings taken by the majority members of the board on March 5, 1945, to enact the proposed ordinance, the provisions of the state act, as above pointed out, set up a complete and definite procedure that must be followed by the supervisors both in the enactment of the original zoning ordinance and in making any changes therein; and here the majority members of the board entirely ignored such provisions in the enactment of the proposed ordinance on March 5, 1945. As will be noted, the purpose of the proposed ordinance is expressed in its title, and as shown by the action taken thereunder on March 5, 1945, the majority members of the board construed its provisions as conferring upon the board the authority to reverse the commission's decision denying application for use permit to construct and operate fish canning and reduction plants and other uses similarly objectionable in the opinion of the commission in district M–2 of the county, and to issue permits therefor. It is apparent, therefore, that the effect of the proposed ordinance, if it became operative, would be to nullify completely vital provisions of the existing zoning ordinance which was enacted pursuant to and in conformity with the mandatory terms of the state act. Under such circumstances the trial court acted entirely within the scope of its discretionary powers in issuing the temporary injunction to restrain the supervisors from taking any further proceedings in the matter pending the trial and determination of the action on the merits.

[5] As to the second principal ground of complaint set forth in plaintiff's cause of action, it is equally clear that the action taken by the majority members of the board in rejecting the decision of the planning commission and directing the issuance of the use permit was illegal. As already shown the provisions of the existing zoning ordinance authorizes the board to approve or disapprove the decision of the planning commission in cases where the commission has directed the issuance of a use permit, but neither the ordinance nor the state act authorizes the board to reject or reverse the decision of the commission and direct the issuance of a use permit after the commission in the lawful exercise of its power had denied the application therefor. Nevertheless the majority members of the board usurped such authority.

[6] Appellants contend that properly construed the existing ordinance confers upon the commission only the limited authority to recommend the granting or refusal of use permits, and that the final decision in all cases rests with the supervisors regardless of the denial of the application therefor by the commission. In support of such contention it is argued that the mere absence from the ordinance of a provision conferring such power upon the supervisors does not deprive the board from exercising that power (citing Blevins v. Mullally, 22 Cal.App. 519, 135 P. 307; Sobey v. Molony, 40 Cal.App.2d 381, 104 P.2d 868; and Stanislaus Bridge Co. v. Horsley, 46 Cal. 108). The argument might have weight if as appellants contend there was merely an absence of such a provision from the ordinance; but that is not the situation presented. The ordinance goes on to state specifically in what cases the board may reverse the commission's decision, namely, where the commission has granted the application for the use permit; and that being so such specific provision constitutes the measure of the board's power. In other words the situation falls within the maxim "Expressio unius est exclusio alterius," which is applicable to and frequently invoked in cases involving statutory construction.

In further support of their contention that the authority conferred upon the commission is only advisory, appellants rely on an excerpt from the opinion rendered in Hopkins v. MacCulloch, 35 Cal.App.2d 442, 95 P.2d 950. The opinion in that case shows, however, that the provisions of the ordinance there under consideration were essentially different from those of the zoning ordinance here involved; consequently the language employed in the opinion is not here controlling. Admittedly under the provisions of the state act the present zoning ordinance can be amended so as to confer upon the supervisors the power it attempted to exercise, provided the procedure laid down in the state act is followed in adopting such an amendment; but until the ordinance is so legally amended the supervisors are bound by the provisions thereof as they now stand.

[7] Nor is there anything contained in section 10 of the state act which supports appellants' view that under the provisions of the existing ordinance the commission acts only in an advisory capacity. The heading of the section and the first sentence thereof read: "Submission *of other matters* to planning commission. The body creating such planning commission may, by general or special rule, provide for the reference of *any other matter* or class of matters to the planning commission before final action thereon by the public body or officer of said city, county, or city and county, having final authority thereon, with the provision that final action thereon shall not be taken until said planning commission has submitted its report thereon * * *." (Italics added.) From the foregoing it will be seen that the obvious purpose of the section is to authorize the legislative body of the city or county to require officers thereof having jurisdiction over matters which might affect county planning and which are not covered by the existing ordinance to submit such matters to the commission for a report before the officer acts upon the same. The section does not purport to interfere with the discretionary powers that may be exercised by the commission under the provisions of the existing ordinance.

[8] Appellants seek to invoke the rule of contemporaneous construction by pointing out that the excerpts from the board's minutes show that in two particular instances the board granted a permit after the commission had denied the application therefor (citing among other cases Los Angeles County v. Frisbie, 19 Cal.2d 634, 122 P.2d 526). However, it does not appear from the excerpts that in either of those instances the applicant as here applied for a permit to construct and operate a business falling within the class of those enumerated in section 11.19 of the ordinance. Moreover, it is apparent from reading the cases cited by appellants that the rule of contemporaneous construction may not be applied where, as here, the plain wording of the statute calls for a different construction.

[9-11] Finally, on this branch of the case, appellants contend that if the ordinance be construed as foreclosing the board from granting use permits after decision by the commission denying the same

it thus deprives the board from exercising the legislative power conferred upon it by statute; and that to that extent the ordinance is invalid; furthermore, that if at the time of the adoption of the zoning ordinance the supervisors then in office, by the terms of the ordinance, attempted to make the decision of the commission final in cases where the commission had denied an application for a use permit, the ordinance to that extent is void as constituting an illegal abdication of the legislative powers of the board. There is no merit in any of the points so made. The state act clearly reserves to the board the legislative power to enact and amend all ordinances necessary to carry out the purposes of the State Planning Act; and in the present case the board exercised such power in the enactment of the original ordinance. While it is true that the board's legislative power may not be legally delegated or renounced, it is obvious that the function of issuing a use permit pursuant to the provisions of a zoning ordinance duly enacted by the board of supervisors involves a purely administrative act, and not a legislative act; and appellant has not called attention to any authorities which hold that a board of supervisors may not, by ordinance, properly confer upon a commission or on officers the authority to perform purely administrative functions, provided, of course, the performance of those functions are not by law enjoined upon the board. As above stated, if the board becomes dissatisfied with the operation of the existing zoning ordinance, it has the power to make such changes therein as it deems fit, provided it follows the procedure prescribed in the state act.

Briefly, the charge of disqualification made against Supervisor Thompson was based on these facts: Throughout the proceedings had before the planning commission and the board of supervisors to obtain the use permit, Alioto and Benicia Food Products Company were represented by Attorney Natalie J. Holly. She is the wife of Supervisor Thompson and was so during the period of time covered by those proceedings. Respondent contends, therefore, that because of the existence of such marital relationship Supervisor Thompson under the community property law of this state had a direct interest in whatever earnings his wife received or might receive for the legal services performed by her in connection with obtaining the use permit, which operated to disqualify him from participating in the proceeding to determine whether or not the board should issue the use permit. At the commencement of the proceedings had before the board on March 5, 1945, respondent challenged the qualifications of Supervisor Thompson by making appropriate objections to his participating in any matter connected with the denial of the use permit; but the objections were overruled. In support of his contention that Supervisor Thompson had an interest in the subject matter of the proceeding that the board was about to hear and decide, respondent cites the case of Nielsen v. Richards, 75 Cal.App. 680, 243 A. 697; and in support of his contention that such interest disqualifies supervisor Thompson from participating in the proceeding involving the issuance of the use permit respondent cites and quotes from the case of Noble v. City of Palo Alto, 89 Cal.App. 47, 264 P. 529. The position taken by appellant is that in this state the question of disqualification is controlled by statute; and that sections 1090 and 1091 of the Government Code restrict such disqualifications to matters (1) involving contracts made by them in their official capacity, or by a body or board of which they were members; and (2) to purchases or sales made by them in their official capacity; and appellants contend therefore that since none of those situations were here involved, Supervisor Thompson was not disqualified. In reply to this latter contention respondent argues that the statute is not controlling, and that apart therefrom there is an old and well established legal doctrine having its origin in the common law and founded on public policy and sound morals, which declares that a public officer is disqualified from participating in any proceeding in which he is called upon to exercise a discretionary power and in which he has a personal interest, regardless of the nature of the subject matter involved;

and that such doctrine has been fully recognized by the courts of this state, citing Noble v. City of Palo Alto, supra, which quotes from a number of authorities from other jurisdictions; and numerous authorities are to be found holding that if the disqualified officer is the member of a board or an official body, and that his is the deciding vote, the action taken by the board is void. See note to 133 A.L.R. p. 1263.

Necessarily the question of disqualification opens up a broad field of inquiry for the reason that the provisions of sections 1090 and 1091 of the Government Code relied on by appellants are made to apply to "members of the Legislature, State, county, township and city officers"; and the legal doctrine which respondent seeks to invoke includes even a greater number of public officers. In the present case it is evident that the issue of disqualification was made part of respondent's cause of action as an alternative issue, which would become a controlling issue only in the event of a holding adverse to respondent on the other two issues which go to make up his cause of action. Since, therefore, on this appeal, those two other issues have been decided in respondent's favor, from which it follows that this court's decision thereon will constitute the law of the case and be binding on the parties at the trial on the merits, and in whatever trial court proceedings may be had leading up to the trial, there could be no useful purpose served in prolonging this opinion by indulging in a discussion of and deciding the alternative issue.

The remaining points appellants urge for reversal are without merit, and are not of sufficient importance to call for special attention.

The order granting the temporary injunction is affirmed.

PETERS, P. J., and WARD, J., concur.

28 Cal.2d 243

## CROUCH v. CROUCH et al.

L. A. 18870.

Supreme Court of California, in Bank.

May 24, 1946.

**1. Divorce ⇐62(1)**

Jurisdiction to grant a divorce rests on bona fide domicil, and where neither party is domiciled within the state, no divorce can validly be granted and all proceedings as well as the judgment are void.

**2. Divorce ⇐327**

A divorce decree rendered in one state may be impeached and denied recognition in another state on ground that neither of the parties had domicil at the divorce forum, notwithstanding recital in divorce decree of the jurisdictional fact of domicil or residence.

**3. Divorce ⇐327**

When a foreign divorce decree is relied on, and record shows a compliance with foreign law, a presumption of validity arises, and in absence of a successful attack on ground that foreign court had no jurisdiction, foreign decree will be recognized.

**4. Divorce ⇐327**

A foreign divorce decree may be collaterally impeached by extrinsic evidence showing that court pronouncing it did not have jurisdiction either of the parties or the subject matter.

**5. Divorce ⇐327**

A foreign divorce decree based on either personal or constructive service or even a personal appearance, may be attacked on ground that foreign court had no jurisdiction because petitioning party had not established a bona fide domicil.

**6. Divorce ⇐327**

In view of statute providing that any judicial record may be impeached by evidence of want of jurisdiction, collusion, or fraud, and statute providing that marriage is dissolved only by death or by judgment of court of competent jurisdiction decreeing a divorce, California courts are precluded from recognizing as valid a divorce based on a judgment of a court of a sister state or foreign country without jurisdiction. Code Civ.Proc. § 1916; Civ.Code, § 90.

**7. Divorce ⇐4**
**Marriage ⇐2**

A state has a constitutional right to declare and maintain a policy in regard to marriage and divorce or other family relationship, at least as to persons domiciled within its borders.

**8. Divorce ⇐327**

The fact that spouse being sued for divorce in a foreign state is unwilling or unable to travel across the country to dispute the issue of jurisdiction of the foreign court, or that no one is in position to protest before foreign decree is entered, or that a recital of jurisdiction is contained in the decree, should not be, of itself, a certificate of legal correctness for what has been done.

**9. Divorce ⇐327**

A Nevada divorce decree in favor of husband wherein the wife was personally served in California but did not appear in the Nevada courts was not entitled to "full faith and credit" in California so as to bar the wife's divorce suit there where the court found that the husband's domicil in Nevada was not bona fide. Code Civ. Proc. § 1916; Civ.Code, § 90; U.S.C.A. Const. art. 4, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Full Faith and Credit".

**10. Divorce ⇐184(4)**

Where appeal by wife from adverse decree in divorce suit was on judgment roll alone, Supreme Court presumed that finding as to husband's lack of good faith in establishing a Nevada domicil prior to obtaining Nevada divorce, was supported by the evidence.

SCHAUER and CARTER, JJ., dissenting.

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Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Suit by Edith M. Crouch against Ben E. Crouch for divorce and for a share of

community property. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment reversed.

Prior opinion, 149 P.2d 437.

Charles C. Montgomery, Jr., of Burbank, for appellant.

Peters & Peters, of Chico, for respondents.

EDMONDS, Justice.

In a suit for divorce and for a share of the community property, the wife's causes of action were held to be barred by a final decree of divorce rendered in favor of her husband in the State of Nevada. But the court found, as a fact, that at no time while the husband was in Nevada did he have any intention of becoming a resident of that state except for the purpose of obtaining a divorce, and the question for decision concerns the effect of the foreign decree under such circumstances.

The appeal is upon the judgment roll. In the complaint filed by Edith M. Crouch in March, 1942, she alleged that the separation between herself and her husband Ben E. Crouch, occurred in 1938; that he deserted her and is now living in this state. She also pleaded a cause of action upon the ground of cruelty, one upon the ground of adultery, and another in which she asserted that he had failed to provide for her. Mrs. Crouch also sought to enjoin the defendants from disposing of any community property in which she had any interest. Within a month before the complaint was filed, she alleged, her husband went to Nevada, "simulating a purported residence" there for the purpose of obtaining a divorce. She prayed for a divorce, an accounting of the community property, alimony, and attorney's fees. By answer the husband denied all of the wife's charges and pleaded as a defense to each cause of action that at the time of the filing of her complaint he was, and for some time prior thereto had been, a resident of Nevada where on May 4, 1942, he had obtained a decree of divorce from her.

Upon the issues framed by these pleadings the court found that each of the appellant's causes of action is barred by the decree of divorce obtained by Crouch in Nevada. But the court also found that at the time when Crouch filed his complaint and at the time of the rendition of judgment, he was not a bona fide resident of Nevada but a resident of California. Crouch entered Nevada, the findings continue, "solely for the purpose of obtaining a divorce from the plaintiff herein [and] * * * in so doing * * * [he abandoned his wife] without cause." He remained in Nevada "just long enough to obtain an apparent residence" there and then filed his action for divorce, obtained the decree in his favor, and returned to California. And, continued the trial court, "* * * at no time while defendant was in the state of Nevada did he have any intention of becoming a resident thereof save and except for the sole purpose of obtaining a divorce from this plaintiff." According to the findings, in the Nevada action there was "constructive service" upon Mrs. Crouch. At the trial of the present suit, her counsel admitted that there was no community property and the cause of action for a part of it was abandoned. By the determination that the decree of divorce obtained by Crouch in Nevada bars the present action, there was no occasion for a finding concerning alimony, but, so far as the record shows, Mrs. Crouch is continuing to assert her right to support.

The Nevada decree recites that "the defendant * * * [was] personally served with summons in the City of Glendale, County of Los Angeles, State of California," and, contrary to the trial court's finding, that "the plaintiff is a bona fide resident of the County of Washoe, State of Nevada." However, the findings of each court state that Mrs. Crouch did not appear in the Nevada action.

Under the findings of fact of the trial court, says the appellant, the decisions of the Supreme Court of the United States do not compel a holding that the divorce decree obtained in Nevada bars the present action in California. The principles laid down by that court, Mrs. Crouch asserts, have no effect upon the rule of decision in this state that the judgment of a sister state may be collaterally attacked for extrinsic fraud. In support of the determination in

his favor, Crouch declares that, as Mrs. Crouch was personally served with a copy of the complaint and of the summons in the foreign action, the courts of California must give full faith and credit to the Nevada decree and are required to recognize it as controlling the rights of the parties in the present litigation.

In Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273, the defendants were convicted of bigamy in the state court. At the time they went to Nevada to obtain divorces from their respective spouses, they were residents of North Carolina. After satisfying the residence requirement under the Nevada statute, each of them obtained a divorce. They were married in Nevada shortly after the divorces were granted and then returned to North Carolina where they lived together as husband and wife. There they were indicted for bigamy and found guilty by a jury. The state Supreme Court sustained the convictions. State v. Williams, 220 N.C. 445, 17 S.E.2d 769.

The judgments of conviction were reversed by the Supreme Court of the United States, which overruled Haddock v. Haddock, 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867, 5 Ann.Cas. 1. If either spouse is domiciled in a state where a divorce is granted upon constructive service, the court held, the divorce must be recognized in other states. But it was careful to point out that the decision did not apply to a situation such as that shown by the record now before this court, saying: "In the first place, we repeat that in this case we must assume that petitioners had a bona fide domicil in Nevada, not that the Nevada domicil was a sham. We thus have no question on the present record whether a divorce decree granted by the courts of one state to a resident as distinguished from a domiciliary is entitled to full faith and credit in another state. Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no bona fide domicil was acquired in Nevada." 317 U.S. at page 302, 63 S.Ct. at page 215, 87 L.Ed. 279, 143 A.L.R. 1273. The decision consistently has been applied in accordance with this reservation. See: Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366; Marshall v. Marshall, 69 Cal.App.2d 20, 157 P.2d 854; Davis v. Davis, Ohio App., 57 N.E.2d 703; Wilkes v. Wilkes, 245 Ala. 54, 16 So.2d 15; Atkins v. Atkins, 386 Ill. 345, 54 N.E.2d 488; Wolff v. Wolff, 134 N.J.Eq. 8, 34 A.2d 150; Melnick v. Melnick, 154 Pa. Super. 481, 36 A.2d 235; Koscove v. Koscove, 1945, 113 Colo. 317, 156 P.2d 696; Kraunz v. Kraunz, 183 Misc. 724, 51 N.Y. S.2d 433; Coe v. Coe, 1944, 316 Mass. 423, 55 N.E.2d 702; Bowditch v. Bowditch, 314 Mass. 410, 50 N.E.2d 65; Commonwealth ex rel Esenwein v. Esenwein, 348 Pa. 455, 35 A.2d 335; see cases cited in 157 A.L.R. 1399, supplementing annotation in 143 A.L.R. 1294.

In a second case arising out of the same divorces (Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366), the question was directly raised whether a Nevada decree must be given full faith and credit when North Carolina found that no bona fide domicil had been established in Nevada. The court ruled that a judgment of one state must be given full faith and credit in another state only if the court that rendered the original judgment had jurisdiction to do so; that North Carolina's determination that the libellants did not establish a bona fide domicil in Nevada sufficient to give its courts jurisdiction to render a divorce decree was warranted by the evidence; and that, under such circumstances, North Carolina was not bound to give full faith and credit to the Nevada decree. The judgments of conviction were affirmed.

In Esenwein v. Pennsylvania, 325 U.S. 279, 65 S.Ct. 1118, 89 L.Ed. 1608, 157 A.L.R. 1396, William F. Esenwein sought relief from an order requiring him to support May H. Esenwein, whom he had married some years before. Twice the petitioner had sought a divorce in Pennsylvania and each time failed to obtain a dissolution of his marriage. Later he went to Nevada and obtained a divorce after the minimum six weeks residence period. Shortly thereafter he left Nevada and became a resident of Ohio.

Petitioner then filed an application in Pennsylvania for relief from the support order. The application was denied upon the ground that petitioner did not have a bona fide domicil in Nevada when he obtained his decree of divorce. 348 Pa. 455, 35 A.2d 335. The United States Supreme Court, upon certiorari, affirmed the judgment, declaring that the state courts "were warranted in finding that the respondent sustained her burden of impeaching the foundation of the Nevada decree on the jurisdictional prerequisite of bona fide domicil." Esenwein v. Pennsylvania, 325 U.S. 279, 65 S.Ct. 1118, 1119, 89 L.Ed. 1608, 157 A.L.R. 1396.

Neither the second Williams case, supra, nor the Esenwein case, supra, necessarily controls the determination of the present controversy. Although these cases hold that one state need not give full faith and credit to a divorce decree rendered by a state which has neither jurisdiction of the parties nor subject matter, they do not decide that one state may not, if it wishes, recognize as valid a decree of another state. However, the decisions are significant for they point out, not only that a state has the "right collaterally to impeach a decree of divorce made in another state, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction" and that "jurisdiction * * * is founded on domicil," but also that if the findings of domicil by one state were conclusive in the state from which the successful litigant came, "the policy of each State in matters of most intimate concern could be subverted by the policy of every other State." Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, pages 1095, 1096, 89 L.Ed. 1577, 157 A.L.R. 1366.

[1] It is a well established rule that jurisdiction to grant a divorce rests upon bona fide domicil. Where neither party is domiciled within the state, no divorce can validly be granted and all proceedings, as well as the judgment, are void.

[2] Stated another way, a decree of divorce rendered in one state may be impeached and denied recognition in another upon the ground that neither of the parties had domicil at the divorce forum, and this is true notwithstanding the recital in the decree from the other state of the jurisdictional fact of domicil or residence. See: Beale, Conflict of Laws, vol. 1, §§ 74.3, 111.1 and cases cited therein; Goodrich, Conflict of Laws, 2d Ed., § 123; Rest., Conflict of Laws, § 111; 9 Cal.Jur. 815, 817. This principle has been recognized by the United States Supreme Court in recent decisions (Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366; Esenwein v. Pennsylvania, supra), and has been consistently followed by courts of other states. Reed v. State, Tex.Cr.App.1945, 187 S.W.2d 660; Atkins v. Atkins, supra; Davis v. Davis, supra; Wilkes v. Wilkes, supra; Wolff v. Wolff, supra; Melnick v. Melnick, supra; Koscove v. Koscove, supra; Usen, v. Usen, 136 Me. 480, 13 A.2d 738, 128 A.L.R. 1449; Howe v. Howe. 179 Va. 111, 18 S.E.2d 294; Adams v. Adams, 191 Ga. 537, 13 S.E.2d 173; Wright v. Wright, 1942, 350 Mo. 325, 165 S.W.2d 870; Ainscow v. Alexander, Del.Super.1944, 39 A.2d 54; Navarrette v. Joseph Laughlin, Inc., La.App.1944, 20 S.W.2d 313; Coe v. Coe, 1944, 316 Mass. 423, 55 N.E.2d 702; In re Lindgren's Estate, 293 N.Y. 18, 55 N.E.2d 849, 153 A.L.R. 936; Commonwealth ex rel. Esenwein v. Esenwein, 348 Pa. 455, 35 A.2d 335; Noffsinger v. Noffsinger, D.C.D.C.1943, 50 F.Supp. 810; and for a more complete list of cases see 157 A.L.R. 1399 supplementing annotation in 143 A.L.R. 1294.

[3-5] The rule of decision long followed in this state is that when a foreign divorce decree is relied upon, and the record shows compliance with the foreign law, a presumption of validity arises, and in the absence of a successful attack upon the ground that the foreign court had no jurisdiction, the foreign decree will be recognized here. However, by an equally well settled corollary of the rule, it is always competent to collaterally impeach a decree of divorce rendered in another state by extrinsic evidence showing that the court pronouncing it did not have jurisdiction either of the parties or the subject matter. Thus the decree may always be attacked upon the ground that the foreign

court had no jurisdiction because the petitioning party had not established a bona fide domicil. Kadello v. Kadello, 220 Cal. 1, 29 P.2d 171; Delanoy v. Delanoy, 216 Cal. 27, 13 P.2d 719, 86 A.L.R. 1321; Estate of Pusey, 180 Cal. 368, 181 P. 648; Estate of Pusey, 177 Cal. 367, 170 P. 846; Bruguiere v. Bruguiere, 172 Cal. 199, 155 P. 988, Ann.Cas.1917E, 122; Estate of Hancock, 156 Cal. 804, 106 P. 58, 134 Am.St.Rep. 177; In re James' Estate, 99 Cal. 374, 33 P. 1122, 37 Am.St.Rep. 60; Marshall v. Marshall, 69 Cal.App.2d 20, 157 P.2d 854; Brill v. Brill, 38 Cal.App.2d 741, 102 P.2d 534; Estate of Davis, 38 Cal.App.2d 579, 101 P.2d 761, 102 P.2d 545; Estate of McNutt, 36 Cal. App.2d 542, 98 P.2d 253; Estate of Bruneman, 32 Cal.App.2d 606, 90 P.2d 323; DuQuesnay v. Henderson, 24 Cal.App.2d 11, 74 P.2d 294; Wynne v. Wynne, 20 Cal. App.2d 131, 66 P.2d 467; Kegley v. Kegley, 16 Cal.App.2d 216, 60 P.2d 482; People v. Harlow, 9 Cal.App.2d 643, 50 P.2d 1052; Ryder v. Ryder, 2 Cal.App.2d 426, 37 P.2d 1069; Warren v. Warren, 127 Cal.App. 231, 15 P.2d 556; Broder v. Broder, 122 Cal.App. 296, 10 P.2d 182; Anthony v. Tarpley, 45 Cal.App. 72, 187 P. 779; Steinbroner v. Steinbroner, 30 Cal.App. 673, 159 P. 235; In re Culp, 2 Cal.App. 70, 83 P. 89. A decree based upon either personal or constructive service or even a personal appearance may be attacked upon this ground. Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020; Brill v. Brill, supra; Estate of Davis, supra; Estate of McNutt, supra; Estate of Bruneman, supra; Kegley v. Kegley, supra; Ryder v. Ryder, supra; Anthony v. Tarpley, supra; see: Roberts v. Roberts, 83 Cal.App. 345, 256 P. 826; Goodrich, Conflict of Laws, 2d Ed., § 123, and cases cited therein; Beale, Conflict of Laws, vol. 1, § 111.1.

[6] Section 1916 of the Code of Civil Procedure provides: "Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings." Civil Code, section 90, provides: "Marriage is dissolved only: One—By the death of one of the parties; or, Two—By the judgment of a court of competent jurisdiction decreeing a divorce of the parties." In view of these code provisions, once it is established that the court of a sister state or foreign country was without jurisdiction to render a valid decree of divorce, the courts of this state are precluded from recognizing as valid a dissolution of marriage based upon such a judgment. See: People v. Harlow, supra, 9 Cal.App.2d page 646, 50 P.2d 1052, and In re Culp, supra, 2 Cal.App. page 81, 83 P. 89.

[7-9] A state undoubtedly has a constitutional right to declare and maintain a policy in regard to marriage and divorce or any other family relationship, at least as to persons domiciled within its borders. And to hold that every divorce decree must be recognized as valid here because our social state, generally recognizes divorce and the legality of remarriage would be to disregard our own marital policy as established by the Legislature. Also, the state is vitally concerned with the welfare of the deserted wife or children within its borders, and the fact that a spouse is unwilling or unable to travel across the country to dispute the issue of jurisdiction, or that no one is in a position to protest before the foreign decree is entered, or that a recital of jurisdiction is contained in the decree should not be, of itself, a certificate of legal correctness for what has been done. Delanoy v. Delanoy, supra, 216 Cal. page 35, 13 P.2d 719; Rehfuss v. Rehfuss, supra, 169 Cal. page 92, 145 P. 1020; Kegley v. Kegley, supra, 16 Cal.App.2d page 221, 60 P.2d 482; Howe v. Howe, supra, 179 Va. page 118, 18 S.E.2d 294; Usen v. Usen, supra; see: Powell, And Repent at Leisure, 58 Harv.L.Rev. 930; Williams v. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366; Radin, The Authenticated Full Faith and Credit Clause, 39 Ill.L.Rev. 1; Rodman, Bases of Divorce Jurisdiction, 39 Ill.L.Rev. 343; Goodrich, Conflict of Laws, 2d Ed., § 123; Beale, Conflict of Laws, vol. 1, § 110.1.

By the preliminary recitals of the findings of fact, it appears that after the court "heard testimony" and "examined proofs offered by the plaintiff," on its own motion it "refused to hear further evidence."

What this further evidence was or by whom it was offered is not shown in the record. However, in his brief, the respondent states that he was called as a witness and testified for the appellant under the provisions of section 2055 of the Code of Civil Procedure. During his examination, it is said, upon the introduction in evidence of the final decree of divorce rendered in Neveda, the court "halted the trial" and decided that the determination in the prior action was decisive of the issues presented by Mrs. Crouch's complaint.

[10] The basis for the ruling upon the introduction of further evidence is made clear by the court's decision. It concluded, as a matter of law, that even if the respondent's domicil in Nevada was not bona fide, the decree of divorce entered in that state is a bar to the present action. As the appeal is upon the judgment roll alone, in conformity with the general rule, it will be presumed that the finding as to the respondent's lack of good faith in establishing a Nevada domicil is supported by the evidence. If he was not given an opportunity to present evidence in addition to his own testimony as an adverse witness, the ruling was not prejudicial for the judgment was in his favor. In the event of another trial, unquestionably the court will receive such admissible evidence as may be offered by each of the parties upon the issue of the bona fides of the respondent's Nevada domicil.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent from the majority opinion and judgment insofar as concerns the discussion and holding as to the lack of finality of the Nevada decree in respect to the marital status of the parties, and am of the view that the judgment should be affirmed insofar as it determines the status of the parties to be as adjudicated in Nevada, but I believe that such part, and such part only, of the judgment as forthwith denies plaintiff any support from defendant should be reversed and remanded to the trial court for a new trial solely on the issue of plaintiff's right, if any, to support from defendant.

I view as unsound in principle and obnoxious to our social order the proposition, today espoused by a majority of this court, that California shall accord substantially no faith or credit to the judgment of the court of a sister state admittedly valid therein. The federal Constitution still contains the language of section 1, article IV. That the proposition may be limited to a judgment determining marital status does not make the vice inconsequential. As acknowledged by the majority opinion, the decision of the Supreme Court in Williams v. North Carolina (1945), 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366 (the second Williams case), does not compel such a commitment. The choice is made by us. I should much prefer to see California heed the philosophy and follow the views expressed by Justices Rutledge and Black (Justice Black's opinion is concurred in by Justice Douglas) in their dissenting opinions in the mentioned case. Such dissenting opinions seem to me to emblazon their conclusion with clarity of thought and language and integrity of principle which are outstanding among all discussions of the subject. And, remarkably enough, they simply urge that a clear constitutional mandate be upheld. The application of their views to the case at hand appears from the facts hereinafter recited and from the portions of the opinions quoted.

The judgment roll in the case before us shows that the plaintiff was personally served, in California, with the summons in the earlier Nevada action and that the Nevada court found as a fact "that the plaintiff [defendant in this action] is a bona fide resident of the County of Washoe, State of Nevada." There is no finding that the Nevada court was the victim of fraud or that the evidence before that court did not as a matter of law support the finding it made. If the Nevada decree were shown to be invalid *under Nevada law* we should have an entirely different situation. But that is not the case. The Nevada court's findings and

judgment remain unimpaired and fully operative in the State of Nevada and the California court in this case has expressly adjudicated "That the final decree of divorce obtained by the defendant * * * from the plaintiff * * * in * * * the State of Nevada * * * is valid." The court here has simply assumed to relitigate between the same parties, one of the identical issues which was litigated in the Nevada court; i.e., the issue of residence or domicile of a party. And such relitigation is indulged in not to determine whether the residence of the party in Nevada was bona fide within the concept of Nevada law and social policy but whether such residence in Nevada was bona fide in Nevada within the concept of a California judge and California's laws and policy. The mere incident that the California court reached a different determination upon such evidence as it received (whether the same or different) touching the issue of fact as to domicile wholly fails to solve the constitutional question and certainly not the social problem. The Nevada court, within the concept of that court and that state's law and social policy, had jurisdiction of the cause and over the party who submitted his status to its adjudication. The defendant there (plaintiff here) was not denied due process.

It seems to me that, as suggested by Justice Douglas in his concurring opinion in the Esenwein case (Esenwein v. Pennsylvania (1945), 325 U.S. 279, 65 S.Ct. 1118, 1119, 89 L.Ed. 1608, 157 A.L.R. 1396), there is a "basic difference between the problem of marital capacity and the problem of support" and that in an action for monetary support a plaintiff *upon that theory* and under certain circumstances could recover from a defendant who had procured a decree in another state. Thus, we are confronted with two problems in this case: (1) we must squarely face the question of the quantum of faith and credit, if any, to be accorded an adjudication of marital status made by the court of, and fully valid in, another state; (2) we must decide what, if any, rights to support exist in favor of a former spouse of one who has severed the marital ties by a divorce secured in another state.

### The Marital Status

In connection with the first problem—that of marital status—we must consider, denuded of confusing qualifications, the stark question as to whether California shall accord full faith and credit to the Nevada judgment, fully valid in that state, or shall reexamine and retry the basic factual issue of domicile. That issue, the majority opinion holds, shall be retried in California not to determine whether the standard concept of domicile acceptable to Nevada, and upon which she has full authority to accord state citizenship rights, was established, but whether a concept ordained for Nevada by California (in the estimation of the trier of fact), as to citizens moving to Nevada from other states, was shown in Nevada. And furthermore, the majority hold, the question to be tried is not whether the evidence presented to the Nevada court was sufficient or insufficient as a matter of law to sustain the finding it made, nor whether there was fraud upon the Nevada court, extrinsic or intrinsic (the record here reveals no extrinsic fraud), but the proceeding here is simply a trial de novo between the same parties, upon the same cause—their marital status—in a different jurisdiction which has a different standard or concept of legal residence.

The holding in this case may also result in nullifying, in many cases, the effect of section 63 of the Civil Code of California, which provides that "All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted are valid in this state." This section has been upheld and applied by this court. (McDonald v. McDonald (1936), 6 Cal.2d 457, 459, 58 P.2d 163, 104 A.L.R. 1290.) The defendant in this case, who is legally divorced in Nevada, could contract a valid marriage, in that state. If he brought his Nevada wife to California, would the majority of this court hold that he had two legal wives in California? Or would they refuse to apply section 63 and hold him guilty of bigamy? What would be the status in California of his children born of the Nevada marriage? These are questions which adherence to the constitutional mandate would

preclude from arising or would answer but which the majority holding tends to engender.

Our social state generally recognizes divorce and the legality of remarriage. It is reported that there are approximately five million divorced persons scattered throughout the forty-eight states. It seems to me that if the status of those persons is to be kept socially tolerable it should be accorded a high degree of stability and be legally ascertainable by a rule of law, applicable alike in all states to all persons within the class, rather than determinable by individual whimsy of judge or jury in each state in a conclusion based on indirect evidence as to a subjective fact.

It is said that domicile depends upon intent. Only the possessor of the intent can give direct evidence of it. It is essentially intangible. Once fixed it may perdure for the full span of a life or it may shift and reshift as quickly as sequent thoughts. The one may be no less real than the other. Neither is susceptible of conclusive proof, hence, courts accept what we term legal proof. Aside from the direct testimony of the party, circumstantial evidence —such as physical presence in a locality, ownership of land, etc.—is the only means of legal proof. Legal proof acceptable to Nevada, was established by the defendant here in his Nevada action.

Section 1, amendment XIV, of the United States Constitution declares that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States *and of the State wherein they reside.*" (Italics added.) No definition of the word "reside" is provided. No law has been suggested as precluding Nevada from extending state citizenship rights to any United States citizen who meets her requirements, nor as precluding any such person from claiming and exercising such rights. It is not disputed that Nevada's residence requirements for divorce, so far as physical presence within the state for the prescribed time are concerned, were met by the defendant. And the Nevada court, upon competent evidence, in a proceeding not even suggested to be vitiated by extrinsic fraud, found that defendant entertained the required intent. It should not lie within the power of a court of another state, under such circumstances, to relitigate that nebulous question which in its very nature can frequently, if not always, be open to conflicting inferences but never to conclusive proof. The majority holding means that no person divorced in another jurisdiction (apparently whether in a default or contested proceeding) can be certain of his status in California until the issue of domicile has been relitigated here. The majority opinion does not purport to limit its ruling to California citizens who undertake to establish residence in Nevada; it appears to base its holding on a finding of the fact trier that in his estimation, defendant was not a legal resident of Nevada. And if the rule is sound as to a Nevada divorce it must be equally applicable to a divorce granted in any other state or country. Whether the residence requirement of a state be one month or five years can make no difference. The physical residence requirement may be fully met, as it was here, yet that nebulous question of intent can always be retried. The obnoxious consequences to the social order of such a rule are self-evident.

The masterful protests of Justices Rutledge and Black as voiced in their dissenting opinions in Williams v. North Carolina (1945), supra, 65 S.Ct. 1092, 1101 and 1109, obviously do not possess the power of law today but they enunciate realistic principles of reason and philosophy which we may hope will prevail when the time comes that the nation or the states will relieve our divorced citizens from the intolerable uncertainties of their present status and solve the problems which seem to me to be created and left unanswered by the majority opinion in that case and which recur, in one form, in this case.

Mr. Justice Rutledge in dissenting says (page 1101 of 65 S.Ct.): "Once again the ghost of 'unitary domicil' returns on its perpetual round, in the guise of 'jurisdictional fact,' to upset judgments, marriages, divorces, undermine the relations founded upon them, and make this Court the unwilling and uncertain arbiter between the concededly valid laws and de-

crees of sister states. From Bell and Andrews to Davis [Bell v. Bell, 181 U.S. 175, 21 S.Ct. 551, 45 L.Ed. 804; Andrews v. Andrews, 188 U.S. 14, 23 S.Ct. 237, 47 L. Ed. 366; Davis v. Davis, 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed. 26, 118 A.L.R. 1518] to Haddock to Williams and now back to Haddock and Davis through Williams again—is the maze the Court has travelled in a domiciliary wilderness, only to come out with no settled constitutional policy where one is needed most. * * *

"Were all judgments given the same infirmity, the full faith and credit clause would be only a dead constitutional letter. * * *

"I.

"What, exactly are the effects of the decision? The Court is careful not to say that Nevada's judgment is not valid in Nevada. To repeat, the Court could not so declare it, unless a different test applies to sustain that judgment than supports North Carolina's. Presumably the same standard applies to both; and each state accordingly is free to follow its own policy, wherever the evidence, whether the same or different, permits conflicting inferences of domicil, as it always does when the question becomes important. * * *

"[Page 1103 of 65 S.Ct.] Every divorce, wherever granted, whether upon a residence of six weeks, six months or six years, may now be re-examined by every other state, upon the same or different evidence, to redetermine the 'jurisdictional fact,' always the ultimate conclusion of 'domicil.' * * * Any decree, granted after any length of time, upon any ground for divorce, and however solid the proof, may be reexamined either by 'the state of domiciliary origin' or by any other state, as the case uncertainly may be. And all that is needed, to disregard it, is *some* evidence from which a jury reasonably may conclude there was no domiciliary intent when the decree was rendered. * * *

"II.

"* * * [Page 1106 of 65 S.Ct.] By every test remaining effective, and not disputed, Nevada had power to alter the petitioner's marital status. She made the alteration. If it is valid, neither North Carolina [nor California] nor we are free to qualify it by saying it shall not be effective there, while it is effective in Nevada, and stands without impeachment for ineffectiveness there. * * *

"It is exactly for the situation where state policies differ that the clause and the legislation were intended. Without such differences, the need for constitutional limitation was hardly one of magnitude. * * *

"III

"* * * [Page 1107 of 65 S.Ct.] Domicil, as a substantive concept, steadily reflects neither a policy of permanence nor one of transiency. It rather reflects both inconstantly. The very name gives forth the idea of home with all its ancient associations of permanence. But 'home' in the modern world is often a trailer or a tourist camp. Automobiles, nation-wide business and multiple family dwelling units have deprived the institution, though not the idea, of its former general fixation to soil and locality. But, beyond this, 'home' in the domiciliary sense can be changed in the twinkling of an eye, the time it takes a man to make up his mind to remain where he is when he is away from home. He need do no more than decide, by a flash of thought to stay 'either permanently or for an indefinite or unlimited length of time.' No other connection of permanence is required. All of his belongings, his business, his family, his established interests and intimate relations may remain where they have always been. Yet if he is but physically present elsewhere, without even bag or baggage, and undergoes the mental flash, in a moment he has created a new domicil though hardly a new home.

"Domicil thus combines the essentially contradictory elements of permanence and instantaneous charge. No legal conception, save possibly 'jurisdiction,' of which it is an elusive substratum, affords such possibilities for uncertain application. The only thing certain about it, beyond its uncertainty, is that one must travel to change his domicil. But he may travel without changing it, even remain for a lifetime in his new place of abode without doing so. Apart from the necessity for travel, hardly evi-

dentiary of stabilized relationship in a transient age, the criterion comes down to a purely subjective mental state, related to remaining for a length of time never yet defined with clarity. * * *

"[Page 1109 of 65 S.Ct.] I therefore dissent from the judgment which, in my opinion, has permitted North Carolina at her substantially unfettered will to deny all faith and credit to the Nevada decree, without in any way impeaching or attempting to impeach that judgment's constitutional validity. But if she is not to be required thus to give the faith and credit due, in my opinion she should not be allowed to deny it by any standard of proof which is less than generally is required to overturn or disregard a judgment upon direct attack. Cf. Schneiderman v. United States, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796. The solemnity of the judicial act and the very minimum of 'respect' due the action of a sister state should compel adherence to this standard, though doing so would not give the *full* faith and credit which the Constitution commands. To approximate the constitutional policy would be better than to nullify it."

Mr. Justice Black, with whom Mr. Justice Douglas concurs, says (page 1110 of 65 S.Ct.): "Statistics indicate that approximately five million divorced persons are scattered throughout the forty-eight states. More than 85% of these divorces were granted in uncontested proceedings. Not one of this latter group can now retain any feeling of security in his divorce decree. Ever present will be the danger of criminal prosecution and harassment.

"All these decrees were granted by state courts. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, and cases following it, recognized the obvious truth, that rules of law laid down by state courts are binding. These judicial 'laws' are represented by decrees, judgments and court opinions. Today's opinion, however, undermines and makes uncertain the validity of every uncontested divorce decree. It wipes out every semblance of their finality and decisiveness. It achieves what the Court terms the 'desirable effect' of providing the 'same' quality to *every* divorce decree, 'wherever the question arises'—it endows them all alike with the 'same' instability and precariousness. The result is to classify divorced persons in a distinctive and invidious category. A year ago, a majority of this Court in a workmen's compensation case declared that the Full Faith and Credit Clause of the Constitution was a 'nationally unifying force'; today, as to divorce decrees, that clause * * * has become a nationally disruptive force. Uncontested divorce decrees are thus so degraded that a person who marries in reliance upon them can be sent to jail. * * *

"[Page 1111 of 65 S.Ct.] The petitioners were married in Nevada. North Carolina has sentenced them to prison for living together as husband and wife in North Carolina. This Court today affirms those sentences without a determination that the Nevada marriage was invalid under that State's laws. This holding can be supported, if at all, only on one of two grounds: (1) North Carolina has extraterritorial power to regulate marriages within Nevada's territorial boundaries, or (2) North Carolina can punish people who live together in that state as husband and wife even though they have been validly married in Nevada. A holding based on either of these two grounds encroaches upon the general principle recognized by this Court that a marriage validly consummated under one state's laws is valid in every other state. If the Court is today abandoning that principle, it takes away from the states a large part of their hitherto plenary control over the institution of marriage. A further consequence is to subject people to criminal prosecutions for adultery and bigamy merely because they exercise their constitutional right to pass from a state in which they were validly married into another state which refuses to recognize their marriage. Such a consequence runs counter to the basic guarantees of our federal union. Edwards v. California, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119. * * *

"[Page 1112 of 65 S.Ct.] The Court permits North Carolina to disregard the decrees on the following line of reasoning. No state need give full faith and credit to

a 'void' decree. A decree rendered by a court without 'jurisdiction' is 'void.' No state court has 'jurisdiction' to grant a divorce unless one of the parties is 'domiciled' in the state. The North Carolina court has decided that these petitioners had no 'domicile' in Nevada. Therefore, the Nevada court had no 'jurisdiction,' the decrees are 'void,' and North Carolina need not give them faith or credit. * * *

"[Page 1113 of 65 S.Ct.] The Constitution provides that 'Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the *effect thereof.*' (Emphasis added.) Acting pursuant to this constitutional authority, Congress in 1790 declared what law should govern and what 'Effect' should be given the judgments of state courts. That statute is still the law. Its command is that they 'shall have such faith and credit given to them * * * as they have by law or usage in the courts of the State from which they are taken.' 28 U.S.C. 687, 28 U.S.C.A. § 687. If, as the Court today implies, divorce decrees should be given less effect than other court judgments, Congress alone has the constitutional power to say so. We should not attempt to solve the 'divorce problem' by constitutional interpretation. At least, until Congress has commanded a different 'Effect' for divorces granted on a short sojourn within a state, we should stay our hands. A proper respect for the Constitution and the Congress would seem to me to require that we leave this problem where the Constitution did. If we follow that course North Carolina cannot be permitted to disregard the Nevada decrees without passing upon the 'faith and credit' which Nevada itself would give to them under its own 'law or usage.' * * * No 'law or usage' of Nevada has been pointed out to us which would indicate that Nevada would, under any circumstances, consider its decrees so 'void' as to warrant imprisoning those who have remarried in reliance upon such existing and unannulled decrees. * * *

"[Page 1117 of 65 S.Ct.] The Court's unjustifiable devitalization of the Full Faith and Credit Clause and the Act passed pursuant to it creates a situation which makes the North Carolina statute [and that of California and all similar statutes of other states] an inescapable trap for any person who places the slightest reliance on another state's divorce decree—a situation which a proper interpretation of the federal question would avoid. * * *

"[Page 1118 of 65 S.Ct.] In earlier times, some Rulers placed their criminal laws where the common man could not see them, in order that he might be entrapped into their violation. Others imposed standards of conduct impossible of achievement to the end that those obnoxious to the ruling powers might be convicted under the forms of law. No one of them ever provided a more certain entrapment, than a statute which prescribes a penitentiary punishment for nothing more than a layman's failure to prophesy what a judge or jury will do. This Court's decision of a federal question today does just that." And the decision of the majority in this court today in California does just that.

The Right to Support

In this state it is declared by statute that "Husband and wife contract towards each other obligations of mutual respect, fidelity, and *support.*" (Civ.Code, § 155; Italics added.) In addition, a thing in action (i.e., a right of action against another) is personal property (Civ.Code, § 14), and, as this court observed in Ponsonby v. Sacramento Suburban Fruit Lands Co. (1930), 210 Cal. 229, 232, 291 P. 167, 168, "The term [property] is a generic one * * *. When unqualified the term is sufficiently comprehensive to include every species of estate, both real and personal, whether choate or inchoate [citations], whether corporeal or incorporeal [citations]. The word is sometimes used in the sense of 'estate.' * * *" Further with respect to property, it is stated in 50 Corpus Juris, pages 736–738, that "Generally, the subjects of property comprise all valuable rights or interests protected by law. * * * In the broad sense of the term, 'property'

includes * * * choses in action. * * * In modern legal systems, property includes practically all valuable rights. The term is indicative and descriptive of every possible interest which a person can have, extends to every species of valuable right or interest, and comprises a vast variety of rights. The right to be protected in a person's privileges belonging to him as an individual or secured to him as a member of the commonwealth is property, as is any valuable interest in or to any object of value that a person may lawfully acquire or hold." (Cited in Scott v. McPheeters (1939), 33 Cal.App.2d 629, 632, 92 P.2d 678, 93 P.2d 562.)

It is elementary constitutional law that a court of one state cannot render a personal judgment against one who is a nonresident and who has not been personally served within the state or appeared in the action, nor can such court cut off the property rights existing without the state, of such nonresident. (See 5 Cal.Jur. § 223, pp. 873, 874; 14 Cal.Jur. § 6, pp. 860–862; 42 Am.Jur. §§ 67, 73–77, pp. 56, 62–76.) And yet that is exactly the effect which the judgment of the trial court herein would accord to the Nevada divorce decree secured by defendant. Although plaintiff in her complaint pleads four separate causes of action for support as well as for divorce against defendant, the trial court made no findings as to the truth or merit of any of them, but simply found "that each of them are barred by" defendant's Nevada decree. It seems to me that regardless of the efficacy, or lack thereof, of such decree to fix the marital status of the parties, plaintiff is entitled to an adjudication by the courts of this state in accordance with our laws as to any right of support she may have had against defendant as of the date of, and preceding, the Nevada decree. (See concurring opinion in De Young v. De Young (1946), 27 Cal.2d 521, 165 P.2d 457.) If, regardless of the Nevada decree, the court finds that plaintiff is entitled to such support, then it should be awarded to her.

Public policy would also, it appears, be supported by such a procedure. Although, as indicated hereinabove, it is my view that it is in the interests of such policy that a decree of divorce rendered under the circumstances here shown be accorded full faith and credit in every state of the union insofar as concerns *marital status,* it seems equally apparent that public policy would likewise be served by refusing to recognize such decree (in a proceeding not having personal jurisdiction over the defendant therein) as cutting off the right to support which then and theretofore existed in favor of a resident of this state. This state has itself assumed a duty of support towards indigent persons and has, in order to relieve itself of certain of the burdens incident to the granting of relief, undertaken to enforce support from those who by law are made responsible for such persons. (Welf. & Inst.Code, §§ 2400–2615.) To permit the courts of another state to cut off that responsibility by means of constructive service of process in an action against a resident of California would seem to me to be both unconstitutional insofar as concerns the rights of such resident, and contrary to the public policy and interests of this state.

It is, therefore, my opinion that regardless of the determination made concerning the effect of the Nevada decree upon the marital status of the parties, plaintiff is entitled to have the merits of her claimed right of support from defendant litigated by California courts.

It should be noted, in conclusion, that the findings of the trial court in this case state as follows: "and the court having heard testimony and having examined proofs offerred by the plaintiff; and the court *on its own motion having refused to hear further evidence;* and the court being fully advised in the premises now makes its Findings of Fact as follows: * * *." (Italics added.) Then appears the finding, among others, that "defendant herein was not a bona fide resident of the State of Nevada" when he sought and secured the Nevada divorce decree. It appears to me that under such circumstances; i.e., where the judgment roll establishes that the trial court denied defendant an opportunity to present evidence in his own behalf, we should not indulge the presumption that the finding against defendant on the issue of

his Nevada residence was supported by the evidence. (See O'Connell v. Behan (1912), 19 Cal.App. 111, 118, 124 P. 1038.) Nevertheless, it is in reliance upon such presumption and such finding that the majority opinion bases its reversal of the trial court's judgment.

For the reasons above stated the judgment should be affirmed insofar as concerns the marital status of the parties but that portion, and that portion only, of the judgment which denies plaintiff support from defendent should be reversed and the cause as to such issue only, remanded to the trial court for a new trial.

CARTER, J., concurs.




28 Cal.2d 282

**BRANDENBURG v. PACIFIC GAS & ELECTRIC CO. et al.**

**Sac. 5777.**

Supreme Court of California, in Bank.

May 31, 1946.

**1. Judgment ⇐199(3)**

A motion for judgment notwithstanding verdict should be granted only when it appears from full and fair consideration of whole evidence, viewed in light most favorable to party securing verdict, that there is no substantial evidence to support verdict, and, if there is any substantial evidence or reasonable inferences to be drawn therefrom in support of verdict, motion should be denied. Code Civ.Proc. § 629.

**2. Carriers ⇐303(9)**

The standard of care required from streetcar company and its employees with regard to dangers from turning car is not absolute, but depends upon surrounding circumstances, and their conduct must be viewed as a whole in light of all circumstances from which negligence might be inferred, especially where several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the other.

**3. Carriers ⇐303(9)**

The standard of care to be exercised by streetcar company and its employees with regard to dangers from turning car must be commensurate to the dangers of the business and hazards at place of injury.

**4. Negligence ⇐10**

A decisive consideration in determining whether act was negligent is whether surrounding circumstances made it reasonably foreseeable that there was a risk of injury.

**5. Carriers ⇐320(25)**
**Street railroads ⇐117(11)**

Whether motorman of streetcar, which was about to make a left turn, was negligent in failing to warn passengers alighting in safety zone of danger of protruding rear end of car as car made turn or in failing to see that passengers were safely beyond space car would occupy as it made turn before he proceeded to move car around curve, and whether street railroad was negligent in failing to instruct motorman to give such warning, were for jury, regardless of whether person injured was still a passenger while in safety zone. Civ.Code, § 2100; Vehicle Code, § 88.

**6. Carriers ⇐303(7)**
**Street railroads ⇐93(1)**

Where risk in standing in safety zone was a general one necessarily connected with location of the zone and curve of streetcar track at corner, streetcar motorman had duty to warn person who had alighted from streetcar when starting the car and street railroad also had duty to instruct motorman to give such warning regardless of whether such person was still a passenger while in safety zone. Civ. Code, § 2100; Vehicle Code, § 88.

**7. Carriers ⇐347(1)**
**Street Railroads ⇐117(17)**

Where passenger alighted from streetcar believing that streetcar intended to continue in a straight course and did not know that safety zone had been erroneously marked to indicate that it was ordinarily safe for passengers alighting from car to

remain within outline thereof, whether passenger was guilty of contributory negligence when struck by rear end of car as it made a left turn was for jury regardless of whether he was still a passenger while in safety zone. Civ.Code, § 2100; Vehicle Code, § 88.

8. Negligence ⇐67

Contributory negligence is not imputable to a plaintiff for failing to look out for danger which he had no reason or cause to apprehend or to a plaintiff who was deceived by appearances calculated to deceive an ordinarily prudent person.

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Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by George Brandenburg against Pacific Gas & Electric Company and another to recover for injuries sustained when plaintiff was struck by the rear end of defendant's streetcar as it was turning a corner. From a judgment for defendant notwithstanding the verdict for plaintiff, the plaintiff appealed. The plaintiff died during pendency of the appeal and Lillian Brandenburg, as administratrix of his estate, was substituted as plaintiff.

Reversed with directions.

Prior opinion 165 P.2d 41.

Brandenburger & White and W. A. White, all of Sacramento, for appellant.

Thos. J. Straub and F. H. Pearson, both of San Francisco, and Jay L. Henry, of Sacramento, for respondents.

Huntington P. Bledsoe, of San Diego, and Donahue, Richards & Hamlin, of Oakland, amici curiæ on behalf of respondents.

TRAYNOR, Justice.

On June 11, 1943 plaintiff, his wife, and three small children boarded a streetcar of defendant corporation travelling north on 28th Street in Sacramento. The car was operated by one man, defendant Colwell. When the car approached P Street, plaintiff signalled the motorman to stop. At the corner of 28th and P Streets, adjacent to the track on 28th Street, there was a safety zone approximately 4 feet wide and 44 feet long outlined on the pavement by broad wide stripes and marked at the corners with white buttons. Plaintiff and his family alighted from the front door of the car to the safety zone. After the stop, the car turned to the west around a curve to P Street. As the car turned, the rear end overlapped the safety zone about two feet. The motorman was aware of the overlap but did not warn plaintiff that the car was going to turn west on P Street or call plaintiff's attention to the danger from the overlap. Plaintiff knew that there were curved tracks at that corner and that the car might therefore turn, but he did not "know definitely that it would turn." He testified that had he known the car was going to turn west on P Street, he would have remained on the car until it reached 27th Street, because he would then have been one block nearer his destination. While standing in the safety zone, plaintiff was struck by the rear end of the car and seriously injured. He testified that he was struck three or four seconds after he alighted. He described the incident as follows: "Well, I stepped into the safety zone and while doing this I was observing the welfare of my family. I was looking after them. * * * I was motioning to them to stay in the clear and not to run out in the street, stay in the safety zone, and as I was turning to the left the back right side of the street car struck me or collided me striking me to the sidewalk." The jury returned a verdict for damages in the sum of $2,500. The trial court gave judgment for defendants notwithstanding the verdict. Plaintiff appealed. He died during the pendency of the appeal, and the administratrix of his estate was substituted as plaintiff. In this opinion, however, the decedent will be referred to as plaintiff.

[1] A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied. Code Civ.Proc. § 629; Neel v. Mannings, Inc., 19 Cal.2d 647, 649

122 P.2d 576; Card v. Boms, 210 Cal. 200, 291 P. 190; McKellar v. Pendergast, 68 Cal.App.2d 485, 487, 156 P.2d 950. There was ample evidence in the present case to support the verdict.

It is contended that plaintiff had a right to feel secure from any collision with a streetcar while he was standing in the safety zone and that he was at least entitled to a warning that the car would protrude into the safety zone. Defendants take the position that since the traffic department of the city of Sacramento established the safety zone it was the city's responsibility if the zone was not so located that its users would be reasonably safe within the zone. They contend that streetcars are not required to keep clear of a safety zone, since section 572 of the Vehicle Code forbids the driving only of "vehicles," a term that does not include streetcars (§ 31), through or within a safety zone. Relying on Dwyer v. Los Angeles Ry. Corp., 115 Cal.App. 709, 714, 2 P.2d 468, they contend that the fact that in rounding a curve the rear end of a streetcar will swing beyond the track is so well known to every adult person that the motorman of a streetcar is under no legal duty to warn such a person of the possible danger of a collision from the swing of the car.

The streetcar tracks in question were laid before the safety zone was established by the city. It does not appear therefore that defendant corporation was responsible for the failure of the safety zone to afford protection to its users against the dangers of streetcar traffic. Nor does the present case turn on the question whether the motorman of a streetcar that is about to turn on a curve is generally under a duty to warn an adult person within the area covered by the swing of the car. The controlling question is whether such a warning is required when the person who might be struck by the rear end of the car stands in a safety zone.

[2-6] The standard of care required from a streetcar company and its employees with regard to the dangers from a turning car is not absolute but depends upon the surrounding circumstances. Their conduct must be viewed as a whole in the light of all circumstances from which negligence might be inferred, especially "where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others." Blair v. Baltimore & Ohio R. Co., 323 U.S. 600, 604, 65 S.Ct. 545, 547, 89 L.Ed. 490. If their conduct is so judged a precaution necessary under some circumstances may be unnecessary under others. In any event the standard of care to be exercised must be commensurate to the dangers of the business and the hazards at the place of the injury. Peri v. Los Angeles Junction Ry. Co., 22 Cal.2d 111, 123, 137 P.2d 441, and cases there cited; Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574, 579, 65 S.Ct. 421, 89 L.Ed. 465; Blair v. Baltimore & Ohio R. Co., supra, 323 U.S. at page 604, 65 S.Ct. 545. A decisive consideration in determining whether an act was negligent is whether the surrounding circumstances made it reasonably foreseeable that there was a risk of injury. When this question depends on the foresight of another it becomes pertinent whether the other had reason to perceive danger, and whether alertness to the requirements of the situation could be expected of him. Thus an actor's duties vary according to whether he faces a child or an adult, a blind man or one who can see, one who sleeps or one who is awake. His duties also vary according to whether he may reasonably expect another to be aware of danger or must know that another's sense of security has been relaxed. See, Rest., Torts, §§ 290, 302; Prosser, Torts, 243. In the present case it should have been apparent to defendants that users of the safety zone would relax their vigilance. A safety zone is ordinarily an assurance to those within its limits that they are reasonably safe from danger. Even though defendants had no part in establishing the safety zone in an unsafe place, it should have been apparent to them that the users of the safety zone would act differently from ordinary users of the street. Regardless of whether one who stood in plaintiff's place had there been no safety zone would be entitled to a warning (see Dwyer v. Los Angeles Ry. Corp., 115 Cal.App. 709, 714, 2 P.2d 468; Wood v. Los Angeles Ry. Corp., 172 Cal. 15, 155 P. 68; Zalewski v.

Milwaukee etc. Co., 219 Wis. 541, 545, 263 N.W. 577; Trail v. Tulsa Street Ry. Co., 97 Okl. 19, 222 P. 950; see, also, Ann.Cas. 1916E, 680), plaintiff, who stood in such a zone could reasonably be expected to divert his mind from the dangers of the street traffic, and should therefore have been warned that he was in danger of harm from the overswing of the car. "Conceding that a pedestrian must be presumed to take notice of the obvious fact that the body of a streetcar in rounding a curve must necessarily swing out some little distance from the track on the outside of the curve, plaintiff herein had no reason to believe that the markings of the safety zone would be within the area of the overswing." He had, therefore, the "right to rely upon the appearances." Mangan v. Des Moines City Ry. Co., 200 Iowa 597, 203 N.W. 705, 709, 41 A.L.R. 368; see, also, Laurent v. United Railways, Mo., 191 S.W. 992; Elder v. Rutledge, 217 Ind. 459, 469, 470, 27 N.E. 2d 358; Heva v. City of Seattle, 150 Wash. 61, 272 P. 41; Wilson v. International Ry. Co., 205 App.Div. 275, 199 N.Y.S. 562; Wechsler v. Pittsburgh Rys. Co., 247 Pa. 96, 98, 93 A. 19; contra: Ferguson v. Kansas City Public Service Co., 159 Kan. 520, 156 P.2d 869, 875; cf. Hering v. City of Detroit, 244 Mich. 293, 295, 221 N.W. 278 [zone unmarked but provided by city ordinance to exist at every regular stopping place of streetcars]. It makes no difference that in the Mangan case the defendant company had installed the safety zone, for the appearances on which plaintiff could rely were the same in both cases. Nor can it be said that because the Vehicle Code prohibits only the driving of vehicles, not including streetcars, through safety zones, the users of such zones are not justified in assuming that the zone affords protection from the dangers of streetcar traffic as well as from the dangers of other traffic. It is generally understood that it is the purpose of a safety zone to afford its users protection from all traffic hazards. In harmony with this common conception, section 88 of the Vehicle Code defines a safety zone as an "area or space lawfully set apart within a roadway for the exclusive use of pedestrians." The Vehicle Code directs its prohibition against passing through safety zones to vehicles only because it presupposes that safety zones will be so arranged as to be out of the reach of streetcars operated on stationary tracks.

Since plaintiff's right to a warning follows from his use of a safety zone and is a right enjoyed by any member of the public similarly situated, it is unnecessary to determine whether plaintiff, while standing in the safety zone, was still a passenger within the meaning of section 2100 of the Civil Code. See Lagomarsino v. Market Ry. Co., 69 Cal.App.2d 388, 393, 158 P.2d 982; Choquette v. Key System Transit Co., 118 Cal.App. 643, 652, 5 P.2d 921. Since the risk that materialized in this case was a general one and was necessarily connected with the location of the safety zone and the curve of the tracks at that corner, it was not only the duty of the defendant motorman to warn plaintiff when he started the car but also the duty of the defendant corporation to instruct its motorman to give such a warning. The former is therefore liable not only for the negligence of its employees but also for its own negligence.

[7, 8] That plaintiff was not contributively negligent follows from our conclusion that he had no reason to believe that the safety zone would be within the area of the overswing. "Contributory negligence is not imputable to a plaintiff for failing to look out for a danger which he had no reasonable cause to apprehend, or to a plaintiff who was deceived by appearances calculated to deceive an ordinarily prudent person." Welsh v. Mercy Hospital, 65 Cal.App.2d 473, 479, 151 P.2d 17, 21; see 38 Am.Jur. 866.

The judgment notwithstanding the verdict is reversed and the court is directed to enter judgment in accordance with the verdict of the jury.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.

**HUNT et al. v. AUTHIER.**

**L. A. 19536.**

Supreme Court of California, In Bank.

June 7, 1946.

Rehearing Denied July 2, 1946.

**1. Death ⇐11**

Upon death of shooting victim, a cause of action for wrongful death arose on behalf of widow and children under the wrongful death statute and continued to exist until the tort-feasor's death. Code Civ.Proc. § 377.

**2. Abatement and revival ⇐52, 58**

At common law, all actions or causes ex delicto died with the person by whom or to whom the wrong was done, with possible exception of the survival of the injured person's estate in cases of asportation of and damage to chattels, and against the tort-feasor's estate for wrongs whereby the latter was benefited.

**3. Abatement and revival ⇐55(1)**

The fact that a complaint states facts which would have constituted a cause of action against a tort-feasor in his lifetime does not foreclose the maintenance of the same or similar cause of action to the extent authorized by statute permitting actions by and against executors and administrators based on destruction or waste of property. Probate Code, § 574.

**4. Death ⇐30**

Assignability is not the test of whether right of action survived for benefit of widow and children against tort-feasor's estate. Probate Code, § 574.

**5. Abatement and revival ⇐55(1)**

The change of the term "goods and chattels" to the word "property", in statute authorizing actions by and against executors and administrators for waste and destruction of property, requires recognition of every property right or interest as "property", but does not require that the waste or destruction thereof shall have been the result of a direct injury. Probate Code, § 574.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

**6. Executors and administrators ⇐117**

The definitions of the word "property" as "real and personal" and of the words "personal property" as "money, goods, chattels, things in action, and evidences of debt" do not preclude an appropriate construction of the word "property" as used in statute authorizing actions by and against executors and administrators for waste or destruction of property. Civ.Code, § 14; Probate Code, § 574.

**7. Property ⇐1**

"Property" is a generic term, the meaning of which in any case must be determined by ascertaining the sense in which it was used, and, when unqualified, is sufficiently comprehensive to include every species of estate, both real and personal, whether choate or inchoate, corporeal or incorporeal.

**8. Death ⇐30**

Murder of husband by tort-feasor who immediately committed suicide was an invasion of the property rights of murdered man's widow and children within statute authorizing an action against the executor or administrator of a deceased, who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the "property" of the plaintiff. Probate Code, § 574.

**9. Abatement and revival ⇐55(1)**

Where a plaintiff has sustained an injury to his estate, whether in being or expectant, as distinguished from an injury to his person, such injury is an injury to "property" within statute authorizing actions by and against executors and administrators based on destruction and waste of property. Probate Code, § 574.

**10. Death ⇐30**

A complaint by widow and minor children, alleging the deliberate shooting of husband with a revolver by tort-feasor who thereafter took his own life, to recover amount alleged to be the pecuniary loss of and damage to property, property rights, and estate of the widow and children, stated a cause of action under statute authorizing actions by and against executors and ad-

ministrators based on destruction and waste of property. Probate Code, § 574.

SPENCE, EDMONDS, and SCHAUER, JJ., dissenting.

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Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Lois M. Hunt and others, minors, suing by and through their guardian ad litem, Mona S. Hunt, and Mona S. Hunt, individually and as guardian ad litem of minor plaintiffs, against Louise Authier, as administratrix with the will annexed of the estate of Ephrem Mounsey, deceased, for waste and destruction of property. From an order and judgment dismissing the action, upon plaintiffs' failure to amend complaint after demurrer thereto had been sustained, plaintiffs appeal.

Reversed.

Prior opinion 161 P.2d 487.

Mitchell, Silberberg & Knupp, of Los Angeles, for appellants.

Henry Brouillette, of Los Angeles, for respondent.

SHENK, Justice.

This is an appeal by the plaintiffs from a judgment dismissing their action after the defendant's demurrer thereto had been sustained (Code Civ.Proc. § 581, subd. 3). The plaintiffs stood upon their complaint as stating a cause of action. The complaint alleges the following facts:

In December, 1943, Ephrem Mounsey killed Dr. Verne C. Hunt by deliberately shooting him with a revolver. Mounsey thereafter took his own life. Surviving Dr. Hunt were the plaintiffs, who are his widow and three minor children. They filed a claim against Mounsey's estate for $150,000 for waste and destruction of their property, property rights and estate. The claim was rejected, and the present action was filed on the claim and for the sum of $150,000 alleged to be the pecuniary loss of and damage to the property, property rights and estate of the plaintiffs.

[1] This action was not brought under the wrongful death statute (Code Civ. Proc. § 377), for the obvious reason that the wrongdoer was dead at the time the action was commenced. That section of the code provides for an action by the heirs and representatives of one killed by the wrongful act or neglect of another "for damages against the person causing the death." Such an action, in the absence of statutory provision for its survival, has been held to abate upon the death of the tort feasor. (Clark v. Goodwin, 170 Cal. 527, 150 P. 357, L.R.A.1916A, 1142; Singley v. Bigelow, 108 Cal.App. 436, 291 P. 899. See, also, Severns v. California Highway Indemnity Exch., 100 Cal.App. 384, 280 P. 213. Upon the death of Dr. Hunt a cause of action for wrongful death arose on behalf of the plaintiffs under section 377 and continued to exist until the tort feasor's death.

[2] The plaintiffs rely on section 574 of the Probate Code to effect a survival of that cause of action, at least in part. The section reads as follows: "Executors and administrators may maintain an action against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the property of their testator or intestate, in his lifetime, or committed any trespass on the real property of the decedent in his lifetime; and any person, or the personal representative of any person, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the property of any such person or committed any trespass on the real property of such person." That section assumes, for the purpose of its effective operation, the existence of a cause of action against the tort feasor during his lifetime on behalf of any person authorized by law then to sue him. It is contended that this is a survival statute in that it prevents the abatement, because of the death of the wrongdoer, of a cause of action which arose against him "in his lifetime," and that to the extent that the detriment suffered represents a loss of an interest in property there was no abatement of the cause of action. The question is then presented whether any of the injury suffered

by the plaintiffs because of the tortious killing of their decedent is an injury to property within the meaning of that section.

At common law the maxim, Actio personalis moritum cum persona, persisted to effect the abatement of all actions and rights of action in trespass. All actions or causes ex delicto died with the person by whom or to whom the wrong was done, with the possible exception of the survival of the injured person's estate in cases of asportation of and damage to chattels (4 Edw. III, c. 7, 1330; 25 Edw. III, c. 5, 1351), and against the tortfeasor's estate for wrongs whereby the latter was benefited. This was apparently the state of the law until 1833 (see 29 Columb.L.Rev. 239 et seq.), when by the statute of 3 and 4 Will. IV, c. 42, causes of action for injuries to real estate survived to the personal representative of the deceased owner, and causes for injuries to real and personal property survived against the representatives of the deceased tort feasor. So that what remained of the substance of the common law rule was the nonsurvivability of causes of action for damages to the person as distinguished from damages to property. In 1846 by statute 9 and 10 Vict., c. 93, commonly known as Lord Campbell's Act, recovery was allowed to the heirs or representatives of a person killed by the wrongful act of another. Death statutes have been enacted by Legislatures of all the states, but in the absence of express provision causes of action thereunder generally have been held not to survive against the estate of the tort feasor.

The common law rule that tort actions did not survive has been looked upon with disfavor by the courts. Before the enactment of survival legislation, exceptions were created by judicial decision. 1 Am.Jur. 68. As time went on legislation was enacted expressly providing for survival in specified cases, such as personal injury cases, and the common law rule has thereby been greatly modified. 1 Am.Jur. 73 et seq. Some of the states have provided for the survival of all causes of action. More than half have provided for the survival of personal injury actions, some with the exception of such cases as seduction and breach of promise to marry. In others certain causes for injuries to personal relations as distinguished from injuries to the person have been entirely abolished by statute. 1 Am.Jur. 75 et seq.; Prosser on Torts, p. 953; see Civ.Code, § 43.5, abolishing actions for alienation of affection, criminal conversation, seduction of a person over the age of legal consent, breach of promise, and arrest when warrant is regular on its face.

Thus the legislative tendency may be said to enlarge rather than to restrict the causes of rights of action which will survive. See 18 Cal.L.Rev. 44.

We are not aided in the solution of the problem by numerous cases similar to Clark v. Goodwin, supra, 1915, 170 Cal. 527, 150 P. 357, L.R.A.1916A, 1142, holding that causes of action based on death alone do not survive against the tort feasor's estate. The courts in Devine v. Healy, 241 Ill. 34, 89 N.E. 251; Gemmill v. Smith, 274 Ill. 87, 113 N.E. 27; Hackensack Trust Co. v. Vanden Berg, 88 N.J.L. 518, 97 A. 148; Levin v. Muser, 107 Neb. 230, 185 N.W. 431; Anderson v. Wirkman, 67 Mont. 176, 215 P. 224; Morehead's Adm'x v. Bittner, 106 Ky. 523, 50 S.W. 857; Putnam v. Savage, 244 Mass. 83, 138 N.E. 808; and Tonkins v. Cooper, 187 N.C. 570, 122 S.E. 294, have broadly construed statutes, some of them death statutes modeled on Lord Campbell's Act, to include the survival of causes against the estates of tort feasors on the theory that the Legislature intended compensation whether or not the tort feasor survived. In other jurisdictions the courts have construed their statutes to exclude survival against the estates of tort feasors. See Hegerich v. Keddie, 99 N.Y. 258, 1 N.E. 787, 52 Am.Rep. 25; Davis v. Nichols, 54 Ark. 358, 15 S.W. 880; Hamilton v. Jones, 125 Ind. 176, 25 N.E. 192; Moe v. Smiley, 125 Pa. 136, 17 A. 228, 3 L.R.A. 341; Russell v. Sunbury, 37 Ohio St. 372, 41 Am.Rep. 523; Heil v. Rule, 327 Mo. 84, 34 S.W.2d 90. In at least eight jurisdictions survival against the tort feasor's estate in death cases is expressly provided for by statute. (See, also, collection of statutes and cases in 1 Chicago L.Rev. 102; 29 Mich. L.Rev. 969; 48 Harv.L.Rev. 1008.)

The portion of section 574 of the Probate Code pertinent to this case was adopted from section 1584 of the Code of Civil Procedure which prior to 1931 read as follows: "Any person of his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person." In 1931 bills were introduced in the Legislature looking to the enactment of provisions for the survival of personal injury rights of action, but they failed of passage. See 19 Cal.L.Rev. 289 et seq. However, the Legislature in that year modified the rule laid down in section 1584 by substituting the word "property" for the words "goods or chattels" and reenacting the section in section 574 of the Probate Code.

[3] The statute does not use express words of "survival." Nevertheless the section affords the right to maintain actions after the death of those who could have been plaintiffs or defendants if they had lived, in cases of injury to property, and to that extent has created a departure from the common law rule that actions ex delicto do not survive. The fact that the complaint states facts which would have constituted a cause of action against the tort feasor in his lifetime does not foreclose the maintenance of the same or a similar cause of action to the extent authorized by section 574.

In Hegerich v. Keddie, supra, 1885, 99 N.Y. 258, 1 N.E. 787, 52 Am.Rep. 25, it was considered that provision for the survival of actions to recover for damage done to property rights or interests did not include survival of an action against the estate of the wrongdoer for damages for negligent death. The decision was based on a provision of the survival statute which expressly excepted actions for injuries to the plaintiff or the plaintiff's decedent. The case recognized, however, that damages to property rights and interest must be something in addition to damage caused by personal suffering. The view was expressed that neither a husband nor a wife has such an interest in the life of the spouse as would subject a person through whose act it was taken to liability for injury to property rights. The court said that assignability and survivability were convertible terms and furnished a test to determine what injuries or property rights were meant by the statute. The court also said that assuming the cause of action to be a property right, it was based upon a tort and must be governed by the rule in such causes on the theory that if such a cause of action abates, the character of the damages cannot save it. It was also observed that the complaint there involved attempted to state a cause of action arising out of death alone, and suggested no injury to property rights. The Hegerich case overruled an earlier decision. Yertore v. Wiswall's Ex'rs, 16 How.Prac., N.Y., 8. In 1935 the New York Legislature provided for survival to and against representatives in personal injury and death cases. (L. 1935, c. 795.) The principle of the Hegerich case (that since injuries flowing from the wrong which caused the death of the plaintiff's decedent include injuries to the person, the action can be no more than an action to recover damages for personal injuries irrespective of how property rights are affected) is not controlling under our statute. Cf. also, Demczuk v. Jenifer, 138 Md. 488, 114 A. 471.

[4] Nor may assignability be the test of the plaintiff's right of action against the tort feasor's estate. It is not an exclusive test under a statute which precludes abatement of the liability of the tort feasor for property damage. In the latter class of cases a test which has been applied is whether the injury affected property rights, or affected the person only. See Sullivan v. Associated Billposters & Distributors, 2 Cir., 6 F.2d 1000, 42 A.L.R. 503; Trust Co. of Norfolk v. Fletcher, 152 Va. 868, 148 S.E. 785, 73 A.L.R. 1111. Such a test was employed in Vragnizan v. Savings Union Bank & Trust Co., 31 Cal.App. 709, 161 P. 507. Prosser (Torts, p. 954) states the modern trend to be "definitely toward the view that the tort causes of action and liabilities are as fairly a part of the estate of either plaintiff or defendant as contract debts," and that there should be no more

difficulty in proving or defending the claim than in any case where personal contract rights are deemed to survive. See, also, 29 Mich.L.Rev. 969; 44 Harv.L.Rev. 980; 48 Harv.L.Rev. 1008; 18 Cal.L.Rev., supra, p. 44; 24 Cal.L.Rev. 716.

A trend toward a liberal interpretation of a statute expressly providing for survival was noted in Bullowa v. Gladding, 1917, 40 R.I. 147, 100 A. 249, L.R.A.1917D, 832, where a cause of action founded on deceitful representations inducing the plaintiff's purchase of worthless stock was held to survive the death of the defendant under a statute providing for survival of causes for damages to personal estate. It has also been held that the wrongs contemplated by such statutes were not limited to wrongs to specific articles of property, but extended to wrongs by which a personal estate was injured or diminished in value. Baker's Adm'r v. Crandall, 78 Mo. 584, 47 Am. Rep. 126; see, also, In re Grainger's Estate, 121 Neb. 338, 237 N.W. 153, 78 A.L.R. 597, and annotation at page 600. Injuries which lessen the estate, although there is no injury to tangible property, survive in many jurisdictions. See article where collection of statutes and decisions is set forth, in 29 Mich.L.Rev., p. 969 et seq. In Vragnizan v. Savings Union Bank & Trust Co., supra, 1916, 31 Cal.App. 709, 161 P. 507, there was no injury to tangible property. The husband's misrepresentation of the community assets by which a property settlement was induced, and a final decree of divorce obtained, was held to be a legal injury to the wife's rights of property which survived the death of the husband.

In Sullivan v. Associated Billposters & Distributors, supra, 2 Cir., 6 F.2d 1000, 42 A.L.R. 503, a cause of action for damages to business resulting from a conspiracy in violation of the Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1–7, 15 note, and involving injuries to intangible items of loss of trade and future profits, was held to survive the death of the tort feasor. A cause of action to rescind a conveyance, Lufkin v. Cutting, 225 Mass. 599, 114 N.E. 822, and a cause to rescind a contract obtained by fraud, Purcell v. Purcell, 233 Mass. 62, 123 N.E. 394, involving no injury to tangible property, were held to survive. In Evans v. Gibson, 1934, 220 Cal. 476, 31 P.2d 389, it was held that a cause of action for damages for deceit survived against the tort feasor's estate. The court expressly distinguished the items of damage to property interest and those which were exemplary or punitive, holding that the latter did not survive since the purpose thereof was to punish the tort feasor and deter him from the commission of like wrongs in the future, and the reason therefor ceased to exist upon his death. There should be no distinction between injuries to property in cases of fraud and deceit, which are tortious acts, and injuries to property rights in other cases of tortious acts such as wrongful death. (See 29 Mich.L.Rev., supra, at p. 986.)

[5] The change of the term "goods and chattels" to the all-inclusive word "property" in section 574 requires that the intent of the Legislature be given its proper effect by the recognition of every property right or interest as "property" within the meaning of the section, and that the waste or destruction thereof need not have been the result of a direct injury. That change clearly indicates an intent to place no restrictions or limitations on the types of property for the injury to which compensation may be recovered from the estate of the wrongdoer, and to make no distinction as to the method by which such destruction or injury is effected.

[6, 7] The definitions of the word "property" as "real and personal," and of the words "personal property," as "money, goods, chattels, things in action, and evidences of debt" (Civ.Code, § 14), do not preclude an appropriate construction of the word "property" as used in section 574. In Ponsonby v. Sacramento Suburban Fruit Lands Co., 210 Cal. 229, at page 232, 291 P. 167, at page 168, this court said that property is a generic term, "and its meaning in any case must be determined by ascertaining the sense in which it was used. When unqualified, the term is sufficiently comprehensive to include every species of estate, both real and personal, whether choate or inchoate * * * whether corporeal or incorporeal * * *. The word

is sometimes used in the sense of 'estate.' * * *" The court held that damage resulting from fraud and deceit was an injury to property, considered in the sense of a lessening or diminution of the plaintiff's estate. In Leavitt v. Gibson, 3 Cal.2d 90, at page 102, 43 P.2d 1091, at page 1096, the court was careful to distinguish actions strictly ex delicto, such as actions to recover damages for personal injuries. The action in that case was for damages for fraud and deceit, and although there was no direct damage to tangible property this court expressed the opinion that the compensatory portion of the damages to the plaintiff's "estate," as distinguished from those merely punitive, would be recoverable against a deceased tort feasor's estate. Cf. Evans v. Gibson, supra, 220 Cal. 476, 31 P.2d 389. See 24 Cal.L.Rev. 479.

[8] In Scott v. McPheeters, 33 Cal. App.2d 629, 92 P.2d 678, 680, 93 P.2d 562, the court quoted with approval from 50 Corpus Juris, page 736, section 7, stating that " 'Generally, the subjects of property comprise all valuable rights or interests protected by law. * * * In modern legal systems, property includes practically all valuable rights. The term is indicative and descriptive of every possible interest which a person can have, extends to every species of valuable right or interest, and comprises a vast variety of rights. The right to be protected in a person's privileges belonging to him as an individual or secured to him as a member of the commonwealth is property, as is any valuable interest in or to any object of value that a person may lawfully acquire or hold.' "

Injuries suffered by the plaintiffs by the lessening of their estate and the invasion and deprivation of their pecuniary interest and right to future support from their decedent by the commission of the wrongful act is as much a destruction or injury to property as was involved in the foregoing cases; and the tort likewise in this case should be deemed to be an invasion of their property rights within the meaning of the present statute. Where the courts have not held such losses to be injuries to property, it has been due to a reluctance to depart from ancient judicial declarations or to the absence of a statute designed to modify the old rule of nonsurvival. The Legislature has definitely spoken by the amendment of our statute so as to enlarge the class of property rights and interests which shall receive protection in the event of the death of the wrongdoer. Where the Legislature has so provided the courts should not countenance a tortious deprivation of property without redress.

[9] It follows that wherever a plaintiff has sustained an injury to his "estate," whether in being or expectant, as distinguished from an injury to his person, such injury is an injury to "property" within the meaning of that word in the present statute.

[10] The plaintiffs have therefore stated a cause of action for recovery from the defendants of the material losses sustained, including the present value of future support from their decedent considering their respective normal life expectancies, but exclusive of any damages for such items as loss of consortium, comfort or society of the decedent.

The judgment is reversed.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., concurred.

SPENCE, Justice (dissenting).

I dissent. Being one of those who would favor the enactment of appropriate legislation providing generally for the survival of practically all tort actions, it is with some reluctance that I take a position contrary to that reached in the majority opinion. The functions of this court, however, are judicial rather than legislative, and in my view the majority opinion has invaded the legislative field through the guise of judicial construction.

It is a matter of common knowledge that the question of whether our law should be changed so as to provide generally for the survival of tort actions has been for some time a highly controversial subject in this state. Legislative bills, embodying proposed general survival legislation, have been introduced at every session of the Legislature over a long period of years. Yet none of these bills has ever

been enacted. Numerous law review articles have been written on the subject, some of which are cited in the majority opinion, and the writers of these articles have almost invariably been strong advocates of general survival legislation. None of these writers has suggested that any general survival legislation has ever been enacted in this state or that the adoption of the provisions of the Probate Code in 1931 (Stats.1931, p. 587 et seq.) had the effect of changing the settled rule that an action for wrongful death did not survive the death of the tort feasor. Clark v. Goodwin, 170 Cal. 527, 150 P. 357, L.R.A. 1916A, 1142; see, also, De La Torre v. Johnson, 200 Cal. 754, 254 P. 1105; Singley v. Bigelow, 108 Cal.App. 436, 291 P. 899; Severns v. California Highway Indemnity Exch., 100 Cal.App. 384, 280 P. 213. Yet the majority opinion, by seizing upon the single word "property," as used in section 574 of the Probate Code, and by ignoring the context, construes that section as a general survival statute accomplishing practically everything which has been sought through the years by the sponsors of general survival legislation, and perhaps more. To these sponsors the majority opinion will come as a distinct surprise, for they will learn for the first time that their attempts to obtain general survival legislation in each session of the Legislature held since the adoption of the Probate Code in 1931, have been wholly unnecessary, as such general survival legislation had been enacted, without coming to their attention, as part of that code. Their surprise will no doubt be shared by the legislators who voted for the enactment of the Probate Code as well as by the members of the bench and bar.

### The Wording of Section 574 of the Probate Code

Section 574 of the Probate Code, which is the section upon which the majority opinion relies, reads as follows: "Executors and administrators may maintain an action against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the property of their testator or intestate, in his lifetime, or committed any trespass on the real property of the decedent in his lifetime; and any person, or the personal representative of any person, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the property of any such person or committed any trespass on the real property of such person."

This section is not ambiguous and there is no need to journey beyond its plain terms in order to reach the conclusion that it has no application to the situation before us. Insofar as it relates to the survival of tort actions after the death of the tort feasor, it applies only to actions against the personal representative of a deceased tort feasor "who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the property" of another "or committed any trespass on the real property" of another.

The majority opinion reaches in two steps its conclusion that the cause of action pleaded here survived the death of the tort feasor. In taking the first step, it lays the entire stress upon the word "property"; gives that word its broadest possible connotation, without regard to the words which surround and qualify it; and thereby construes the section as though it provides for the survival, after the death of the tort feasor, of any tort action involving any "injury" to any "property right" or to any "pecuniary interest" or to the "estate" of another. None of the last quoted words or phrases may be found in the language used in the section. The majority opinion then takes the second step by holding that plaintiffs had a "property right" in the duty of support owed to them by the deceased victim and that plaintiffs have therefore suffered an injury to their "estate" by the act of the deceased tort feasor. It is unnecessary to discuss the second step as the language of the section does not warrant the first step, which is essential to reaching the ultimate conclusion.

It may be freely conceded that the word "property" may be used in different senses but in Ponsonby v. Sacramento Suburban Fruit Lands Co., 210 Cal. 229, 291 P. 167, cited in the majority opinion, it is said on page 232 of 210 Cal., on page 168 of 291 P.,

that "its meaning in any case must be determined by ascertaining the sense in which it was used." And on page 233, of 210 Cal., on page 168 of 291 P., the court concluded, with respect to the problem there involved, that "There is nothing to qualify the expression either in the Code section in which it was used or in any other related section."

It is thus proper to keep in mind a cardinal rule of construction, recognized in the Ponsonby case, when reading section 574 with the purpose of determining the meaning of the word "property" as there used. That rule, supported by abundant authority, is stated in 23 California Jurisprudence, page 748, as follows: "As words do not always mean the same thing, they should not be considered separately or abstractly, but the context should be consulted for the purpose of ascertaining the precise meaning intended or the particular purpose for which a doubtful word or phrase was employed."

When section 574 is examined in the light of this rule, the words "wasted, destroyed, taken, or carried away, or converted to his own use" cannot be ignored. Those words make it clear that the word "property," as used in that section, relates only to tangible property which is capable of being "wasted, destroyed, taken, or carried away, or converted" to one's own use. In other words, the fact that the section covers only certain limited classes of tortious conduct necessarily requires that the meaning of the word "property" be limited to that class of property to which such tortious conduct may be related. It follows that the context of the section prohibits the extremely broad construction which is given to the word "property" in the majority opinion.

But assuming that it might be said that a mere reading of section 574 as a whole does not make its meaning entirely clear, it is proper to resort to the history of the section and to the official report of the Code Commission as aids to its construction. "The courts have given considerable weight to the notes of the code commissioners in the construction of code provisions." 23 Cal.Jur. 794, and cases cited.

Statutory Provisions Prior to 1931.

Prior to the adoption of the Probate Code in 1931, substantially the same provisions that are now found in sections 573 and 574 of the Probate Code were embodied in the former sections 1582, 1583 and 1584 of the Code of Civil Procedure.

Section 1582, so far as pertinent, provided that actions "for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto" could be maintained by or against executors and administrators.

Section 1583 provided that executors and administrators could maintain actions "against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the goods of their testator or intestate, in his lifetime" and also "actions for trespass committed on the real estate of the decedent in his lifetime."

Section 1584 provided that an action could be maintained "against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person."

It is entirely clear from a reading of those sections of the Code of Civil Procedure, as they existed before their repeal in 1931, that they provided only for the maintenance by and against executors and administrators of certain limited types of actions involving tangible property. Those sections appear to have been nothing more than a reenactment, in statutory form, of the common law rules as modified by the English statutes, which common law rules are referred to in the majority opinion. In any event, it was held that those sections had no bearing whatever upon the question of whether an action for wrongful death survived the death of the tort feasor. Clark v. Goodwin, supra, 170 Cal. 527, 150 P. 357, L.R.A.1916A, 1142; see, also, Singley v. Bigelow, supra, 108 Cal.App. 436, 291 P. 899.

It will be noted that the terminology was not uniform. The word "property" was used in section 1582; the word "goods" was

used in section 1583; and the words "goods and chattels" were used in section 1584.

### The 1930 Report of the Code Commission and the Enactment of the Probate Code in 1931

In 1931 the Code Commission, which was created by Statutes 1929, chapter 750, filed its report proposing the adoption of a Probate Code. (Appendix to Journals of Senate & Assembly, California, Forty-Ninth Session, 1931, vol. 2.)

The proposed code is found commencing at page 25 of the report, and the proposed sections 573 and 574 are found at page 86. It was proposed that the provisions of the former section 1582 of the Code of Civil Procedure should be carried into a section to be numbered 573 of the proposed Probate Code, and that the provisions of the former sections 1583 and 1584 of the Code of Civil Procedure should be carried, with slight changes in wording, into a single section to be numbered 574 of the proposed Probate Code. The proposed slight changes involved making uniform use of the word "property" in the proposed sections 573 and 574 of the Probate Code. Thus, it was proposed that the word "property" should replace the word "goods," formerly appearing in section 1583, and should also replace the words "goods and chattels," formerly appearing in section 1584. It was also proposed that the term "real property" should be substituted for the term "real estate," formerly appearing in both sections 1583 and 1584.

The absence of any intention on the part of the Code Commission to propose any change in substance by the mere uniform use of the word "property" in the proposed sections is made manifest by examining other portions of the commission's report to the Legislature. The report contains a cross-index reference table, which is found at page 30 et seq. (see, also, Deering's Prob.Code, Ann., p. xliii), which table purports to show the origin of the various proposals and also the proposed changes, if any, in the existing law. On page 34, the proposed sections 573 and 574 are listed as having their origin in sections 1582, 1583 and 1584 of the Code of Civil Procedure but no change in the existing law is noted. The report also contains a statement concerning the powers and functions of the Code Commission. On page 10, it is said: "By the statute creating the Code Commission, its powers are limited to preparing such 'restatement as will best serve clearly and correctly to express the existing provisions of law', and it is not within the province of the Code Commission to embody in its report any substantial changes in the existing law. Nor would it be proper for the Code Commission to recommend changes where there may be real differences of opinion as to matters of policy."

The Legislature received the Code Commission's report and, in line with the recommendations contained therein, enacted the Probate Code, including sections 573 and 574, which sections were enacted in the precise form proposed by the Code Commission. Stats.1931, p. 618.

### Effect of the Enactment of Sections 573 and 574 of the Probate Code.

It is entirely clear that the Probate Code was proposed and enacted as a recodification or revision of existing law. It does not appear that it was intended by the Code Commission or the Legislature that any change should be made in the then existing law found in sections 1582, 1583 and 1584 of the Code of Civil Procedure, and there is nothing in the wording of sections 573 and 574 of the Probate Code which indicates that these sections should be construed as effecting any such change. But if it should be conceded that the language of section 574 leaves doubt as to its meaning, this court should adhere to what was said in De La Torre v. Johnson, supra, 200 Cal. 754, 254 P. 1105. It was there claimed that the provisions of section 26 of the Workmen's Compensation, Insurance and Safety Act (Stats.1917, p. 831, as amended in 1919, Stats.1919, p. 920) had the effect of causing the action to survive the death of the tort feasor. On page 760 of 200 Cal., on page 1107 of 254 P., this court said, in repudiating appellant's construction of that section: "The justification for following appellant in so wide a departure from the long-approved rules of law should rest upon express statutory language or upon inferences arising out of the language of the act under

construction which are so convincing as to leave no doubt as to legislative intent." It therefore follows that there is no justification in the present case for giving to section 574 of the Probate Code the meaning and effect attributed to it by the majority opinion.

Support for the last mentioned conclusion is found in section 2 of the Probate Code, which specifically provides: "The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments." Sections 573 and 574 are substantially the same as the previously existing statutes, the slight changes proposed by the Code Commission being in line with its declared purpose to prepare such "restatement as will best serve clearly and correctly to express the existing provisions of law."

In commenting upon section 2 of the Probate Code, the court said in Childs v. Gross, 41 Cal.App.2d 680, at page 687, 107 P.2d 424 at page 428, that the rule of construction laid down in that section follows the weight of authority, and the court then quoted approvingly from 59 Corpus Juris, page 894, section 493, the following:

"'A mere change of phraseology, or punctuation, or the addition or omission of words in the revision or codification of statutes, does not necessarily change the operation or effect thereof, and will not be deemed to do so unless the intent to make such change is clear and unmistakable. Usually a revision of statutes simply iterates the former declaration of legislative will. No presumption arises from changes of this character that the revisors or the legislature in adopting the revision intended to change the existing law; but the presumption is to the contrary, unless an intent to change it clearly appears. The reasons assigned are that the changes made by the revision may usually be accounted for by the desire to render the provisions more concise and simple, and to bring the laws into some system and uniformity. * * *'"

"'No rule of statutory construction rests upon better reasoning than that, in the revision of statutes, alteration of phraseology, the omission or addition of words, will not necessarily change the operation or construction of former statutes. The language of the statute as revised, or the legislative intent to change the former statute, must be clear before it can be pronounced that there is a change of such statute in construction and operation. Langford v. Dunklin, 71 Ala. 594, 609, quoting Cole v. Sloss-Sheffield Steel, etc. Co., 186 Ala. 192, 65 So. 177, 178, Ann. Cas.1916E, 99'".

Additional support for the conclusion that section 574 cannot be given the construction placed upon it in the majority opinion is found in Gerberich v. Southern California Edison Co., 26 Cal.App.2d 471, 79 P.2d 783. That case involved an appeal from a judgment notwithstanding the verdict in an action brought by the father of an injured minor, to recover for the loss of earnings of said minor and for medical expenses incurred. The father died before trial and a special administratrix had been appointed. The court stated the point raised by said administratrix to be that "the estate of the original plaintiff became diminished in value by reason of medical expenses and loss of services and hence, it is urged by appellant, the estate is entitled to recoup the loss." The court quoted in full sections 573 and 574 of the Probate Code, and then said at page 483, of 26 Cal.App.2d at page 789 of 79 P.2d: "That such an action did not survive at common law requires no citation of authority, and the sections above quoted contain no such authority."

### Authorities Cited in the Majority Opinion

No particular comment is required on the cited authorities from other jurisdictions, which authorities were decided under different statutory provisions. Reference should be made, however, to three California cases cited in the majority opinion.

Leavitt v. Gibson, 3 Cal.2d 90, 43 P.2d 1091; Evans v. Gibson, 220 Cal. 476, 31 P.2d 389; and Vragnizan v. Savings Union Bank & Trust Co., 31 Cal.App. 709, 161 P. 507, were fraud cases which were decided without reference to any comparable

statutory provisions. The question of the survival was discussed at length only in the Vragnizan case, and that discussion demonstrates that fraud cases occupy an anomalous position in their relation to the matter of survival. The following portion of that discussion, appearing at pages 711 and 712, of 31 Cal.App., at pages 508 of 161 P., shows the basis of the decisions in the fraud cases:

"* * * The true test is not so much the form of the action as the nature of the cause of action. When the action arises out of a tort, unconnected with contract, and which affects the person only and not the estate—such as assault and battery, false imprisonment, malicious prosecution, personal injuries—the action is purely personal and abates with the death of the wrongdoer. But when the action is virtually founded upon contract, though nominally in tort, it survives against the tort-feasor's legal representatives. 1 Cyc. 60; 1 C.J. 340, 362; 1 R.C.L. 22; Lee's Adm'r v. Hill, 87 Va. 497, 12 S.E. 1052, 24 Am.St.Rep. 666; Payne's Appeal, 65 Conn. 397, 32 A. 948, 33 L.R.A. 418, 48 Am.St.Rep. 215. And in the case of a tort resulting in the wrongful acquisition of personal property, the law imposing on the wrongdoer the duty of returning that property to the owner, the obligation at common law might be treated as quasi contractual, and the neglect to perform it a breach of such contract, in which case the damage resulting from the tort is substantially the value of the property, and the damage resulting from the breach of contract is measured substantially in the same way. Similarly, in determining the question of survival at common law the substantial cause of action might properly be treated as founded in contract. (1 R.C.L. 24.)"

It thus appears that in fraud cases the authorities have held that the actions survived either upon the theory that the action was founded upon contract, although involving a tort, or upon the theory that the law created a quasi contractual obligation in order to prevent unjust enrichment. These theories are somewhat similar to those underlying the opinions of this court in Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990, and McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019. In the present case, however, the survival of the action cannot be predicated upon either a contractual or quasi contractual theory and therefore the fraud cases are not helpful.

Conclusion

It is my conclusion that the construction placed upon section 574 in the majority opinion is wholly unwarranted and erroneous. Such construction does violence to the language of the section, to the obvious intention of the Code Commission and the Legislature in proposing and enacting the section, to settled rules of construction, and to the express mandate of section 2 of the Probate Code.

The authorities cited in Clark v. Goodwin, supra, 170 Cal. 527, 150 P. 357, L.R.A. 1916A, 1142, are but a few of the many which establish the settled rule of law that in the absence of an express statutory provision providing for survival, actions for wrongful death do not survive the death of the tort feasor. We have no such express statutory provision providing for survival in this state, and regardless of the views of this court concerning the desirability of the enactment of such legislation, it is not the function of this court to usurp the powers of the Legislature. As was said by this court in the Clark case at page 531 of 170 Cal., at page 359 of 150 P., L.R.A.1916A, 1142: "* * * Arguments as to the wisdom or justice of a plain rule of law should be addressed to the legislative department of the state, rather than to the courts, which, if they confine themselves to the limits marked for them by the Constitution, will not attempt to usurp the powers of the legislative department."

In my opinion, the judgment should be affirmed.

EDMONDS and SCHAUER, JJ., concurred.

Rehearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.

## PEOPLE v. PEETE.

Cr. 4673.

Supreme Court of California, in Bank.

June 7, 1946.

Rehearing Denied July 2, 1946.

**1. Criminal law ⇐369(2)**

Evidence that is relevant is not excluded because it reveals the commission of an offense other than that charged, except when it shows merely criminal disposition.

**2. Criminal law ⇐369(2)**

The general tests of admissibility of evidence in a criminal case are, does it tend logically, naturally and by reasonable inference to establish any fact material for the people or to overcome any material matter sought to be proved by the defense, and, if it does, it is admissible regardless of whether it embraces the commission of another crime, whether the crime is similar in kind and whether it is part of a single design.

**3. Criminal law ⇐1172(2)**

In murder prosecution, where evidence concerning prior murder for which defendant had been convicted was admitted in evidence, instruction of court regarding purpose for which evidence of prior murder could be considered did not prejudice the defendant.

**4. Homicide ⇐171(3)**

Evidence concerning another offense is relevant to prove that a death resulted from the execution of a scheme when in the light of the circumstances of the crime sought to be proved, it indicates the existence of such a scheme.

**5. Criminal law ⇐372(1)**

Where a defendant's conduct in connection with previous crime bears such similarity in significant respects to defendant's conduct in connection with crime charged as naturally to be explained as caused by a general plan, the similarity indicates that the conduct was directed by design and evidence of the conduct in connection with prior offense is admissible.

**6. Criminal law ⇐783(1)**

Where the striking similarity in significant respects between defendant's conduct in prior homicide for which defendant had been convicted of murder and her conduct in connection with death on which present murder prosecution was based strongly indicated a scheme by defendant to acquire property of a suitable victim by murder, but defendant testified that deceased was killed by her husband, court properly instructed jury that evidence concerning prior case tended to prove the defendant had a motive for killing deceased and served to rebut her defense.

**7. Criminal law ⇐369(15)**

Where defendant had been previously convicted of killing another who was killed by means of a bullet from behind, severing the spinal cord at the neck, and deceased in present prosecution was shot from behind at close range in an attempt to sever the spinal cord, evidence of the prior homicide was admissible as tending to identify defendant as the murderer.

**8. Criminal law ⇐370**

Where defendant, charged with murder, explained that her unusual conduct following the death was designed to obviate suspicion that might be engendered by her criminal record, evidence that her similar conduct after the murder of another aided in her conviction for that murder, tended to prove that she knew the incriminating effects of such conduct and that therefore her explanation was false and in bad faith and was admissible to show knowledge and absence of good faith.

**9. Criminal law ⇐369(2), 1202(1)**
**Witnesses ⇐337(5)**

A previous conviction is charged solely for information of court and prison authorities in determining punishment to be imposed in case of conviction, and statute prohibiting the reading or alluding to an admitted charge of previous conviction, as well as statute regarding order of trial, prevents circumvention of rules against admission of evidence of previous conviction when such evidence is not relevant or admissible to impeach, but it was not designed to exclude relevant evidence nor to prevent impeachment of witness by proof of conviction of a felony. Pen.Code, §§ 644, 666-668, 1025, 1093, 3025.

**10. Criminal law ⇐371(12), 372(4)**
**Witnesses ⇐337(6)**

Where defendant, charged with murder, admitted charge of prior conviction of murder, admitting evidence of prior murder for purpose of impeaching defendant and to show motive and scheme, did not violate statute prohibiting reading or alluding to admitted charge of prior conviction in presence of jury. Pen.Code, § 1025.

**11. Witnesses ⇐337(6), 359**

Where defendant, charged with murder, admitted charge of previous conviction of murder but testified that she did not kill the prior victim and that she did not know whether he was dead, record of judgment in prior case was admissible to impeach defendant. Code Civ.Proc. § 2051.

**12. Criminal law ⇐400(2)**

Where judgment has not been pronounced, a conviction may be proved by record of the verdict, but when a judgment has been rendered, the record thereof establishes the previous conviction and record of earlier proceedings is cumulative. Code Civ.Proc. §§ 1838, 2044.

**13. Criminal law ⇐1169(1)**

Where judgment of conviction in prior murder prosecution was admissible in murder prosecution, defendant was not prejudiced by introduction of record of proceedings preceding judgment in prior prosecution, in view of fact that such proceedings added little information to that related in the judgment.

**14. Criminal law ⇐338(3)**

Where defendant, charged with murder, admitted charge of previous murder conviction, evidence that prior conviction had been affirmed on appeal was relevant to a determination of weight to be given the prior conviction.

**15. Witnesses ⇐350**

A conviction may be shown by examination of witness to impeach him. Code Civ. Proc. § 2051.

**16. Witnesses ⇐350**

Where defendant, charged with murder, admitted charge of previous conviction of murder, admitting evidence that prior conviction had been affirmed on appeal and permitting prosecution to elicit such information from defendant on cross-examination was not error. Code Civ.Proc. § 2051.

**17. Witnesses ⇐350**

The prosecution may not, in impeaching a witness by proving a previous conviction, inquire as to merits of the conviction.

**18. Criminal law ⇐1170½(5)**

Where defendant, charged with murder, while being cross-examined as to her previous conviction for murder, stated of her own volition that she had been prevented by force from testifying in the prior case, permitting cross-examination concerning such statement was not prejudicial error.

**19. Criminal law ⇐419(12)**

Where defendant, charged with murder, contended that deceased's husband was the assailant, deceased's verified petition executed in connection with her husband's commitment to an institution for insane and reciting that husband had threatened to kill deceased and himself and had struck deceased was hearsay, and inadmissible to prove that the recitals were true.

CARTER, J., dissenting.

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Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Louise Peete was convicted of first-degree murder, and she appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and John Barnes, Deputy Dist. Atty., both of Los Angeles, for respondent.

TRAYNOR, Justice.

An information was filed against defendant by the District Attorney of Los Angeles County, charging her with the murder of Margaret R. Logan. The jury found defendant guilty of murder in the first degree and made no recommendation as to punishment. Defendant admitted a

charge of a previous conviction of murder and serving a term therefor. The trial court denied her motion for a new trial. This appeal is automatic from the judgment imposing the death penalty.

Defendant was convicted in 1921 of the murder of Jacob C. Denton. On June 2, 1920, approximately two weeks after defendant had leased his residence, Denton disappeared. Defendant answered inquiries as to his whereabouts with various statements: that he had been shot in the arm by an unknown "Spanish woman"; that he was avoiding his residence because he was ashamed of his wound; that his arm had been amputated; that he had gone to one or another part of the country; that he wanted to conceal his affairs from his family and acquaintances. She also stated that he had given her a bill of sale to his automobile; that he permitted her to open his mail; that he authorized her to sell his house and accept the first payment. Defendant rented the Denton residence to a third party, forged Jacob Denton's name to a lease, had dealings for the sale of the residence, drew forged checks against Denton's bank account, attempted to gain entrance to his safety deposit box, went through his papers, pawned his diamond rings, explaining that she gave the proceeds to the "Spanish woman," gave away some of his clothing and had some made over for her daughter, and attempted to discourage search for him. On September 23, 1920, Denton's body was found buried under his residence. A bullet had entered the back of the neck at the fourth cervical vertebra and severed the spinal cord, causing instant death. The decomposed state of the body indicated that he was killed about the time of his disappearance. Although defendant did not testify, she made a lengthy explanation to a deputy district attorney of her conduct after Denton's disappearance, which was discredited.

Following her conviction, defendant spent eighteen years in the state penitentiary. During and following her imprisonment, she told a number of persons that she expected to acquire a valuable estate or "trust fund" in the near future. The evidence shows that these statements were false, and that defendant was impecunious. The evidence also indicates that after her release in 1939 she procured a revolver by theft.

In November, 1943, she was engaged by Mrs. Logan, whom she had known many years, for domestic service and care of Arthur Logan, who was then 73 years of age and in a state of senile dementia. Arthur Logan was committed to an institution for the insane early in November, 1943, on petition filed by his wife. Defendant aided Mrs. Logan in securing this commitment. Mrs. Logan regretted her action and he was paroled later that month to her care. Mrs. Logan gave defendant two letters in November, 1943, for use in connection with her husband's release, which stated that defendant was her "foster sister." Defendant retained these letters until they were found on her person at the time of her arrest thirteen months later.

On March 19, 1944, Mrs. Logan placed her husband in a private sanitarium for one week. The records of the sanitarium reveal that Mr. Logan was unruly and noisy on occasions, but was not dangerously violent. Testimony was given that Mrs. Logan's purpose in placing him in the sanitarium was to have him cared for while she worked at an aircraft factory.

Before Mrs. Logan's death on May 29, 1944, defendant purported to finance through a trust fund a $50,000 real estate purchase by herself and Mrs. Logan, the property to be held in joint tenancy. She failed to obtain the $2,000 escrow deposit, and the decedent procured the sum by pledging her savings account. After Mrs. Logan's death, the escrow period expired with the purchase price remaining unpaid, and defendant obtained one-half of the deposit by forging the decedent's name to an instrument giving defendant the power of attorney for decedent. Earlier, on May 19, 1944, defendant forged a check for $200 drawn on Mrs. Logan's checking account, and deposited the check in an account held jointly with her husband. A cashier, however, discovered the forgery and notified Mrs. Logan, who directed him to charge the sum to her account and reassured him that the forger would repay the obligation. Defendant was unable to do so, however, until two days after Mrs. Logan's death,

when she made partial payment with funds appropriated from a refund of money paid for railroad tickets by decedent.

On May 2, 1944, defendant secretly married and moved to a nearby hotel. She did not reveal her criminal record to her husband. She told several people during that month that Mr. Logan was having dangerous fits of violence. She stated to one witness that "One morning you are going to wake up and read the headlines in the paper of a terrible tragedy," but repeatedly asked the witness not to mention her statement to Mrs. Logan. Defendant was at the Logan home on May 29, 1944, the date of the decedent's disappearance and death. Two days later, she and her husband moved into the Logan home. On or about June 1, 1944, on the pretext that Mrs. Logan had been seriously injured in an automobile accident, defendant induced Arthur Logan to accompany her to a probation officer. On the basis of defendant's statements that she was Mrs. Logan's "foster sister," and that in an insane rage, Arthur Logan had attacked his wife, bitten her on the neck and nose, and had bitten defendant on the hand, he was sent to the psychopathic ward of a county hospital, and later to the Patton State Hospital. Defendant did not mention to the probation officer that Mrs. Logan had been shot. Defendant forged Mrs. Logan's name to subsequent correspondence with the Patton authorities. Arthur Logan became increasingly ill and died on December 6, 1944. At defendant's direction, his body was given to a medical school for scientific purposes.

In response to inquiries as to Mrs. Logan's whereabouts, defendant reiterated her statement as to an attack by Arthur Logan, adding that Mrs. Logan had gone to an institution for plastic surgery, and that because she was self-conscious about the disfigurement caused by the attack, she did not want any of her friends to see her. Defendant stated on various occasions that Mrs. Logan had gone to Santa Monica, San Bernardino, Oregon, "inland," Denver, "back east," and New York; that defendant was purchasing the Logan home; that Mrs. Logan no longer desired the personalty in the home and had told her to do what she wanted with it; that Mrs. Logan did not want her car and that defendant had but one more paper to sign and it would be hers; and that Mrs. Logan intended never to return to her home.

Defendant lived with her husband in the Logan residence from May 31, 1944, to December 20, 1944, the date of her arrest. During this period, she had some of Mrs. Logan's clothing made over to fit herself, opened Mrs. Logan's mail, and when necessary answered it in Mrs. Logan's name, had the interior of the house repainted and various articles of furniture remodeled, paid incidental bills, gave away and loaned fine articles of personalty, promised her relatives Mrs. Logan's diamonds, sold an electric mangle, and used the Logan car, gas coupons, and food stamps.

Shortly after Arthur Logan's death defendant obtained forms necessary to make a death claim for $1,425 owing on his life insurance policy, and sent them to the Patton authorities with a letter of instruction on which she forged Mrs. Logan's name. After her arrest, two deeds of gift that purported to give the Logan property to her were found in a suitcase under her bed. Defendant testified that the deeds had been drafted in good faith by her husband because he felt insecure since they were occupying the property neither as owners nor as tenants.

It was Mrs. Logan's duty to file monthly parole reports on defendant's conduct. Defendant wrote all parole reports from June to December, 1944, and forged Margaret Logan's name thereto. Suspicion arose as to their authenticity, and she was taken into custody on December 20, 1944. At the time of her arrest, defendant was going through Mrs. Logan's papers. She gave the arresting officers the same explanation of the decedent's absence that she had previously given others. After a brief search the body of Mrs. Logan was found in a shallow grave in the back yard of the Logan residence. Defendant had placed a high, solid gate between the garage and the corner of the house that prevented passage or view from the driveway to the back yard. The autopsy revealed that a bullet had entered the back of the neck and struck the fourth cervical vertebra, narrowly

missing the spinal cord, and had passed out of the body below the left jaw. Death was caused by two depressed fractures of the skull.

Defendant testified that Mrs. Logan was killed by Arthur Logan in an insane rage on May 29, 1944. She admitted that the explanation that she had given for Mrs. Logan's disappearance was false, but explained that her conduct after May 29, 1944, was designed to conceal the death to obviate suspicion that would be cast on her because of her criminal record. A witness testified that Arthur Logan had bruised his wife on a previous occasion, and that Mrs. Logan stated that he was "hard to handle." Defendant testified that at about 2 o'clock in the afternoon of May 29, 1944, she ran into the Logan living room in answer to an urgent call from Mrs. Logan, and found Mr. Logan struggling with and biting his wife; that the latter was bleeding profusely from wounds under her eyes, at the end of her nose, and in her neck; that she later found a piece of flesh that looked like a part of Mrs. Logan's nose. Examination of Mrs. Logan's body revealed minor abrasions but no evidence of biting or other injury to the face or neck. Testimony was given that Arthur Logan had no natural teeth, and was very feeble and in poor health, as contrasted to Mrs. Logan, who was ten years his junior and a strong, heavy woman. Defendant further stated that Arthur Logan was enraged because he thought he was about to be sent to an institution for the insane; that after separating the Logans, defendant refrained from calling the police at Mrs. Logan's request; that Arthur Logan procured a steak hammer from the kitchen and struck his wife on the face and head with it; that she and Mrs. Logan sank to the floor, she holding the victim's head; that later she sent Mr. Logan to the back porch, locking him out, on the pretext of his watching for Mr. Butler, who was to call for the ironing mangle; that later she heard voices and went to the door, spoke to Mr. Butler and gave him the mangle. Mr. Butler's testimony that he telephoned defendant concerning the mangle several days before he called for it and that defendant then informed him that Mrs. Logan had been in an accident, indicated that when he later called for the mangle Mrs. Logan had already been dead several days. He testified further that he walked to the front door of the residence and rang the bell; that a voice from the front bedroom told him that he would find the mangle outside the back porch and that nothing else was said; that he saw no one in the back yard and no one came to the back door.

Defendant testified further that during this period she did "both the normal and the abnormal thing"; that she readmitted Mr. Logan; that he again "flicked" Mrs. Logan's head with the steak hammer; that later Mr. Logan came out of a bedroom brandishing the defendant's revolver, and struck Mrs. Logan with it; that defendant then raised Mrs. Logan from the floor; that the revolver fell to the floor, Mr. Logan again struck his wife with the steak hammer, and she again fell to the floor; that defendant, whose clothing was bloody, now feared calling the police or neighbors, although Arthur Logan was also covered with blood, and was still acting in an insane manner; that because blood was coming out of Mrs. Logan's mouth, defendant turned her so that she lay face down; that Mr. Logan again struck his wife; that defendant then heard several shots; that defendant was "paralyzed" at this time in a "semi-kneeling" position.

Defendant's testimony that she heard several shots was contrary to evidence that after careful search only one bullet was found, imbedded in the wall 38½ inches from the floor. Although defendant testified that the decedent was shot by her husband from a standing position, no bullet hole or ricochet mark was found in the rug or floor where, according to her testimony, the shooting occurred. Expert testimony was given that because carbon particles were found two inches within the bullet wound, the gun must have been placed against the decedent's neck when fired. Although defendant testified that Mr. Logan struck his wife several times with the steak pounder, no marks on the skull of deceased that might have been made by the conical knobs on the instrument were found.

Blood and human hair were found, however, on the revolver, and the butt of the weapon, which contained a defect, fitted perfectly into the two depressed fractures of the skull that were the cause of death.

Defendant testified that after the decedent was shot, she telephoned a doctor to learn how to quiet Mr. Logan, and following his advice, gave Mr. Logan four sleeping tablets. The doctor testified that although he did not recall the conversation, he would not in any case have ordered such a dose. Defendant stated that Mrs. Logan, who because of defendant's fear for her own safety had received no medical attention, died at 8 o'clock in the evening, and that having determined to conceal her death, defendant washed the blood off Arthur Logan, cleaned the blood from the rug and floor, and buried the body in the back yard. Concerning the probability that Mr. Logan would have absolved her had he killed his wife in an insane rage, defendant stated that Mr. Logan did not remember what occurred during his attacks of violence. Other witnesses testified that although forgetful, he remembered past social affairs and important current events.

The prosecution's theory was that the jury could infer from the foregoing evidence that before the Denton murder defendant conceived a scheme whereby she could gain wealth by finding a suitable victim and acquiring his property by murder; that although the execution of the scheme was thwarted in the Denton case, her false statements while in prison concerning her prospective wealth were designed to forestall suspicion that might arise should she succeed after parole in a new attempt that she contemplated; that similar statements, and also statements that Arthur Logan was becoming increasingly violent, made to neighbors and friends of the Logans before the date of the present tragedy, were designed to lay the groundwork for an attempt to acquire the Logan property by murdering Mrs. Logan and procuring the recommitment of Arthur Logan; that defendant's inability to procure funds for the escrow deposit in the real estate transaction or to repay the amount of the forged check in all probability indicated to Mrs. Logan that defendant's financing of the real estate purchase was fictitious; that the power in Mrs. Logan's hands to report that defendant had by committing the forgery, violated her parole, and to recommend that she be sent back to the penitentiary was an additional motive for murder; that on May 29, 1944, defendant in all probability gave Arthur Logan the sleeping tablets before the murder, and after he had thus been disposed of, shot the unsuspecting Mrs. Logan from behind at close range in an attempt to sever the spinal cord; but that realizing from the victim's actions that she had missed her mark, defendant fractured her skull by two blows with the butt of the revolver.

[1, 2] Defendant concedes the sufficiency of the evidence to sustain the verdict. She contends, however, that there is a general rule against the admissibility of evidence concerning prior crimes, and that evidence concerning the Denton murder does not fit into any "exception." It is settled in this state, however, that except when it shows merely criminal disposition (People v. Cook, 148 Cal. 334, 340, 83 P. 43; People v. Glass, 158 Cal. 650, 658, 112 P. 281), evidence that is relevant is not excluded because it reveals the commission of an offense other than that charged. "The general tests of the admissibility of evidence in a criminal case are: * * * does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not." People v. Sanders, 114 Cal. 216, 230, 46 P. 153, 157; People v. Morani, 196 Cal. 154, 157, 236 P. 135; People v. Nakis, 184 Cal. 105, 114, 193 P. 92; People v. Cook, 148 Cal. 334, 340–342, 83 P. 43; People v. Suesser, 142 Cal. 354, 363, 75 P. 1093; People v. Wilson, 117 Cal. 688, 691, 49 P. 1054; People v. Craig, 111 Cal. 460, 468, 44 P. 186; People v. Tucker, 104 Cal. 440, 442, 38 P. 195; People v. Lane, 101 Cal. 513, 517, 36 P. 16; People v. Rogers, 71 Cal. 565, 567,

12 P. 679; People v. McGilver, 67 Cal. 55, 56, 7 P. 49; People v. Cunningham, 66 Cal. 668, 671, 4 P. 1144, 6 P. 700, 846; People v. Fitzgerald, 14 Cal.App.2d 180, 202, 58 P.2d 718; People v. Foster, 79 Cal.App. 328, 333, 249 P. 231; People v. Reyley, 67 Cal. App. 553, 562, 227 P. 957; People v. Klopfer, 61 Cal.App. 291, 294, 214 P. 878; People v. Kizer, 22 Cal.App. 10, 15, 133 P. 516, 134 P. 346; People v. Tomalty, 14 Cal. App. 224, 233–234, 111 P. 513; People v. Rowland, 12 Cal.App. 6, 19, 106 P. 428; People v. McPherson, 6 Cal.App. 266, 270, 91 P. 1098; see cases cited, 8 Cal.Jur. 60, 13 Cal.Jur. 703; Fricke, California Criminal Evidence, 215; 13 So.Cal.L.Rev. 511, 513; 28 Cal.L.Rev. 516; Stone, The Rule of Exclusion of Similar Fact Evidence: England, 46 Harv.L.Rev. 954; Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 Harv.L.Rev. 988. "It is true that in trying a person charged with one offense it is ordinarily inadmissible to offer proof of another and distinct offense, but this is only because the proof of a distinct offense has ordinarily no tendency to establish the offense charged; But, whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion." People v. Walters, 98 Cal. 138, 141, 32 P. 864, 865; People v. Ellis, 188 Cal. 682, 689, 206 P. 753; People v. Ebanks, 117 Cal. 652, 663, 49 P. 1049, 40 L.R.A. 269.

[3] The relevance of evidence that proves crimes other than that charged, however, must be examined with care. People v. Albertson, 23 Cal.2d 550, 577, 145 P.2d 7; see Stone, supra, 46 Harv.L.Rev. 954, 983. In the present case, the question of the admissibility of evidence concerning the Denton murder was submitted to the trial court before trial, and the court's decision to admit the evidence was made after extended argument on the part of counsel. Defendant made no request that the jury be admonished at the time of the admission of the evidence as to its relevance. The court's instructions,* while not models to be

* "Evidence has been received in this case concerning the matter of the alleged death of Jacob C. Denton in the year 1920, and some of the facts surrounding that transaction including the matter of the prosecution of this defendant in connection therewith have been introduced in evidence. This evidence was not received and should not be considered by you as tending to indicate that the defendant is the kind of a person who, because of the commission of another crime, would be more likely to have committed the crime with which she is now charged, and for which she is now being tried. You must not consider such evidence for that purpose. If you find from the evidence relating to the said Denton transaction that the defendant was guilty of a felonious homicide in connection therewith, you must not permit this fact to prejudice you against the defendant. This evidence has been received and is to be considered by you only for one or all of the following purposes and for no other purpose whatsoever. You may consider the evidence relating to the Denton transaction for these purposes only:

"First, for the purpose of determining the motive if any which actuated the defendant in the commission of the crime of which she is now charged.

"Second, for the purpose of determining whether the death of Margaret R. Logan was the result on the one side of accident or the sudden outburst of Mr. Logan, or on the other hand whether the death of Margaret R. Logan was the result of design upon the part of this defendant.

"Third, for the purpose of determining the identity of the murderer, if you find that a murder was committed; that is to say, if a murder were committed did the defendant herself plan and commit the murder, or was the slaying accomplished by Mr. Logan, the defendant being innocent in the transaction.

"Fourth, for the purpose of determining whether the murder of Margaret R. Logan, if you find the fact to be that she was murdered by the defendant, was the result of and a part of a general plan or scheme on the part of the defendant of which the death of Jacob C. Denton and Margaret R. Logan were both parts.

"Fifth, for the purpose of showing knowledge as a part of criminal intent, and absence of good faith, in connection with acts of this defendant prior to, during, and after the death of Margaret R. Logan.

"If you find that the death of Jacob C. Denton in 1920 was accomplished by the defendant for the purpose of enabling her to acquire the property of said Denton, you have a right to consider the

followed, did not under the circumstances prejudice the defendant.

[4, 5] Since defendant's conviction was based on the theory that Margaret Logan's death was part of a scheme to acquire property by murder, proof of such a scheme was essential to the prosecution's case. Evidence concerning another offense is relevant to prove that a death resulted from the execution of a scheme when in the light of the circumstances of the crime sought to be proved, it indicates the existence of such a scheme. When a defendant's conduct in connection with the previous crime bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan, the similarity is not merely coincidental, but indicates that the conduct was directed by design. See II Wigmore, Evidence 3d Ed. 202, 275; R. v. Smith, 41 Crim.App.Rep. 229, 236. In People v. Lisenba, 14 Cal.2d 403, 427, 94 P.2d 569, this court held that evidence that a former wife of defendant, whose life he had insured, had drowned under circumstances tending to incriminate the defendant, was admissible to prove that defendant, in the execution of a scheme of insuring and murdering wives, had murdered a second wife, whom he had also insured, and who also drowned under circumstances pointing towards defendant's guilt. People v. Gosden, 6 Cal.2d 14, 24, 56 P.2d 211, held that evidence that a former wife of defendant had died of strychnine poisoning after defendant had insured her life, was admissible to prove that defendant murdered a second wife, whom he had also insured, and who also died of strychnine poisoning. In People v. King, 4 Cal.App.2d 727, 731, 41 P.2d 593, it was held that evidence that on two prior occasions the two defendants had burglarized or attempted to burglarize apartments of apartment managers by a scheme whereby one would burglarize the manager's apartment while the manager was engrossed in conversation with the other, was admissible to prove that the burglary charged was committed in the execution of such a scheme. See, also, cases cited, People v. King, supra, 4 Cal.App.2d 727, 731, 41 P.2d 593; 23 Cal.L.Rev. 530; II Wigmore, supra, 275; Fricke, supra, 224.

The striking similarity in significant respects between defendant's conduct in the Denton case and her conduct in connection with Mrs. Logan's death strongly indicates a scheme by defendant to acquire the property of a suitable victim by murder. In each case, defendant obtained access to the victim's home before the murder and responded to inquiries as to the decedent's whereabouts by stating that the decedent had been injured by a third party, that defendant had since been in touch with decedent, that the decedent had gone to one or another part of the country, and had not returned because of self-consciousness caused by the injury. Instead of transferring the decedent's assets to the heirs, in each case defendant, after the decedent's death, treated the decedent's residence and personal property as her own: She used the decedent's automobile and made claims of ownership thereto; had the decedent's clothing made over for herself or her daughter; gave away or sold personal property of the decedent that she did not want; went through papers belonging to the decedent; attempted by forgery to acquire decedent's personal property; opened the decedent's mail; stated that she was going to buy or sell the decedent's residence and prepared or had prepared instruments purporting to lease or deed the residence to her. After the death of Jacob Denton, she stated that he wanted to conceal his affairs from his friends and relatives. After Mrs. Logan's death, she stated that Mrs. Logan intended never to return to her home and no longer wanted the personalty therein. In each case, defendant stated that the decedent was shot while she was on the premises, but she did not get in touch with the police. In each case, the condition of the decedent's body, buried un-

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**circumstances prior to, during and after that transaction in connection with the matters of motive, plan or scheme, knowledge, accident or design, and identity of the perpetrator of the crime charged in the present information. If, however, you should find that the defendant did not murder Jacob C. Denton, then the evidence connected with that transaction should be disregarded by you, and you should reach your verdict upon the other evidence in this case alone."**

der or near his residence, indicated that the method of killing sought by the assailant was by a bullet from behind severing the spinal cord at the neck. In each case, defendant gave a detailed explanation of her unusual conduct following the disappearance and death of the decedent but was discredited.

The expiration of a number of years between the Denton murder and Mrs. Logan's death is not significant, since defendant was in the penitentiary until 1939, and was under the supervision of parole authorities after that year. There was therefore little opportunity for her to find a suitable victim before entering into the employ of the Logans.

[6] Since the defendant testified that Mrs. Logan was killed by her husband, the court properly instructed the jury that evidence concerning the Denton case tended to prove that defendant had a motive for killing Mrs. Logan. People v. Gosden, supra, 6 Cal.2d 14, 24, 56 P.2d 211; People v. Argentos, 156 Cal. 720, 726, 106 P. 65; People v. Miller, 121 Cal. 343, 346, 53 P. 816, and served to rebut her defense. See People v. Lane, 101 Cal. 513, 517, 36 P. 16; 13 So.Cal. L.Rev. 511, 512.

[7] The instruction that the Denton transaction tended to identify defendant as the murderer was likewise proper, since the method by which Jacob Denton was murdered, a bullet from behind severing the spinal cord at the neck, produced instant death with a minimum of resistance, and tended to identify defendant as the one who similarly attempted to sever Mrs. Logan's spinal cord. See II Wigmore, supra, 387.

[8] The final purpose for which the jury was allowed to consider evidence concerning the Denton case, to show knowledge and absence of good faith on defendant's part, was also proper. Since defendant explained that her unusual conduct following Margaret Logan's death was designed to obviate suspicion that might be engendered by her criminal record, evidence that her similar conduct after the murder of Jacob Denton aided in her conviction for that murder, tended to prove that she knew the incriminating effect of such conduct, and that therefore her explanation was false and in bad faith. See People v. Whalen, 154 Cal. 472, 476, 98 P. 194, and cases cited; People v. Gosden, supra, 6 Cal.2d 14, 24, 56 P.2d 211.

[9, 10] Defendant contends that the court erred in admitting evidence of the Denton murder on the ground that section 1025 of the Penal Code provides that when a defendant who pleads not guilty has been charged with a previous conviction and admits the charge, "the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." A previous conviction is charged, however, solely for the information of the court and the prison authorities in determining the punishment to be imposed in case of conviction. People v. Thomas, 110 Cal. 41, 43, 42 P. 456; see Pen.Code, §§ 644, 666, 667, 668, 3025. This section, as well as section 1093 of the Penal Code, prevents the circumvention, by reading or alluding to the admitted charge in the presence of the jury, of the rules against the admission of evidence of a previous conviction when such evidence is not relevant or admissible to impeach. See People v. Sansome, 84 Cal. 449, 451, 24 P. 143. It was not designed to exclude relevant evidence nor to prevent the impeachment of a witness by proof of conviction of a felony. People v. Oliver, 7 Cal.App. 601, 604, 95 P. 172; People v. Mullaly, 77 Cal. App. 60, 64, 245 P. 811; see People v. Oppenheimer, 156 Cal. 733, 738, 106 P. 74; People v. Jeffries, 47 Cal.App.2d 801, 805, 119 P.2d 190.

[11] The judgment roll in the Denton case, consisting of the indictment, plea, verdict, proceedings on arraignment for judgment, and judgment, were introduced over defendant's objection. The prosecution contends that this record was admissible as part of the proof that defendant committed a crime relevant to present issues, in that it renders defendant's guilt thereof res judicata. See People v. Majado, 22 Cal. App.2d 323, 326, 70 P.2d 1015; Harris v. State, 193 Ga. 109, 17 S.E.2d 573, 147 A.L. R. 991, 996. Since, however, the prosecution made no objection to defendant's testifying that she did not kill Jacob Denton and that she did not know whether he was dead, and requested no instruction that his death at

defendant's hands was established as a matter of law, defendant's guilt of Denton's murder was not treated below as res judicata. The record of the judgment was admissible in any event to impeach defendant's testimony (Code Civ.Proc. § 2051; People v. Booth, 72 Cal.App. 160, 166, 236 P. 987), and the court emphasized in its instructions that this evidence was to be considered for this purpose.

[12, 13] Although when no judgment has been pronounced, a conviction may be proved by the record of the verdict (People v. Ward, 134 Cal. 301, 307, 66 P. 372), when a judgment has been rendered, the record thereof establishes the previous conviction beyond dispute, and the record of the earlier proceedings is cumulative. See Code Civ.Proc. §§ 1838, 2044; People v. Peak, 66 Cal.App.2d 894, 913, 153 P.2d 464. Defendant was not prejudiced by the introduction of the record of proceedings preceding the judgment in the Denton case, however, for these proceedings added little information to that related in the judgment.

[14-16] Defendant contends that it was error to admit over objection evidence that the Denton case was affirmed on appeal and to permit the prosecution to elicit this information from her on cross-examination. Affirmation on appeal as relevant, however, to a determination of the weight to be given a previous conviction. See People v. Hardwick, 204 Cal. 582, 589, 269 P. 427, 59 A.L.R. 1480. Such a conviction may be shown by examination of the witness to impeach him. Code Civ.Proc. § 2051.

[17, 18] Defendant, while being cross-examined as to her previous conviction, stated of her own volition that she was prevented by force from testifying in the Denton case. It is contended that error was committed in overruling an objection to cross-examination concerning this statement. Although the prosecution may not, in impeaching a witness by proving a previous conviction inquire as to the merits of the conviction (People v. David, 12 Cal.2d 639, 646, 86 P.2d 811; People v. Eldridge, 147 Cal. 782, 786, 82 P. 442; People v. Chin Hane, 108 Cal. 597, 606, 41 P. 697), defendant's testimony tended to mitigate the discrediting effect of the Denton conviction, and could not have been prejudicial.

[19] Defendant contends that the court erred in excluding a verified petition by Margaret Logan executed in connection with her husband's commitment in November of 1943. The petition recited that Arthur Logan "has threatened to burn down the house, and has also threatened to kill me and himself. He struck me a week ago with his fist and my face is still bruised from the assault. He cannot be controlled or managed and needs supervision and care." The petition was hearsay and inadmissible to prove that these recitals were true. People v. Willard, 150 Cal. 543, 548, 89 P. 124; People v. Lee, 108 Cal.App. 609, 612, 291 P. 887; Adkins v. Brett, 184 Cal. 252, 256, 193 P. 251; see 5 Wigmore, supra, 76. Defendant contends that it was nevertheless admissible to support her defense that Arthur Logan was the assailant in that it indicated that Mrs. Logan feared her husband and believed him dangerous. The petition was offered, however, before defendant testified that Mr. Logan was the assailant, and was excluded on the ground that Mrs. Logan's state of mind toward her husband was not in issue. Although the right to offer it later without the necessity of an authenticating witness was reserved, the petition was not again offered.

Even if it be assumed that the petition was admissible to prove Mrs. Logan's state of mind, it is improbable that had it been admitted the jury would have inferred that Mrs. Logan feared a murderous attack by her husband. The jury was informed of the nature of the petition by recitals in a final judgment admitted in evidence declaring Arthur Logan insane and ordering his commitment. The judgment recited that Margaret Logan on November 8, 1943, testified "in regard to the mental condition of said person * * *" and that on the basis of this testimony and that of two medical examiners, Arthur Logan was found "dangerously mentally ill," and that unless he was given supervision, he "may endanger health, person and property. * * *" Defendant admitted, moreover, that Mrs. Logan's reason for procuring her husband's commitment was the hope that

he would be cured. Testimony of other witnesses revealed that Mr. Logan had been weakened by a major operation, and was very feeble. Defendant, who was present when the petition was prepared by a Los Angeles County deputy clerk from statements by Mrs. Logan, testified that because Mrs. Logan did not know the procedure, she aided her in procuring the commitment; that Mrs. Logan told defendant that the bruise on Mrs. Logan's face, referred to in the petition, was in fact caused by her husband's tripping her; that Mrs. Logan regretted filing the petition, wept, and stated that she would never again place her husband in an institution.

The judgment and the order denying the motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER, and SPENCE, JJ., concurred.

CARTER, Justice.

I dissent. In my opinion it was error to admit in evidence the matters pertaining to commission of the crime of 1920. In view of the volume of this evidence and the circumstantial nature of the proof as a whole, it cannot be said that the defendant was not prejudiced.

It is the settled policy of the law of this state to give effect to the universally recognized general rule of exclusion under which a defendant may be tried for no offense other than that with which he is charged. 8 Cal.Jur. § 167, p. 58; People v. Albertson, 23 Cal.2d 550, 576, 145 P.2d 7; see, also, Wharton's Crim. Evidence, §§ 343, 344, p. 483 et seq; 20 Am.Jur. § 309, p. 287; 22 C.J.S., Criminal Law, § 682, p. 1084 et seq. This rule and the reasons for it are well stated in the leading case of People v. Molineux, 168 N.Y. 264, 291, 61 N.E. 286, 293; 62 L.R.A. 193:

"The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged. 1 Bish. New Cr.Proc. § 1120. This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt. This rule, and the reasons upon which it rests, are so familiar to every student of our law that they need be referred to for no other purpose than to point out the exceptions thereto. The rule itself has been stated and discussed in this court in a number of cases, but we will cite only a few. In People v. Sharp, 107 N.Y. 427, 14 N.E. 319, 1 Am.St.Rep. 851 it was said: 'The general rule is that when a man is put upon trial for one offense he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded.' In Coleman v. People, 55 N.Y. 81, it is laid down as follows: 'The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one.'

"In People v. Shea, 147 N.Y. 78, 41 N.E. 505, the rule is thus stated: 'The impropriety of giving evidence showing that the accused had been guilty of other crimes, merely for the purpose of thereby inferring his guilt of the crime for which he is on trial, may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been

in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of his whole past life, his tendencies, his nature, his associates, his practices, and in fine all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such a course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful, doctrine. By that law the criminal is to be presumed innocent until his guilt is made to appear beyond a reasonable doubt to a jury of 12 men. In order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question.' * * * The court of last resort in Pennsylvania thus states the rule: 'It is the general rule that a distinct crime unconnected with that laid in the indictment cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof in itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefore predisposes the mind of the juror to believe the prisoner guilty.' Shaffner v. Commonwealth, 72 Pa. 60, 13 Am.Rep. 649."

After thus reviewing the general rule, the court in the Molineux case discusses the applicability of various exceptions, saying: "The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes, is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. Whart.Cr. Ev. (9th Ed.) § 48; Underh.Ev., § 58; Abb. Tr.Brief, Cr. § 598."

First, as to motive, it is pointed out that "in every criminal trial when proof of motive is an essential ingredient of the evidence against a defendant, the motive to be established is the one which induced the commission of the crime charged. This is too simple for discussion. To hold otherwise would be to sanction the violation of the general rule under the guise of an exception to it." In the present case, the motive which prompted the crime charged, if defendant committed that crime, was to acquire for herself the property of her victim, or to prevent the victim from reporting the forgery of the check or other misconduct. In either case the fact of the 1920 murder was of no probative value in establishing the motive for the later crime. Because of the large percentage of crimes committed for the purpose of feloniously acquiring property of another that similarity of motive alone is not sufficient to warrant application of the exception to the general rule.

Second, as to intent, which is distinguishable from motive, it is obvious that proof of an intent to kill Denton in 1920 was of no probative value in establishing an intent to kill another at a different time.

Third, under the facts it is clear, and indeed there is no contention to the contrary, that the exception relating to the absence of mistake or accident has no application.

Fourth, as to plan or scheme, it is said in the Molineux case, that "To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. * * * Some con-

nection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received. This connection must clearly appear from the evidence. Whether any connection exists is a judicial question. If the court does not clearly perceive it, the accused should be given the benefit of the doubt, and the evidence rejected. The minds of the jurors must not be poisoned and prejudiced by receiving evidence of this irrelevant and dangerous description." Applying this test to the present facts, it is seen that there is no evidence of common purpose, plan, or scheme. At most the prosecution showed that two isolated murders were committed, with twenty-four years intervening between them, for the apparent purpose in each case of securing the victim's property. The death of both victims was not a means to a single goal.

Lastly, as to the exception covering identity, it is said in the Molineux case: "There are not many reported cases in which this exception seems to have been affirmatively applied. A far larger number of cases, while distinctly recognizing its existence, have held it inapplicable to the particular facts then before the court. The reason for this is obvious. In the nature of things, there cannot be many cases where evidence of separate and distinct crimes, with no unity or connection of motive, intent, or plan, will serve to legally identify the person who committed one as the same person who is guilty of the other. The very fact that it is much easier to believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime proves the dangerous tendency of such evidence to convict, not upon the evidence of the crime charged, but upon the superadded evidence of the previous crime. Hence our courts have been proverbially careful to subject such evidence to the most rigid scrutiny, and have invariably excluded it in cases where its relevancy and competency was not clearly shown. As was said in People v. Sharp, 107 N.Y. [427], 471, 14 N.E. 319, 1 Am.St.Rep. 851, such evidence 'tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tend to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence.' Such evidence gives opportunity for the conviction of an accused person upon mere prejudice, instead of by evidence showing the actual commission of the crime for which a defendant is on trial. It compels a defendant to meet an accusation not charged in the indictment, which he might successfully refute if given the opportunity to do so, unembarrassed by other issues." In the present case the defendant was admittedly at the scene of the murder. The only issue was whether it was she or Mr. Logan who struck the blows and fired the fatal shot. How evidence of the 1920 crime could prove her identity rather than that of Mr. Logan as the murderer is obscure, unless it can be said that the two crimes show a common plan or scheme. But, as already stated, no common plan appears other than perhaps a purpose to feloniously acquire property of the victim, and that is not a sufficient connection to justify application of the exception to the general rule.

The development of the law in this state shows a departure from the early restrictions governing the application of exceptions to the general rule as defined in the Molineux case. This is evidenced by decisions such as People v. Lisenba, 14 Cal. 2d 403, 94 P.2d 569, and cases there reviewed (see dissenting opinion reported in volume 89 of the Pacific Reporter 2d at pages 54-108). In my opinion the pendulum has swung too far to the side of admissibility. The restrictions should be reappraised and given effect. As said in People v. Albertson, 23 Cal.2d 550, 577, 145 P.2d 7, 20: "The trial court, however, should be guided by the rule that such proof is to be received with 'extreme caution,' and if its connection with the crime charged is not clearly perceived, the doubt is to be resolved in favor of the accused, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt." See, also, People v. Glass, 158 Cal. 650, 112 P. 281; People v. Lane, 100 Cal. 379, 387-390, 34 P. 856;

People v. Darby, 64 Cal.App.2d 25, 148 P.2d 28; 13 Cal.Jur. § 84, p. 707; 8 Cal. Jur. § 168, p. 61.

An indication of the policy of this state to adhere to a limited application of the exceptions to the general rule is found in section 1025 of the Penal Code, enacted in 1874, which provides that when a defendant who pleads not guilty has been charged with a previous conviction and admits the charge, "the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." Although, as the majority opinion notes, this statute, as construed and applied, does not exclude relevant evidence, or prevent the impeachment of a witness by proof of conviction of a felony, nevertheless this court just recently took occasion to comment at length on the prejudice which is thrust upon any defendant charged with crime who has been previously convicted of a felony. People v. Adamson, Cal.Sup., 165 P.2d 3. So far as possible the settled policy underlying the enactment should be given effect (see People v. Sansome, 84 Cal. 449, 451, 24 P. 143; People v. Hobbs, 37 Cal.App.2d 8, 11, 98 P.2d 775), and the application of exceptions to the general rule should be confined to the narrow field laid down in early cases.

The issue of remoteness is an important one. The proximity of the offense charged to the prior offense sought to be introduced in evidence is universally considered by the courts in determining whether such evidence is admissible. Whiteman v. State, 119 Ohio St. 285, 164 N.E. 51, 63 A.L.R. 602; 22 C.J.S., Criminal Law, §§ 683-689, pp. 1089-1111; 1 Wharton's Criminal Evidence, 11th Ed. § 361, p. 569; 8 Cal.Jur. § 170, p. 65. Generally it must appear that the evidence of other offenses relates to acts that occurred shortly before, or shortly after, the commission of the offense for which the accused is being tried. However, no definite time limit can be fixed, and the matter rests largely in the discretion of the court. The California Jurisprudence text-writer states: "In regard to the distance of time between the principal fact and the collateral fact to be shown in proof of knowledge or intent, no precise rule can be established so far as the admissibility of the evidence is concerned. If the principle upon which this evidence is introduced is the doctrine of chances or probabilities, the remoteness of such occurrences in point of time goes to the weight rather than the admissibility of the evidence. In such cases, if the evidence has any application under the rule, whether or not it has sufficient weight to entitle it to be submitted to the jury is a question for the trial court. The question must be left in a great measure to the discretion of the judge who tries the case." 8 Cal.Jur. § 170, p. 66.

Under this rule, it appears that in this case the mere fact of extreme remoteness did not compel the exclusion of evidence of the prior offense by the trial judge. However, when it is considered that twenty-four years elapsed between the two crimes, eighteen of which were spent by the defendant in prison with ample time for reflection, it is at least arguable that even had she originally intended to murder a second victim, she would hardly have planned to carry out the crime by the same method which had resulted so disastrously for her in the first instance. In other words, the fact of remoteness, considered with all of the other facts in this case, negatives any common plan and supports the conclusion that the trial court abused its discretion in admitting evidence of the prior offense.

In my opinion the defendant should be retried on evidence confined to the commission of the offense with which she is here charged.

For the foregoing reasons, I would reverse the judgment.

Rehearing denied; CARTER, J., dissenting.

## PEOPLE v. MANCHETTI. *

Cr. 2376.

District Court of Appeal, First District, Division 1, California.

June 12, 1946.

Hearing Granted July 11, 1946.

1. Criminal law ⇐641(1)

There must be a substantial deprivation of the right of selection of counsel of the choice of accused before it may be determined, without reference to prejudice, that constitutional rights have been infringed. Const. art. 1, § 13; U.S.C.A. Const.Amends. 5, 6.

2. Criminal law ⇐1165(1)

Every small infringement of a constitutional right does not in and of itself, without a showing of resulting prejudice, require a reversal in a criminal case. Const. art. 1, § 13; U.S.C.A. Const.Amends. 5, 6.

3. Criminal law ⇐1115(2)

Whether attorney's unfamiliarity with the facts precluded him from thoroughly examining jurors on their voir dire, to the prejudice of accused, could not be decided on appeal, in absence from the record of such proceeding.

4. Criminal law ⇐1166(8)

Where attorney appeared on behalf of counsel for accused to request a continuance and attorney was instructed to proceed with the trial, whereupon jury was selected, and on subsequent day evidence was presented, accused was not prejudiced by any failure to give attorney sufficient time to prepare and to permit accused to discuss the case with him.

5. Witnesses ⇐262

Recalling a witness for further interrogation is within discretion of trial judge. Code Civ.Proc. § 2050.

6. Witnesses ⇐264

Generally, a request to have a witness recalled should enumerate the subjects of the proposed examination, the new matter relative to subjects whereon the witness was cross-examined, or the new matter that has been discovered since the previous cross-examination. Code Civ.Proc. § 2050.

7. Witnesses ⇐262

In prosecution for robbery while armed with a deadly weapon, where direct examination of state's witness involved a matter of identification, and where ability of witness to observe accurately, and to recall the events was successfully attacked on cross-examination, refusal to recall the witness at request of the defense was not an abuse of discretion. Code Civ.Proc. § 2050.

8. Criminal law ⇐696(3)

A motion to strike testimony from the record is directed to the admissibility of the testimony and not to the credibility of the witness, except where absence of such testimony would leave the record silent on a vital issue.

9. Criminal law ⇐696(3)

A party cannot insist that competent and relevant evidence be stricken out for reasons going to its weight, sufficiency or credibility, at least unless elimination of such evidence would be decisive of the whole case.

10. Criminal law ⇐696(3)

In prosecution for robbery while armed with a deadly weapon, where testimony of state's witness on direct examination related to a matter of identification, a motion to strike the testimony, after it appeared on cross-examination that witness' recollection about the whole affair was hazy was not well taken, because it went only to the weight of the evidence and not to its admissibility.

11. Criminal law ⇐742(1)

Where a case is tried before a jury, the judge has nothing to do with credibility of witnesses except on a motion for new trial.

12. Criminal law ⇐785(1)

In prosecution for robbery while armed with a deadly weapon, where state's witness on direct examination testified regarding a matter of identification, but ability of witness to observe accurately, and to recall and relate those events, was successfully attacked on cross-examination, instruction pointing out the factors of credibility to be weighed in respect to testimony of that witness was not required. Pen.Code, § 1093, subd. 6; Const. art. 6, § 19.

* Subsequent opinion 175 P.2d 533.

13. Criminal law ⇐656(1)

A trial judge may make any comment deemed necessary properly to determine the issues and need not comment on all the evidence, but should be cautious with a view to protecting the defendant's rights. Pen.Code, § 1093, subd. 6; Const. art. 6, § 19.

14. Criminal law ⇐823(12)

An instruction calling attention to testimony of particular witness for state and charging that jury were the sole judges of credibility of the testimony of that witness, and of every other witness, was not prejudicial as emphasizing the disputed testimony of that witness, when instruction was read with other given instructions from which it appeared that all material matters were covered thoroughly without undue emphasis given to that witness' testimony. Pen. Code, § 1093, subd. 6; Const. art. 6, § 19.

15. Witnesses ⇐362

Proof that witness has been convicted of a felony is not necessarily an impeachment of all the sworn statements made by that witness. Code Civ.Proc. § 2051.

16. Witnesses ⇐338, 345(1), 379(1)

Contradictory statements or evidence that witness' general reputation for truth, honesty and integrity is bad, or proof of a conviction of a felony, may be considered as evidence tending to impeach witness. Code Civ.Proc. § 2051.

17. Criminal law ⇐730(8)

Where district attorney in closing argument stated that jury might disregard defendant's testimony because of his previous conviction of a felony but court instructed that evidence of a previous conviction might be considered for purpose of impeachment only, no prejudicial error was apparent. Code Civ.Proc. § 2051.

18. Criminal law ⇐730(1)

Where district attorney in argument stated that case was initiated by the Grand Jury and that there was probable cause that a crime had been committed and that the defendant was guilty of the crime, but court instructed that argument of counsel was just argument and not evidence, the argument though inadvisable was not prejudicial.

19. Criminal law ⇐823(1)

An instruction that question of punishment was entirely for the court to determine was inaccurate but was not prejudicial, as long as jury understood from further instruction that jury should not be concerned with question of punishment.

20. Criminal law ⇐1156(3)

Denial of motion for new trial on ground of newly discovered evidence will not be reversed unless it appears that due diligence to discover the evidence was exercised.

21. Criminal law ⇐938(1)

Motion for new trial on ground of newly discovered evidence is addressed to trial court's discretion.

22. Criminal law ⇐941(1)

Where there was ample time to prepare defendant's case between date of arraignment and date of impanelment of jury, and the evidence in affidavits supporting motion for new trial on ground of newly discovered evidence was merely corroborative, denial of motion was not an abuse of discretion, notwithstanding failure of state to introduce counter-affidavits.

23. Criminal law ⇐1156(3)

A broad discretion rests with the trial court in denying motion for new trial on ground of newly discovered evidence and unless an abuse of discretion appears and an injustice has been perpetrated, the trial court should be upheld.

24. Criminal law ⇐641(1), 1166(8)

Where attorney who appeared on behalf of counsel for accused to request an additional continuance was instructed to proceed with the trial and regular counsel for accused was not substituted until after two days of presentation of evidence, and objection was based only upon the grounds of preference for regular counsel and that attorney demanded a fee which accused was unable to pay, accused was not deprived of his constitutional right to counsel, or arbitrarily deprived of counsel of his own choice, and denial of motion for con-

tinuance was not prejudicial error. Const. art. 1, § 13; U.S.C.A.Const. Amends. 5, 6.

PETERS, P. J., dissenting.

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Appeal from Superior Court, San Francisco County; Herbert C. Kaufman, Judge.

Dante Manchetti was convicted of robbery while armed with a deadly weapon, and he appeals.

Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., City and County of San Francisco, and Charles S. Peery, Deputy Dist. Atty., both of San Francisco, for respondent.

WARD, Justice.

Defendant was indicted on two counts: robbery while armed with a deadly weapon and violating sec. 209 of the Penal Code. These offenses are alleged to have occurred on November 13, and 14, 1940. The charge in the second count—kidnapping—was dismissed on motion of the district attorney. Defendant admitted a prior conviction and now appeals from the judgment of conviction of robbery while armed with a deadly weapon and from the order denying a new trial.

The prosecution rested its case on testimony showing that defendant and one Pelizzari came to the place of business of the prosecuting witness, Rose Pesce, who admittedly operated a house of prostitution known as the Depot Rooms, in Benicia, California, at about 11 a. m., November 13, 1940, and kept her under constant terror from threats, guns and physical violence until she directed her maid to give them $500, and further agreed to go with the two men to her safe deposit box in San Francisco to secure $1,000. On November 14, 1940, still under threat of bodily harm, she accompanied the two men to her bank in San Francisco and, followed by Manchetti, went to her safe deposit box and took out the $1,000 and gave it to him. This story may seem improbable, but the jury may have considered that the victim was operating a house of prostitution and was reluctant to report the matter to the authorities. The testimony of the prosecuting witness was supported by other evidence, including that of David T. Edwards, a shell-shocked soldier, who, prior to the war, had testified before the Grand Jury that on the night of Nov. 13, 1940, he lived in the rear cottage of the Depot Rooms, some 15 feet from the main building, and that he heard certain threats made by the two men against the prosecuting witness. There is also the testimony of the maid, Edna R. Arnold, who got the $500 out of a "strong box" and who was present during the entire proceedings covering two days; also testimony of one of the bank employees who saw the prosecuting witness and defendant enter the safe deposit vault together on November 14, 1940. There was rebuttal evidence that a night watchman who called twice every night saw the witness Arnold in the Benicia house on the nights in question.

The appellant notes various points as grounds for reversal. Some of them may be considered with others, so that it seems fair to say that the main grounds are: Whether defendant was deprived of counsel of his choice; whether the testimony of a certain witness was properly before the jury; whether certain instructions given on the subject of punishment were proper; whether certain refused instructions should have been given; whether certain comments made by the district attorney were prejudicially erroneous, and whether the court erred in denying a new trial if value is given to the affidavits used on such motion.

There is no special claim that the evidence is insufficient to support the verdict though the veracity of many of the witnesses is attacked. Only the evidence relative to the points in which it is claimed there is error need be set forth in detail. Preliminarily it should be said that many of the facts testified to by witnesses for the state and for the defense are contradicted by other witnesses. A fair sample appears in the testimony of a sister-in-law of the complainant who testified that she performed housework consisting of laun-

dry and cleaning at the Benicia establishment. The sister-in-law testified that Edna R. Arnold, a colored woman, who corroborated the complaining witness on many of the factual matters, was not working or living at the Benicia house on the 13th or 14th of November, 1940. The husband of the sister-in-law testified that his wife never *at any time* lived or worked in the Benicia house; that on the contrary on the dates in question she lived in Vallejo.

The principal question on appeal, namely, whether defendant was arbitrarily deprived of the right of counsel of his own choice, is based upon the following incidents occurring prior to and during the trial. The indictment was presented December 15, 1941. The case had been continued a number of times because the defendant was not within the jurisdiction of the court and had not been apprehended, though no claim of "flight" is made by the People, and no instruction was given on that subject. On June 2, 1944, the record shows that the defendant Manchetti was arraigned, and at his request the cause was continued to plead. Seven days later a plea of not guilty was entered to the offense charged *and the defendant admitted that he had suffered a prior conviction of a felony.* Thereafter numerous continuances "to be set" were ordered "by consent" of the respective parties. The record also shows that some of the continuances were ordered without reference to "consent." On May 24, 1945 the trial actually started by the empanelment of a jury in the absence of the attorney, Nathan C. Coghlan, who appeared in the preliminary proceedings. An attorney, Mr. Andrews, who appeared on behalf of Mr. Coghlan to request a continuance, was instructed to proceed with the trial. On May 25, witnesses, including the complainant, her maid, Mrs. Arnold, and Mr. Edwards were sworn and testified. On May 28th, by consent, Mr. Andrews withdrew as counsel for defendant, and the present counsel, Mr. Coghlan, was substituted. Thereupon a three day continuance was ordered at which time the trial proceeded.

Several days prior to the commencement of the trial the present counsel appeared and notified the court that on the date set he would be engaged in the trial of a criminal case in an adjoining county. The district attorney's office opposed the continuance at that time and stated: "* * * we have subpoened foreign witnesses who are presently within the jurisdiction of the city, and ready for trial." At a later date the following statement was made: "We're put in this position, your Honor, that we've brought for the purpose of this trial a foreign witness into the jurisdiction, one from out of the State, and another from Los Angeles, and other witnesses are from Albany, California. They are all here and we're ready to proceed." No witness from another state or from Los Angeles testified and so far as the record on appeal discloses no such witnesses were placed under subpoena. There is no evidence that the statement of the district attorney was false.

On the day set for trial when Mr. Andrews appeared to ask for a continuance on behalf of Mr. Coghlan, the present counsel, Mr. Andrews read a telegram to the effect that Mr. Coghlan was actually engaged in a trial in San Mateo County and he requested a continuance to any day during the following week. The court's attention was called to the fact that Mr. Coghlan was the choice of the defendant and that Mr. Andrews was not familiar with the facts of the case. Once more a representative of the district attorney called attention to "witnesses who have come from Los Angeles." The court, upon the statements made by the district attorney and for other reasons, determined: "We will proceed with the selection of a jury, and then after we select the jury the Court will take a reasonable recess to enable you [Mr. Andrews] to familiarize yourself with the facts of the case." Whereupon the following occurred:

"The Defendant: May I say something?

"The Court: No, you just sit down and follow the advice of your lawyer. All right, call the roll of jurors, Mr. Clerk."

On the next day the record shows the following:

"The Defendant: This other lawyer, he's gone, and he wants money and I have no money, I've paid Mr. Coghlan.

"The Court: Go see if he is in the hallway.

"The Defendant: He's asked for some money, and I have no money.

"The Court: We will see that you have counsel whether you have money or not. All right, here is your counsel, Mr. Andrews, so don't worry. He thought maybe his counsel had disappeared.

"Mr. Andrews: I would like to, your Honor. I would prefer that Mr. McDonald take this matter over.

"The Court: No, you are in the case. You will have to stay in. The same thing happened to me before Judge Trabucco and he said 'No, the Court is satisfied you can do a very fine job,' and I feel you, Mr. Andrews, will do a very fine job.

"The Defendant: Mr. Coghlan, he'll be here to-night or to-morrow morning. He would be willing to go on to-morrow morning.

"The Court: Mr. Andrews will very ably represent you."

Two issues arise from the facts just enumerated: (1) Was defendant deprived of his constitutional right to counsel? (2) if not, was the denial of the motion for a continuance prejudicially erroneous? People v. Lanigan, 22 Cal.2d 569, 140 P.2d 24, 148 A.L.R. 176 and In re Egan, 24 Cal.2d 323, 149 P.2d 693, are factually so different that they are of little assistance in determining the problem presented on this appeal, but in each decision certain legal views are expressed that are pertinent to the issues stated above. The theory upon which a reversal was ordered in the Lanigan case rested upon the conclusion that no effective appointment of counsel was made, which is in violation of art. 1, sec. 13 of the California Constitution, similar to the rights conferred on defendants in federal courts by the fifth and sixth amendments to the Constitution of the United States.

The facts in the Lanigan case are set forth clearly in the following holding (22 Cal.2d at page 577, 140 P.2d at page 29, 148 A.L.R. 176): "So in the present case there was a failure to make an 'effective appointment of counsel.' It must therefore be concluded that the trial court erred prejudicially in forcing the defendant Giardano to share the attention and efforts of his counsel with the other defendant, and that the court likewise so erred in forcing the defendant Lanigan to be represented by counsel who did not wish to represent him, who objected to the order of the court appointing him and who did not feel that he could properly represent him. In such circumstances counsel was not in a position freely to decide what was most advantageous for the defense of one client without weighing against it the disadvantage that might result to the other." "In Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527, it was stated that 'the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.'" In Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, one of the accused, Glasser, wished to have the undivided attention of counsel of his own choice. The denial of such privilege in view of the facts of that case warranted the assumption that prejudice arose from the mere denial. The accused in the Glasser case had no opportunity to confer with the appointed counsel. *Here there is no claim that defendant was not permitted to confer with Mr. Andrews.*

[1, 2] Subsequently the Supreme Court of California clearly and definitely stated the rule as follows: "The petitioner places great reliance on language appearing in the Glasser case, and applied in the Lanigan case, that the right under consideration was a fundamental right and that courts should not indulge in nice calculations as to the amount of prejudice arising from its denial. So here also we are not concerned with nice questions of prejudice. A showing of a substantial deprivation of the right is essential. Unless the petitioner has established such a deprivation he may not prevail in this proceeding." In re Egan, supra, 24 Cal.2d at page 338, 149 P.2d at page 701. It should be concluded that the test is that there must be a "substantial deprivation" of the right

of the selection of counsel of the choice of the accused before it may be determined without reference to prejudice that constitutional rights have been infringed. Every small infringement of a constitutional right does not in and of itself, without a showing of resulting prejudice, require a reversal in a criminal case. People v. O'Bryan, 165 Cal. 55, 130 P. 1042; People v. Mayfield, 85 Cal.App. 77, 259 P. 75; People v. Peterson, 120 Cal.App. 197, 7 P.2d 366; People v. Looney, 9 Cal.App.2d 335, 49 P.2d 889; People v. Watts, 198 Cal. 776, 247 P. 884.

[3] The question of prejudice may better be considered in relation to the denial of the motion to continue the case for trial until Mr. Coghlan could appear. It is suggested by appellant that Mr. Andrews, unfamiliar with the case, could not intelligently interrogate the prospective jurors. Appellant admits that Mr. Andrews is a lawyer of ability. Whether his unfamiliarity with the facts precluded him from thoroughly examining the jurors on their voir dire is a question that may not be decided on this appeal due to the absence from the record of such proceeding. In the request for a transcript to use on appeal the following appears: "And the appellant further requests the transcription of all the notes of the reporter of all the oral proceedings taken at the trial of the above entitled cause, excepting the examination of the 'jurors' as to their qualifications."

[4] Whether the statements made by the representative of the district attorney relative to the appearance of a witness from without the state and witnesses from Los Angeles was an imposition on the court need not be decided upon the present record. However, there was no suggestion by Mr. Coghlan, in support of his application for a continuance, that the testimony of these witnesses might be taken in the presence of the defendant and used on a trial continued to a subsequent date. The statements in relation to these witnesses who never appeared in the trial indicate that at the time the statements were made the district attorney declared that the witnesses were in the City and County of San Francisco.

On the day the jury was selected, and the subsequent day when evidence was presented, the effect of the objection of the defendant was that defendant preferred Mr. Coghlan. The objection was not based upon defendant's doubt of the ability of Mr. Andrews to protect the legal and factual rights of the accused. It was, as stated, based upon the grounds of preference for Mr. Coghlan, and that Mr. Andrews demanded a fee, which defendant was unable to pay. On the second morning, Mr. Andrews stated that he would prefer that the public defender "take this matter over," but there was no objection that counsel had not been given ample time to interview the accused. According to California cases sufficient time was given Mr. Andrews to prepare and to permit the defendant to discuss the case with counsel. People v. Maddox, 65 Cal.App.2d 45, 149 P.2d 739 (petition for hearing by Supreme Court denied); People v. Peterson, supra; 8 Cal.Jur. 211.

After two days of presentation of evidence Mr. Coghlan appeared and took over the burden of conducting the trial. Mr Andrews, with the consent of the defendant, withdrew from the responsibility of the case. On the last previous hearing Mr. Andrews had requested, and the court had admonished: "All witnesses in the courtroom, who have been on the stand, but who haven't been fully cross-examined," to return on the next day of trial. All witnesses that Mr. Coghlan desired to cross-examine, except one, were returned to the witness stand, thereby giving appellant two opportunities to cross-examine. Up to this point no possible error prejudicial to the defendant appears in the record.

The crux of the problem of prejudice rests upon the appearance of one witness, Edwards, and the court's refusal either to strike his testimony from the record or have him re-called for further testimony. Edwards was the first witness called by the People. He testified that he lived in Benicia on November 13 and 14, 1940, in a room 10 or 15 feet from the main premises run by Mrs. Pesce; that he paid rent to the maid but was acquainted with Mrs. Pesce and that he had seen the defendant.

He also testified that there was some confusion in his own mind relative to the incident. He said that there was a commotion in the main building on the night of November 13, 1940; that he recognized Mrs. Pesce, Mrs. Arnold and Manchetti, "and I saw the fellow I believe they call him Pelizzari or Webb." Edwards testified that Manchetti said: "I want the money now." Subsequently he testified that he was not sure whether it was Manchetti or Pelizzari who made the foregoing statement. He also testified that Manchetti said: "If we don't get it one way we'll get it another," and that at that time Manchetti had a gun in his hand and that Mrs. Pesce replied: "I haven't got it." On cross-examination by Mr. Andrews he testified that it could have been Pelizzari who said: "If we don't get it one way we'll get it another," but that it was Manchetti who had the gun. When shown his testimony taken before the Grand Jury that he had testified that it was Pelizzari who had the gun, the record shows the following:

"A. Sir, that was four years ago. I don't remember. I have been overseas, and there's a lot of things I don't remember. I don't know why I'm up here sometimes.

"The Court: Just give us your best recollection. A. That's my best recollection.

"Mr. Andrews: Q. This was your testimony before the Grand Jury? A. Before I was in the army, yes, sir.

"Q. And you testified before the Grand Jury as to the question asked you as to who had the gun. You heard the question and that was your testimony then? A. Yes, sir, as far as I understand it is, yes, sir.

"Q. Now, then, Mr. Edwards, your recollection is somewhat hazy about the whole affair, isn't it? A. Will you say that again.

"Q. Your recollection about the whole affair is rather hazy, isn't it? A. Apparently they think so, yes, sir.

"Q. You are not really sure of what did go on there, are you? A. All this confusion, sir, I am rather hazy.

"Q. Yes. A. I'd like to be excused.

"Mr. Perry [Assistant District Attorney]: Well, I'm afraid that is not possible.

"Mr. Andrews: No objection, your Honor.

"The Court: Were you wounded overseas? A. No, sir, I'm shell-shocked.

"The Court: Well, all this did happen four years ago, and it wouldn't be surprising to have his recollection somewhat hazy with what he apparently has gone through."

[5-7] Several sessions after Mr. Coghlan's appearance the request was made that Edwards should be called for further cross-examination. Recalling a witness for further interrogation is a matter within the discretion of the trial judge. "A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the court. Leave is granted or withheld, in the exercise of a sound discretion." Code Civ.Proc. sec. 2050. In the present case two important details appear in the direct examination, namely, who made a verbal threat and who held a gun. On direct examination, with some hesitancy by reason of evasive answers, Edwards testified that it was Manchetti. On cross-examination by Mr. Andrews he admitted in each instance it could have been Pelizzari; that he was hazy about it all. What Mr. Coghlan could have elicited to the benefit of the defendant that was not covered by Mr. Andrews is vague as Mr. Coghlan did not present what further testimony he expected to elicit. The witness' ability to observe accurately, to recall the events testified to and to relate those events was successfully attacked from the standpoint of the defense by Mr. Andrews on cross-examination. The generally accepted rule in presenting a request to have a witness recalled to testify is to enumerate the subjects of the proposed cross-examination—the new matter relative to subjects whereon the witness was cross-examined or the new matter that has been discovered since the previous cross-examination. Mullia v. Mayer, 217 Cal. 209, 17

P.2d 705; Norton v. Blenkiron, 138 Cal. App. 66, 31 P.2d 807; People v. Searing, 20 Cal.App.2d 140, 66 P.2d 696; Chamberlain v. Chamberlain, 114 Cal.App. 591, 300 P. 100; 27 Cal.Jur., pp. 111, 112. Under the circumstances as they appear from the record the trial court did not abuse its discretion in refusing to recall Edwards as a witness.

[8-11] The motion to strike the testimony is equally without merit. The motion here referred to all and not a part of the testimony of witness Edwards. A motion to strike testimony from the record is confined to the admissibility of the evidence and not to the credibility of the witness except in the instance where such evidence would leave the record silent on a vital issue. In the present case if the evidence had been stricken out, the record still contained similar evidence given in the testimony of Mrs. Arnold and Mrs. Pesce. "A party cannot insist that competent and relevant evidence be stricken out for reasons going to its weight, sufficiency, or credibility, at least unless elimination of such evidence could be decisive of the whole case; and in some jurisdictions it is held that the court has no authority to strike out evidence on such grounds." 64 Cor.Jur., p. 210, sec. 220. The "haziness" and lack of memory of witness Edwards went only to the weight of the evidence and not to its admissibility, hence the motion was not well taken. It is the province of the trier of the facts to pass on the credibility of a witness. People v. Carlisle, 66 Cal.App.2d 874, 153 P.2d 401; People v. Johnson, 46 Cal.App.2d 63, 115 P.2d 605. When the case is tried before a jury the judge has nothing to do with the credibility of witnesses except on a motion for new trial. This court is not prepared to say that any error could be based upon a refusal on the part of the court to recall a witness who had been previously interrogated on cross-examination on the issues elicited on the direct examination; nor may a motion to strike all such evidence from the record be the basis of prejudicial error where "it is apparent that the situation was both unusual and one calling for consideration and discretion upon the part of the trial court." Chamberlain v. Chamberlain, supra, 114 Cal.App. at page 595, 300 P. at page 101. Incidentally the record shows that defendant sought to subpoena Edwards after the appearance of Mr. Coghlan in the case and that Edwards could not be found. The motion to recall Edwards for further cross-examination was made after the case for the People had been presented and when the defense had been unsuccessful in subpoenaing Edwards.

[12] The conclusion reached on the last point raises a further contention by appellant. It is urged that if the testimony was not stricken that appellant was entitled to have an instruction given pointing out the factors of credibility to be weighed in respect to Edwards' testimony. It is a dangerous procedure to address an instruction to the reliability of a specifically named witness. "The court should not single out witnesses for instructions as to the weight to be given their testimony. Thomas v. Gates, 126 Cal. 1, 58 P. 315; Estate of Blake, 136 Cal. 306, 68 P. 827, 89 Am.St.Rep. 135; Juchert v. Tenent, 126 Cal.App. 216, 14 P.2d 617." County of San Mateo v. Christen, 22 Cal.App.2d 375, 382, 71 P.2d 88, 91. (Petition for hearing by Supreme Court denied.) The foregoing statement appears to be a judicial rule that must be followed notwithstanding Penal Code sec. 1093, subd. 6 enacted pursuant to the provision of art. VI, sec. 19 of the Constitution of this state. "It will be noted that the constitutional provision above quoted by its terms imposes no restriction on the nature of the comment except that the jury must be instructed that it is the exclusive judge of fact and credibility." People v. Robinson, Cal. App., 166 P.2d 17, 19. "The provision in the Constitution expressly permits the court to 'make *such* comment on the evidence and the testimony and credibility of any witness *as in its opinion is necessary for the proper determination of the case.*'" People v. Ottey, 5 Cal.2d 714, 728, 56 P.2d 193, 200. There does not appear from the facts in this case good reason why a court should emphasize its opinion that a general rule is particularly applicable to the testimony of a specifically named witness. In the present case appellant, upon the invitation of the court, requested an instruction

relative to Edwards as a witness, noting as factors in determining his credibility his ability as a witness to testify coherently and to remember as an enlargement upon the general instructions as to weight of testimony. The proposed instructions read: "And in this connection I desire to call your attention to testimony of the witness David T. Edwards. (This witness declared in his testimony that he was 'shell shocked,' and that as to the things he testified about, that 'all this is confusion' and that he was 'rather hazy.') I charge you, that you are the sole judges of the worth or value or credibility of the testimony of this witness, (and of every other witness) (If you believe from his appearance, or manner upon the witness stand, or from his own statement, he was incapable of observing, remembering, or communicating what he may or may not have seen or heard, it will be your duty to assess the weight and value, if you believe it has any weight or value, in this case, of such testimony. And if you have a reasonable doubt as to whether any weight should be given his testimony, you should resolve that doubt favorably to the defendant.)" It is not clear from the record whether the parenthesized portions are "proposed" or court inserted portions. However, the court thereupon prepared another instruction reading: "The Court further instructs the jury they are the sole judges of the weight to be given to the evidence of any witness who may have testified in this case. And in this connection I desire to call to your attention the testimony of the witness David T. Edwards. I charge you that you are the sole judges of the worth or value or credibility of the testimony of this witness, and of every other witness." Appellant now states that the court erred in naming Edwards in his charge to the jury inasmuch as the instruction as given merely emphasized the disputed testimony.

[13, 14] A trial judge may make any comments deemed necessary properly to determine the issues in the case (People v. Ottey, supra) and is not required to comment on all the evidence (People v. Dail, 22 Cal.2d 642, 140 P.2d 828) and should be cautious with a view to protecting the defendant's rights. People v. De Moss, 4 Cal.2d 469, 50 P.2d 1031. When the court's instructions are read with other given instructions it appears that all material matters were covered fairly and no undue emphasis was given to Edwards' testimony that could prejudice the cause of appellant.

[15-17] The following series of minor matters are relied upon to justify a reversal. In his closing argument to the jury the district attorney in charge of the prosecution of this case made the following statement: "Now, we come to the testimony of the defendant, which I anticipate the Court will instruct you stands impeached here by reason of his previous conviction of a felony. For that reason you are at liberty to disregard it in this case." Appellant prepared the following instruction: "The Court instructs the Jury, that the testimony given by this defendant, as to his previous conviction of a crime does not raise any presumption that he is guilty of the offense for which he is here on trial. The defendant cannot be convicted of the crime charged because he has stated that he suffered a previous conviction, and that fact was not allowed to go to your attention in order to prove him guilty of the crime charged, nor are you allowed to consider that fact as in any way tending to prove that he committed the crime charged." The proposed instruction was fully covered by the following instructions: "Now, the Court instructs the jury that the burden of proving what is here charged against the defendant is on the prosecution. The defendant has a right to testify or not to testify, as he chooses to do. In this case the defendant took the witness stand." "Every witness is presumed to speak the truth. The defendant in this case is entitled to the benefit of this presumption in common with the other witnesses. You are not to discredit or give less value to his testimony merely because he is accused of a crime in this particular indictment."

"The Court instructs the jury this defendant is on trial solely for the crime of robbery as described in the indictment. He is not here charged with the commission of any other crime, and the only ultimate fact for you to find here is did he rob the

complaining witness of the sum of $1500 as charged. He is not on trial for doing any other thing. You are instructed you have no right to consider the fact that the complaining witness may or may not have blamed him for other acts as proof against him in this case." "Proof or evidence of a previous conviction of a felony is admitted, and may be here considered for the purpose of impeachment of the defendant as a witness, and for no other purpose."

Proof of a conviction of a felony is not necessarily in and of itself an impeachment of all the sworn statements made by a witness. Contradictory statements or evidence that the witness' general reputation for truth, honesty and integrity is bad, or proof of a conviction of a felony, are methods prescribed in the Code of Civil Procedure, sec. 2051, that may be considered as evidence tending to impeach an adverse witness. The section provides: "A witness may be impeached," etc. "The proof authorized by the code provision is admitted solely for the purpose of discrediting a witness." 27 Cal.Jur., pp. 139, 140, sec. 115; People v. McLane, 60 Cal. 412; People v. Hardwick, 204 Cal. 582, 269 P. 427, 59 A.L.R. 1480; 70 Cor. Jur., pp. 847, 848, sec. 1052. The argument of the district attorney in this respect is not a correct statement, but the instructions of the court fully covered the subject and no prejudicial error is apparent.

[18, 19] The district attorney in his argument also made the following statement: "As you know, this case was initiated by the Grand Jury in 1941, and that means, ladies and gentlemen of this city and county listened to the testimony of the complaining witness, Mrs. Arnold and David Edwards, and there was probable cause that a crime had been committed and the defendant was guilty of the crime.

Mr. Coghlan: We are going to object to that, your Honor. The Grand Jury is merely an accusatory body.

"The Court: I think the jury understands this is merely argument of counsel. The argument of counsel on both sides is just argument and not evidence in the case, and may be considered as argument and an aid in arriving at their verdict, in addition to the evidence in this particular case."

The statement was inadvisable but not prejudicial in view of the court's admonition. The appellant complained of the court's instruction: "With regard to any punishment that may be imposed upon a defendant convicted of such an offense, the jury has nothing to do. The question of punishment, when and if it does arise, is one entirely for the Court to determine, and the jury is not concerned with this question at all." That portion of the instruction to the effect that the determination of punishment lies entirely in the hands of the court is an inaccurate statement. However, whether the court or a board, or both, may have some duty in determining if and what punishment there shall be is immaterial so long as the jury was instructed that in this case the jury should not be concerned with the question of punishment. Any error in the instruction could not have been prejudicial.

[20-24] With respect to the motion for new trial the appellant contends that the trial court erred in denying the motion in view of the affidavits presented to the trial court at that time. Four affidavits by Manchetti, Mrs. Patricia Wallace, Ernest F. Wickersham and Rita Gomez were filed. The first affidavit submitted was dated June 15, 1945 and signed by appellant Dante Manchetti. It relates the various dates of continuances of the trial and that the jury was empaneled on May 25, 1945; that the verdict was returned on June 5, 1945; the defendant was arraigned for judgment and presented a motion for new trial on June 9th and the motion continued until June 15, 1945 for hearing. The Manchetti affidavit avers "that if a new trial is granted in this case, the evidence of said witnesses will contradict the evidence of Rose Pesce, the complaining witness in this case and will show that Rose Pesce was not in the house at Depot Rooms on the 13th or 14th days of November, 1940." Appellant also averred that the occupants of the Benicia house "were diligently sought for by affiant" but that he was unable to get in contact with them until after the trial. There is no

explanation of why, in view of the efforts of the defense, the witnesses were not found. Patricia Wallace signed an affidavit to the effect that she was present with Rose Pesce, Rita Gomez and Paul Wallace at the time "that the defendant in the case was on trial," and also a few days prior thereto, and on each occasion Rose Pesce in effect stated to Rita Gomez " 'if you are ever called as a witness, say that you were not present at the Depot Rooms on the 13th or 14th of November, 1940.' " Paul Wallace did not file an affidavit and Patricia Wallace failed to state the date of such conversations, though they were comparatively recent. Ernest F. Wickersham in an affidavit averred that he and Rita Gomez were living at the premises in Benicia at that time (referring to the November 13, 14, 1940); that he had lived there since November 5, 1940 and that neither Manchetti nor any one else came to the establishment either at night time or day time to assault or abuse Rose Pesce; that Edna R. Arnold "was not either living or working" at the house during the month of November, 1940. It should be noted that this affiant does not *deny* that Rose Pesce lived at the "Depot Rooms" on November 13 and 14, 1940 or at other periods in November. The affidavit also sets forth that Rose Pesce "whom affiant dealt with under the name of Olive Rose, was proprietress until the month of November, 1940; that on November 1st, 1940 affiant handed to said Rose Pesce at the Bay Bridge Inn Berkeley, California, the sum of $1,000.00, $200.00 of which was for the rental of the Depot Rooms beginning November 1st, 1940 and $800.00 of which was for the business, including furnishings, as shown in a contract of sale to Rita Gomez of said Depot Rooms." The Rita Gomez affidavit sets forth that she is "acquainted with Rose Pesce" and "knows Dante Manchetti"; that a few days before November 1, 1940 affiant agreed to purchase from Rose Pesce the "Depot Rooms" in Benicia, including fixtures, furnishings, etc.; that "between the 1st day of November, and the 7th day of November, 1940 a contract of sale of the premises and property * * * was signed and delivered * * * to * * * affiant"; that a receipt for $200 for the rent of the property and $800 as a down payment on the contract of sale was given by Rose Pesce to Wickersham for Rita Gomez and that such receipt bears the date November 1, 1940; that affiant during the whole month of November, 1940 lived at the Depot Rooms as the proprietress; that during the whole month of November Mary Marzi, the sister of Rose Pesce, worked at the "Depot Rooms" as housekeeper and that Rose Pesce, Mary Marzi, Wickersham and affiant took part in making up an inventory. Two inventories are attached to the Gomez affidavit as exhibits, but each one appears "Approved as correct November —, 1940." A notice of intended sale, dated in October, and the receipt for $1,000 heretofore referred to are also exhibits on motion for new trial, but the contract of sale is not part of this record. Rita Gomez' affidavit also sets forth that Marian Gianquento, a sister-in-law of Rose Pesce, during the month of November 1940 worked at the Depot Rooms but that Edna R. Arnold, familiarly called "Eddy", was not working there and "was not there at any time during November 1940. Affiant then avers "that affiant knows of her own knowledge that neither Dante Manchetti nor Albert Pelizzari nor any other person demanded from said Rose Pesce or took from her the sum of $500.00 or any other sum of money; and that no disturbance of any character occurred and no abusive language was used by anybody toward any other person on any day during the month of November, 1940 * * *; that affiant does not know David T. Edwards who testified in this case; but she does know of her own knowledge that said David T. Edwards did not during the month of November, 1940 at any time reside in or about the premises known as The Depot Rooms, and that such man as David T. Edwards came to said Depot Rooms or was known to her at all." The Gomez affidavit then sets forth in very similar detail the conversation related in the Wallace affidavit. Finally "that she did not tell anyone what she knew about said case; that neither the defendant nor any of his attorneys nor anyone else who testified at the trial of this case was told anything about affiant's knowledge as hereinabove

related, nor did they know anything about said conversations or any matter which she has sworn to in this affidavit so far as she knows, or is informed or believes."

Before a trial court's action in denying a new trial on the ground of newly discovered evidence will be reversed it must appear that due diligence to discover the evidence has been shown. "It is conceded by appellant that the granting or denial of a motion for a new trial on the ground of newly discovered evidence rests in the discretion of a trial court. * * * People v. Mandell, 48 Cal.App.2d 806, 818, 120 P. 2d 921; People v. Yeager, 194 Cal. 452, 491, 229 P. 40; People v. Paysen, 123 Cal. App. 396, 401, 11 P.2d 431; People v. Taminago, 35 Cal.App. 238, 239, 169 P. 696; People v. Del Prado, 49 Cal.App.2d 597, 599, 122 P.2d 76." People v. English, 68 Cal.App.2d 670, 673, 157 P.2d 429, 431. It appears that there was ample time to prepare defendant's case between June 2, 1944, the date of the arraignment, and May 25, 1945, the date of the empanelment of the jury. Mrs. Pesce's sister and her sister-in-law were available to give the defendant the required information. The affidavits are merely corroborative. In support of his position that a new trial should have been granted, appellant asserts that this "newly discovered evidence" would have contravened important facts in the prosecution's case, and stresses the failure of the People to introduce counter-affidavits as a circumstance which should be weighed in granting or denying the motion. The lack of counter-affidavits may or may not evidence lack of diligence on the part of the State. The evidence introduced by the People and by the defense separately or taken together was sufficient to overcome the subjects touched upon in the affidavits. People v. Egbert, 43 Cal.App.2d 117, 110 P.2d 495. "Public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at his trial all existing evidence in his behalf. It has been said that the circumstance that the testimony has just been discovered when it is too late to introduce it is so suspicious that courts require the very strictest showing of diligence. People v. Freeman, 92 Cal. 359, 366, 28 P. 261. It is recognized, however, that despite the exercise of such effort, cases will sometimes occur where, after trial, new evidence most material to the issues and which would probably have produced a different result, is discovered. For such cases the remedy of a motion for a new trial on the ground of newly discovered evidence has been given. People v. Byrne, 160 Cal. 217, 225, 116 P. 521. As declared by subdivision 7 of section 1181 of our Penal Code, the court may grant a new trial 'when new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.'" People v. Shepherd, 14 Cal.App.2d 513, 517, 518, 58 P.2d 970, 972. In the Shepherd case another party had admitted the commission of the offense, had been charged and convicted of the identical offense and judgment had been pronounced. The propriety of an order for a new trial under such circumstances should not be questioned. Such compelling facts do not appear in this case. Testimony that Mrs. Arnold was not present in the "Depot Rooms" on November 13th and 14th would be cumulative, as were all of the other facts stated in the affidavits, i.e., no new substantive evidence would have been presented, the matter merely being for impeachment or corroboration. Mrs. Gianquento testified at least that she worked on and off; that Mrs. Pesce was there on November 13, 1940 and that she left on the morning of the 14th, which corroborates Mrs. Pesce's testimony. Neither Mrs. Marzi, the sister, nor Mrs. Gianquento, the sister-in-law, who testified for the defense of Manchetti, mention the presence of Rita Gomez in or near the place during the month of November, 1940, and in none of the affidavits is there any statement that Mrs. Pesce was not at the house during any portion of the month of November and no statement that she was not there on November 13th and part of the 14th.

One of the affidavits relates positively that witness Edwards was not in a nearby house on November 13 and 14, 1940. The trial judge as a thirteenth juror could have determined that the evidence of Edwards was "hazy" and unreliable and that any effort to contradict his statements would be

unnecessary and a waste of time. In view of the inconsistent statements in the several affidavits the trial judge may have determined that they were not worthy of belief, including the reference to the claim that Mrs. Pesce sought to have Mrs. Gomez deny that she occupied the premises in the early part of November, 1940.

A broad discretion rests with the trial court in denying a new trial on the grounds of newly discovered evidence. Unless an abuse of discretion appears, the trial court should be upheld when it appears that an injustice has not been perpetrated.

The judgment and order denying a new trial are affirmed.

KNIGHT, J., concurs.

PETERS, Presiding Justice.

I dissent.

In my opinion the record demonstrates to a certainty that this defendant was not accorded a fair trial.

This is not a case where the evidence points unerringly to the guilt of the defendant. The case was very close on its facts. The story told by the prosecution witnesses while not impossible was, to say the least, highly improbable. Most of the witnesses were either operators, inmates or workers in houses of prostitution. The complaining witness, admittedly a brothel operator, had lived with defendant for long periods of time. After the events supposed to have occurred on November 13 and 14, 1940, she took a two-month automobile trip with defendant. She testified that he kidnapped her and removed her from this jurisdiction so that she could not testify against him, and that during the entire two months she was his prisoner. No complaint was made to any one during this period, however. She testified that for years defendant had beaten and threatened her and extorted large sums of money from her. The prosecuting officials, however, did not see fit to charge defendant with these other crimes, and, in fact, voluntarily dismissed a kidnapping count in the indictment based on the events of November 14, 1940. If the story told by the prosecution witnesses is true, the defendant is a bad man indeed, and should be incarcerated. However, the testimony of the complaining witness and of the other prosecution witnesses, does not stand uncontradicted. The sister and sister-in-law of the complaining witness directly contradicted her, and also testified that the reason for the prosecution was that defendant had spurned the affections of the complaining witness. Melodramatic threats were testified to on both sides. Feeling ran high during the trial. Not only did sister contradict sister, but the husband of a defense witness directly contradicted his wife. A fight broke out among the witnesses during the trial. If the stories told by the defense witnesses are true, the defendant is innocent of the crime charged, and the prosecution witnesses are guilty of perjury. After reading the entire record I cannot say where the truth may lie. Certainly the evidence fails to clearly establish either the guilt or the innocence of the accused. It is, of course, true that these conflicts were for the jury, and that the jury has found in favor of the prosecution. This court has no power to weigh the evidence. But it is proper to emphasize the fact that the case was very close on its facts, and to point out that there was abundant evidence, which, if believed, would support a finding of innocence. This is so because the closeness of the case on the evidence is the vital factor that determines that the errors hereafter pointed out were prejudicial. It is quite obvious that what might not be a prejudicial error in one case where the evidence is overwhelming on behalf of the prosecution, may well be prejudicial in another case where the evidence is close.

Another generalization is here pertinent. In determining whether a defendant has been accorded his constitutional right to a fair trial the case as a whole must be considered. The weakness of the majority opinion is that it considers each claimed error as if it were a separate and distinct problem, and fails to appreciate that all of the claimed major errors are interrelated. They are all the result of forcing this defendant to trial with a lawyer who was not only unprepared but was not selected or desired by the defendant. When the problem

is considered in this light I believe that there can be no doubt at all that defendant was not accorded a fair trial, and that the interests of justice would best be served by granting him a new trial.

The majority opinion contains a reasonably complete statement of facts. Certain dates and facts, however, should be emphasized. The crime charged in the indictment is alleged to have occurred on November 13 and 14, 1940. Apparently no complaint was made to the local police for many months, although the complaining witness did testify that she reported the facts to the parole board. This was not corroborated. At any rate, the indictment was not returned until December of 1941. Defendant was not arraigned until June 2, 1944, and not brought to trial until May 24, 1945. During the period June 2, 1944, to May 24, 1945, some fourteen continuances were had, one from June 2, 1944, to June 9, 1944, at the request of defendant, the others by consent, by order of court, or by request of the prosecution. The record also shows that on April 24, 1945, the cause came on for trial. On that date by order of court it was continued to May 23, 1945. The record shows that the defense was ready to go to trial in April, but that the case was continued until May 23d. On May 21st defense counsel and a deputy district attorney appeared before a trial judge other than the judge that ultimately tried this case. It appears that Mr. Coghlan, the defense counsel, had phoned the district attorney on the 19th and informed him that he, Coghlan, would be engaged in a trial in San Mateo County on May 23d, and requested a short continuance. The deputy district attorney that appeared on May 21st was not the deputy that tried the cause. The deputy objected to a continuance on the sole ground that the prosecution had foreign witnesses present in San Francisco and ready to testify. The trial judge then presiding suggested that the lawyers try to secure a continuance of the San Mateo case which had been set for May 23d. The judge suggested that the deputy district attorney telephone to the San Mateo judge and explain the facts and request a continuance of the San Mateo case. He authorized counsel to use his name in the negotiations. On May 23d, which was a Wednesday, the deputy district attorney pointed out that because of the condition of the trial court's calendar the case could not proceed to trial that day but would have to be continued one day. He also admitted that since May 19th he had known that Mr. Coghlan was to be engaged in the San Mateo trial and that on May 23d Coghlan was so engaged, but he insisted that, because he had subpoenaed out-of-state and Los Angeles witnesses, the cause go to trial the next day. The defendant was unrepresented by counsel at this hearing and the court ordered the defendant to get busy and have Mr. Coghlan or some one else there the next day. On May 24th, Thursday, Mr. Andrews appeared for Coghlan and requested a continuance on the ground that Coghlan was then engaged in the San Mateo trial, and represented that any day the next week would be agreeable to Coghlan. Andrews told the court that he knew nothing about the case, had not consulted with the defendant, and in fact only knew what the charges were in a most general way. The deputy district attorney opposed the motion on the ground that the prosecution had witnesses ready from Los Angeles. The trial judge denied the motion. Andrews vigorously protested on the ground that he had not even consulted with defendant and was totally unprepared. The court announced that they would immediately proceed to select a jury and that then it would grant a continuance to permit Andrews to familiarize himself with the facts. The defendant attempted to address the court on the question but was summarily told to sit down. A jury was then selected, the record showing that but fifteen prospective jurors were interrogated, one being excused by stipulation, and one each by challenge by the prosecution and defense. Andrews requested a continuance until noon of the next day, but the trial court ordered him to trial on May 25th at 10 a. m. The next morning Andrews again objected to proceeding and suggested that the defendant should be represented by the public defender. The trial court denied this sug-

gestion. The defendant pointed out that Coghlan could be there the next day but the court insisted on going to trial at once. This is the first error of which complaint is made.

This claimed error cannot be considered, however, separate from the second main error that occurred immediately afterwards. The very first witness called by the prosecution was David T. Edwards. This witness positively places the defendant on the premises in question on November 13, 1940. He positively identified defendant. He puts a gun in defendant's hands and puts threats in defendant's mouth. While his testimony as to who had the gun and who said what is somewhat confused, his identification of defendant, his testimony that Edna Arnold was then on the premises (a point challenged by many defense witnesses), and his testimony as to the date, were clear and unconfused. His direct examination covers some eight pages of transcript. On cross-examination, covering but several pages, Andrews, who had just secured the Grand Jury record that morning, was able to bring out that before the Grand Jury the witness had testified that the codefendant had the gun and not Manchetti. The witness became quite confused on this issue. But as to the vital issues of identification, of the date, of the existence of a gun by one of the defendants, of the making of threats, etc., Andrews had no real opportunity to cross-examine because it soon developed that the witness was ill in that he was then a shell-shocked war veteran then undergoing treatment for his shattered nerves. When the witness became confused as to who had the gun he asked to be excused. Andrews stated that he had no objection. Obviously what Andrews meant was that he had no objection to the witness stepping down from the stand—not that he acquiesced in this witness being excused completely. This is demonstrated by the colloquy between court and counsel. The court then excused the witness.

Of course, Andrews should have specifically requested that the witness be excused subject to being recalled. That was not done, but fairly construed that is what was then intended.

The trial continued. Various witnesses were called by the prosecution. As to all of the major witnesses called on the 25th Andrews' inability to cross-examine because of his lack of preparation was so clear that the court permitted him to reserve his cross-examination. This was on Friday. The trial was then recessed until Monday, May, 28th. On Monday, Coghlan was present and substituted in the place of Andrews. Then because the trial judge had a cold, a three-day continuance was granted for the convenience of the court.

Thereafter, as the prosecution's case developed the testimony of the soldier Edwards began to take on increasing importance. Every one of the prosecution's witnesses that testified as to the facts of the actual crime, with the exception of Edwards, was connected in some way with the operation of brothels. Coghlan knew, of course, that several of his major witnesses were of the same type. Here was Edwards, a soldier, who had no connection with any of these witnesses. He was the only impartial witness called by either side on the basic question of whether a crime had been committed. His testimony was so important to the prosecution that in both his opening and closing arguments to the jury the prosecuting attorney referred to it in detail. The majority opinion recognizes the importance of Edwards' testimony. On page one [169 P.2d 940] it is pointed out that the story told by the prosecuting witness "may seem improbable," and then it is stated that this improbable story was supported by the testimony of Edwards. The Edwards' testimony is then bolstered by a reference to Edwards' testimony before the Grand Jury—testimony which was, of course, not then subject to cross-examination.

Before the defense put in their case Coghlan moved to have Edwards recalled for further cross-examination and when this was denied he moved that his testimony be stricken. This motion was taken under consideration and subsequently denied.

The majority opinion considers each of these matters separately and determines that the granting of the continuance and the refusal to recall Edwards or to strike his testimony were within the discretion of

the trial court. I agree that the trial court has wide powers of discretion in these matters, but it must be remembered that even where discretion is conferred a trial court's powers are not unlimited or uncontrolled. The discretion is not a discretion to act pursuant to mere whim or caprice, but a judicial discretion—a sound discretion governed by reason and law. When this record is read as a whole it must be held that the trial court abused its discretion in refusing the continuance and in refusing to recall Edwards or to strike his testimony.

Consider, indeed, the plight of defendant. He had retained counsel of his own choice. That lawyer was thoroughly familiar with the entire case, including the major testimony that was to be produced by the prosecution as well as by the defense. He had been counsel for defendant even prior to the date the indictment was returned. A month before May 23d he told the court that he could not proceed on that date. The defense was ready to proceed in April but either for the convenience of the court or the prosecution the case was continued. On May 19th counsel informed the deputy district attorney that he could not proceed on the 23d because of a prior commitment in San Mateo. Then on the 21st counsel formally informed the court of his predicament. The trial judge suggested that an attempt be made to secure a continuance of the San Mateo case. That attempt failed. On the 21st and again on May 23d, the deputy district attorney objected to a continuance solely because he had out-of-state and Los Angeles witnesses in San Francisco ready to testify. The deputy obviously was in error because no such witnesses were called, and nowhere in the record or briefs is there any explanation of this apparent misrepresentation. On the 23d the trial court had no objection to granting a continuance until the 24th to suit its convenience, and on the 28th it took a three-day continuance because the judge had a cold. On the 23d the defendant found himself completely unrepresented. On the 24th Andrews appeared not to represent the defendant, but on behalf of Coghlan to request a continuance of two trial days. At that time Andrews had not consulted with the defendant, had not read the Grand Jury testimony and was totally unfamiliar with the case. Nevertheless, the court in effect appointed Andrews to represent the defendant, and when the defendant attempted to express himself he was told to sit down. The trial court then compelled Andrews to select a jury without even giving him an opportunity to consult with his client. The majority opinion holds that this was not error because the voir dire examination of the jurors does not appear in the record. This is an unrealistic approach to the problem. The selection of a jury is not an abstract problem. The questions asked of prospective jurors must turn on the facts of the case. All that Andrews then knew was that defendant was charged with robbery. He had not then read the Grand Jury record, and had not then had the opportunity to consult with his client. He, of course, did not know the nature of the prosecution's case nor the type of witness upon which the prosecution was to rely. He had no idea of the nature of the defense that he was to make. Under such circumstances how could any attorney, regardless of competence, intelligently interrogate prospective jurors? How could he ascertain whether the prospective jurors would be prejudiced against his client, when he then did not know the facts upon which such prejudice might exist? An attorney would have to be omnipotent as well as omniscient to select intelligently a jury under such circumstances. To force an attorney to select a jury without any real knowledge of his case is an obvious infringement of the right of the defendant to a fair trial.

And then what happened? Edwards was called as the first prosecution witness. He testified that he saw defendant on the premises on November 13, 1940; that he saw Edna Arnold there; that defendant had a gun in his hand; that defendant made demands for money and uttered threats as to what would happen if he did not get it. The testimony of this witness alone proved every element of the offense except the actual securing of the money. Then Andrews started to cross-examine. He started to interrogate the witness as to whether Manchetti or his codefendant had the gun or made the threats, and the wit-

ness became confused, and asked to be excused. At that point, however, no cross-examination of any substantial character was had as to whether defendant was in fact there, whether Edna Arnold was in fact there, and whether a gun was in fact used or threats uttered by one of the parties. Andrews acquiesced in the witness being excused and a moment later stated to the court that the witness wanted "to step down from the stand." A few days later when Coghlan had been substituted he moved to recall the witness. This was denied, the court apparently feeling that the witness was too upset or too ill to be recalled. Coghlan moved to strike his testimony. The majority opinion seems to hold that Coghlan's motion was based on the point that the witness had demonstrated that he was unable to recall the facts. The majority opinion quite properly holds that Edwards' credibility was for the jury. What the majority opinion does not clearly disclose is that the motion was likewise based on the point that unless the witness were recalled the defendant was deprived of his right of cross-examination. It is the denial of the motion on this ground that constitutes the prejudicial error.

It hardly needs citation of authority to establish the principle that a defendant in a criminal trial is entitled to be confronted with the witnesses against him, and has the legal right to cross-examine such witnesses. Such rights are an inherent part of due process. It is, of course, the law that when a witness has been cross-examined and excused, whether he shall be recalled for further cross-examination rests in the discretion of the trial court. But it must be remembered that the trial judge is not sitting there as an impartial umpire passing on a game of skill. A trial is not a game where victory or defeat depends solely upon whether all of the technical rules have been followed. The trial judge is duty bound to see to it that the defendant receives a fair and impartial trial. Here the trial court had denied a continuance and forced defendant to trial with an attorney not of his own choice and one who was admittedly unprepared. A defendant has the constitutional right "to appear and defend, in person and with counsel". Art. 1, § 13, of Constitution. The legal principles involved have frequently been stated by the courts. See People v. Lanigan, 22 Cal.2d 569, 140 P.2d 24, 148 A.L.R. 176; Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527—so unsuccessfully attempted to be distinguished in the majority opinion. The case of In re Egan, 24 Cal.2d 323, 149 P.2d 693, so strongly relied upon by the majority, has no application at all to the problem here involved. That was an attempt to attack collaterally a ten-year-old final judgment by habeas corpus. In such a proceeding prejudice must be clearly demonstrated. None appearing, the writ was denied. In our case prejudice is obvious.

So far as the continuance is concerned, it must, of course, be conceded that no lawyer is entitled as of right to a continuance just because he has so many cases that it is inconvenient to appear on a certain day. Court calendars could not be maintained if that were the rule. But in ruling on such a motion the court must not only consider its convenience and that of the prosecution but also the rights of the defendant. The court possesses full powers to punish attorneys by contempt, or otherwise, when they fail to appear to defend their clients. But in penalizing the attorney the courts should not penalize the client who is in no way at fault. Here there had been fourteen continuances covering a period of nearly a year. All but one had been granted by consent, by order or upon request of the prosecution. A month before May 23d the court was informed that it was doubtful if counsel could appear on that date. On May 19th the prosecution was so informed, and on May 21st the full facts were disclosed. Even then the court did not absolutely deny the request but suggested that counsel and the deputy district attorney seek a continuance of the San Mateo case because out-of-state witnesses and Los Angeles witnesses were present in San Francisco to testify. These negotiations failed. Until the morning of May 23d it was reasonably apparent that unless the San Mateo case could be continued, the San Francisco case could not

proceed. On that date the court continued the case for one day because it was otherwise occupied. On the 24th the sole ground upon which the prosecution objected to the continuance was that it had these out-of-state and Los Angeles witnesses ready to testify. That was an important factor in determining whether to grant the request. But no such witnesses were called. No explanation of this apparent misrepresentation appears. The trial court acted on that apparent misconception. It then forced defendant to accept Andrews as his counsel and forced Andrews to select the jury without any preparation at all. It seems to me that this was prejudicial error. But whatever doubt may exist as to whether such error was prejudicial is completely set at rest by the court's failure to recall Edwards or to strike his testimony. While Andrews should have formally moved to reserve his right to cross-examination, it seems to me that this was done by implication. But even if this was not done, and if the recalling of the witness rested in the discretion of the court, it was an abuse of discretion, as a matter of law, to deny the request. The court then knew that Andrews was unprepared to try the case. It then knew that Edwards' testimony was of fundamental importance to the prosecution. It then knew that every prosecution witness who testified as to the actual crime was a person of questionable character. It then knew that Edwards, this shell-shocked veteran of this war, was the only prosecution witness not of questionable character who placed the defendant at the scene of the crime. It then knew that Andrews had not had the opportunity to cross-examine on the basic questions as to whether Edna Arnold was there, whether defendant was there, etc. To deny the right to recall the witness or to strike his testimony under these circumstances was clearly an abuse of discretion, and resulted in denying to defendant that fair and impartial trial guaranteed to him by our state and federal Constitutions.

The defendant may be a bad man. He may be guilty. But as bad as he is, or as guilty as he may be, he is entitled to a fair trial. The maxim that the end justifies the means has no place in our criminal law. If the criminal processes may be abused to convict a bad or a guilty man, they could be abused to convict an innocent one. It is the proper function of an appellate court to be ever alert to see to it that the fundamental rights of one accused of crime are not infringed. In no other way can our democracy be preserved.

In my opinion the judgment and order appealed from should be reversed.




## CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. NORINS REALTY CO., Inc. *

**Civ. 14969.**

District Court of Appeal, Second District, Division 1, California.

June 5, 1946.

Rehearing Denied June 26, 1946.

Hearing Granted Aug. 1, 1946.

**1. Master and servant ⇐78**

The Unemployment Insurance Act is declaratory of policy of the state to avoid evil social effects of unemployment and hence courts must construe the act so as to accomplish its objects and overcome evil results of excessive unemployment. St. 1935, p. 1227, § 7; St.1937, p. 2052, § 6.5.

**2. Statutes ⇐179**

Adoption by Legislature of specific definitions of "employment" and "employer" in Unemployment Insurance Act indicated that Legislature did not intend to incorporate in such act, common law concept of master and servant or the definitions of employment, service, employee and wages as contained in the Labor Code and the Workmen's Compensation Act. St.1935, p. 1227, § 7; St.1937, p. 2052, § 6.5.

**3. Statutes ⇐179**

Where meaning to be given to particular terms is prescribed by Legislature in enacting a statute, that meaning is binding upon the courts.

* Subsequent opinion 175 P.2d 217.

**4. Master and servant ⇐78**

The Unemployment Insurance Act discloses legislative intent that application of Act is to be broadly determined rather than by any narrow, technical, or even previously established legal definitions or descriptions. St. 1935, p. 1227, § 7; St.1937, p. 2052, § 6.5.

**5. Taxation ⇐59**

Whether a real estate salesman is an employee within coverage of Unemployment Insurance Act, or an independent contractor not covered by the Act, depends upon particular facts. St.1935, p. 1227, § 7; St.1937, p. 2052, § 6.5.

**6. Taxation ⇐59**

In determining whether a person is an employee within Unemployment Insurance Act, it is the existence of control over manner in which work was to be done and not the extent of its exercise that is controlling. St.1935, p. 1227, § 7; St.1937, p. 2052, § 6.5.

**7. Master and servant ⇐1**

Strong evidence in support of an employment relationship is the right to discharge at will without cause.

**8. Master and servant ⇐5**

While an employee may quit, an independent contractor is legally obliged to complete his contract.

**9. Taxation ⇐59**

Where real estate brokers and salesmen obtained from realty company "employment cards" whereby they agreed to abide by regulations of company, they also agreed to devote their whole time and energy to effect sales of company's properties, company could discharge them at will without cause, and instrumentalities and place of work were supplied by company, brokers and salesmen were "employees" within Unemployment Insurance Act for whom company was required to make unemployment compensation contributions. St.1935, p. 1227, § 7; St.1937, p. 2052, § 6.5; St.1919, p. 1252, §§ 2, 9, 18, as amended.

**See Words and Phrases, Permanent Edition, for all other definitions of "Employee".**

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the California Employment Stabilization Commission, successor to the California Employment Commission, formerly Unemployment Reserves Commission, against Norins Realty Company, Inc., for the collection of unemployment contributions and interest alleged to be due from defendant. From a judgment for defendant, plaintiff appeals.

Reversed.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Maurice Gordon, of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff instituted this action for the collection of unemployment contributions and interest alleged to be due from defendant for the period commencing January 1, 1936, to and including December 31, 1937. By its answer defendant corporation denied that it was an employer with respect to certain of the individuals in connection with whom contributions were sought to be collected. Following trial of the action, judgment was rendered in favor of the defendant. From such judgment plaintiff prosecutes this appeal.

By its findings of fact the trial court determined that the individuals whose services to defendant are involved in this appeal "were not employees of said defendant, but * * * were in truth and in fact independent contractors."

The facts are not in dispute, and may be summarized as follows: Defendant was a corporation engaged mainly in the sale of real estate owned by it. In order to carry on this business defendant engaged the services of certain individuals whom it admitted to be its employees. In addition to these, defendant engaged the services of about sixty-nine real estate salesmen and brokers, who sold the property of the corporation. It is with this group alone we are here concerned. The method of operation by both the real estate salesmen and the brokers performing services for the

defendant was identical. With but few exceptions, defendant sold its own property, and for a time also sold insurance. Defendant's holdings consisted principally of subdivision property, and the salesmen and brokers selling it were licensed by the California Real Estate Commission to defendant corporation. Asked regarding the conversation had with salesmen and brokers who were employed, John W. Dewey, secretary-treasurer of defendant corporation, testified that such conversation was substantially as follows: "Well, that he would be paid commissions the same as the other agents on the same basis for the sale of the property we were selling at that time, which we own near Lake Arrowhead, and the price we asked for the property." Each salesman and broker signed a contract with reference to his services. With reference to their operations, the record discloses that the salesman or broker would take his prospects to respondent's office, display pictures of the property to them, and would receive 25% of the sales price as his commission. Defendant furnished the salesmen with pictures of the property and business cards showing defendant's name. Some of the salesmen and brokers used the defendant's telephone service, usually without charge, and with reference to one of the salesmen defendant's sales manager urged her to "hustle up on her sales a little bit"; salesmen were asked to attend sales meetings, and were given a price list of the properties by defendant. In some cases the salesmen did not close the sale, but other persons in defendant's office would take the clients to view the property. The salesmen were furnished with price lists of the property to be sold, and in each case there was an agreement with regard to the amount of commission. At times advances were given to the salesmen from the defendant's funds and bookkeeping entries thereof made on defendant's records. The contract blanks to be used by salesmen were furnished them by the defendant. Salesmen were instructed not to make any misrepresentations.

There was introduced in evidence an "employment card," in which the salesman agreed to abide by certain regulations appearing thereon when he accepted employment with the defendant. The salesmen were not furnished with office space, desk space, or transportation. They were not given report forms which they were required to fill out. The salesmen were not restricted to any particular territory and were not required to devote any particular time to the business or produce a minimum volume of business, nor were they confined to fixed hours of employment. No surety bonds were furnished by the salesmen, nor were the names of prospective customers furnished to them. In the event inquiry was made at the office of the corporation concerning property, this information would be given to the salesman who might be around at the time. Defendant did not bear any part of the expense incurred by the salesmen in their selling activities, nor were any instructions given to them as to the manner in which the sales were to be made. The defendant did not carry workmen's compensation insurance on the salesmen and had never done so.

The question in the case is whether or not the real estate salesmen and brokers performing the aforesaid services were "in employment" of defendant as that term is defined in the California Unemployment Insurance Act, Stats.1935, ch. 352, p. 1226, the pertinent and applicable provisions of which read as follows: "Sec. 7. 'An employment,' means any employment by an employer * * *."

In 1937 the definition of the term "employment" was changed by section 6.5 of the act to read in part as follows: "'Employment,' subject to the other provisions of this act, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied." St.1937, p. 2052.

[1-4] In the case at bar we are dealing with an express statute declaratory of the social policy of the state and designed to implement such social or economic policy to the end that the evil social effects of unemployment may be avoided. B. P. Schulberg Productions, Ltd., v. California Employment Commission, 66 Cal.App.2d 831, 153 P.2d 404. It therefore becomes the duty of the courts to so construe it as

to accomplish its objects and overcome the evil results of excessive unemployment. Respondent's reliance upon cases decided under workmen's compensation and bankruptcy statutes is unavailing, because, as said by this court in B. P. Schulberg Productions v. California Employment Commission, supra, 66 Cal.App.2d at page 834, 153 P.2d at page 406, "That the legislature did not intend to incorporate in this measure the common law concept of master and servant or the definitions of 'employment', 'service', 'employee' and 'wages' as contained in the Labor Code * * * and the Workmen's Compensation Act * * * is evidenced by the fact that the statute itself contains definitions of the words 'employment' and 'employer', both of which definitions are hereinbefore set forth. When the meaning to be given to particular terms is prescribed by the legislature in enacting a statute, that meaning is binding upon the courts. In re Monrovia Evening Post, 199 Cal. 263, 270, 248 P. 1017; Rideaux v. Turgrimson, 12 Cal.2d 633, 637, 86 P.2d 826. We must not, therefore, use the words defined in the statute according to their rigid, precise or dictionary meanings, but rather as defined by the act itself, which evidences a legislative intent to give the words a broad and liberal description to the end that the far-reaching and evil effects of excessive unemployment may be eradicated. The broad language of the definitions contained in the statute leaves no doubt that the application of the act is to be broadly determined rather than by any narrow, technical, or even previously established legal definitions or descriptions."

[5] While the occupation of real estate salesman is one that might come under the classification of either employee or independent contractor, the determination of which category it falls within depends upon the facts of the particular case. In the recent case of Empire Star Mines Co. v. California Employment Commission, 168 P.2d 686, 692, the Supreme Court said: "The relationship contemplated by the legislation as the basis of the requirement for contributions is that of employer and employee; a principal for whom services are rendered by an independent contractor does not come within the scope of its provisions. Garrison v. State of California, 64 Cal.App.2d 820, 824, 149 P.2d 711; see California Emp. Comm. v. Bates, 24 Cal.2d 432, 150 P.2d 192; California Emp. Comm. v. Los Angeles, etc., News Corp., supra [24 Cal.2d 421, 150 P.2d 186]. * * * Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. Rest., Agency, § 220; Cal.Ann. § 220."

[6] Bearing in mind the foregoing rules enunciated by the Supreme Court for determining the distinction between the status of independent contractor and that of employee, we find in the record before us conclusive evidence of the right of the employer to exercise complete and authoritative control over the manner in which the work of the employee was to be done. It is the existence of such control and not the extent of its exercise that is controlling. Plaintiff's Exhibit 1, introduced at the trial, was a form of "employment card," issued to the salesman, reading as follows:

"I, the undersigned, hereby accept employment, as salesman, with the Norins Realty Co., Inc., Realtors.

"I agree to abide by all the rules and regulations as set forth by the officers of the company.

"Any dispute that may arise as to commissions, whether as to amount, or as to a division with another salesman, or as to how said commission shall be paid, I agree to let the judgment of the company decide.

"In the event that it is necessary to make a refund to a customer, I agree that the amount of the refund may be deducted from my contingent commissions, if any, or to reimburse the company amount of said refund. The company is to be the judge as to whether or not refund is made.

"I agree to turn over all checks and money received in payment on sales to the company. Commissions on sales shall be the basis of compensation, payable on Saturday of each week.

"In consideration therefore I agree to devote my whole time and energies to further and effect sales of North Albuquerque Acres and other properties of Norins Realty Co., Inc., and I agree to make no statement or representation not contained in the literature published by the company.

"The kit, maps, etc., supplied me by the company is loaned and remains the property of the Norins Realty Co., Inc., and I agree to return it on demand or reimburse the company therefor."

It would be difficult to conceive of an agreement reflecting more complete or authoritative control of the employer over the employee than is contained in the foregoing document.

[7, 8] The employer was also clothed with the right to discharge the employee and terminate his services at will and without cause, which is strong evidence in support of an employer-employee relationship. The employee possessed the right to end his services whenever he desired to do so. It is axiomatic that while an employee may quit, an independent contractor is legally obliged to complete his contract. That the salesmen had no freedom of action as to the means and methods for accomplishing the result of their services is at once apparent from the conditions of their employment wherein they agreed to "abide by all the rules and regulations as set forth by the officers of the company." Each salesman also agreed "to devote my whole time and energies to further and effect sales of * * * properties of Norins Realty Co., Inc." Can there be any question as to what would have happened should a salesman ignore or refuse to obey the "rules and regulations as set forth by the officers of the company"? In addition, the contract authorizes the defendant to enforce its "rules and regulations" by the ever-present right to discharge the salesman. Could there be any doubt as to what would have happened if in the judgment of its officers the salesman refused a request, for instance, to attend a sales meeting or do as he agreed and devote his "whole time and energies to further and effect sales"?

While the respondent company did not concern itself with how the salesman conducted his business so long as the results were satisfactory, nevertheless, whether or not the respondent company exercised its authority with respect to all duties of the salesmen, it was possessed of the right to exercise complete control.

The instrumentalities and the place of work were supplied for the persons doing the work, viz., contract blanks, kits, maps, pictures, etc., and use of the company's office. The services were performed in furtherance of the business the company was engaged in. Its present function was the selling of real estate. While respondent company did not control at all times the place where the original solicitation occurred, it did control the place to which the salesmen brought their prospects and from which they were taken by other persons in respondent company's office to view the property in which the salesmen had interested them.

In the instant case appellant urges that the salesmen here in question were all licensed as real estate salesmen at the request of and under the employment of respondent. The California Real Estate Act, Deering's Gen.Laws, Act 112, Stats.1919, p. 1252, now sec. 10000 et seq., Business & Professions Code, made it unlawful to engage in the business of real estate broker or real estate salesman without first obtaining a license and fulfilling certain other requirements. Section 2 of the act defined a real estate broker as one "who, for a compensation, sells or offers for sale, * * * lists, or solicits for prospective purchasers, or negotiates the purchase or sale or exchange of real estate * * *

*for another or others."* (Emphasis added.) A real estate salesman was defined in part as one "who for a compensation *is employed* by a licensed broker to sell, or offer for sale * * * real estate." (Emphasis added.) Section 9 provided that an application for a license as real estate salesman "shall be accompanied by the recommendation of his employer, if employed, certifying that the applicant is honest, truthful and of good reputation, and recommending that the license be granted to the applicant." Section 18 of the act made it unlawful for any real estate salesman to "be employed by or accept compensation from any person other than the broker under whom he is at the time licensed."

Pursuant to the provisions of the act, respondent company, in signing its salesmen's applications for a license, executed the following certificate to the State Real Estate Division:

"Certificate of Employer Recommending Salesman

"I Hereby Certify, that I am a licensed Real Estate Broker; that upon investigation I have ascertained that the person named in this application for a Real Estate Salesman License is honest, truthful and of good reputation. I request the Division of Real Estate to issue to said applicant a license as Real Estate Salesman in my employ, and if a license is issued I will exercise a careful supervision over his real estate activities while so employed."

While it is true that respondent when selling its own property could not strictly be classified as a broker because section 2 of the act makes one a broker only when performing the enumerated services "for another or others", nevertheless it was conceded that respondent was a licensed broker, had made sales of property other than its own, and procured real estate salesman's licenses for the salesmen with whom we are here concerned, certifying to the state Division of Real Estate that as the employer of each of such salesmen respondent would "exercise a careful supervision over his real estate activities while so employed." Furthermore, by the provisions of the act the salesmen were prohibited from being employed by or accepting compensation from any person other than the respondent company under whom such salesmen were licensed. In other words, these salesmen under the law could work only for respondent under a license procured by it for them. Possessed as respondent was of the right to discharge a salesman at will, without cause, and burdened with the duty to "exercise a careful supervision over his activities while so employed," the only reasonable inference that can be deduced is that the salesmen were subject to the control of respondent company.

In the case of Lowmiller v. Monroe, Lyon & Miller, Inc., 101 Cal.App. 147, 151, 281 P. 433, 282 P. 537, a situation somewhat similar in its factual background to that confronting us in the instant case concerning the status of real estate salesmen was presented. In the cited case the court said: "In the case at hand Clark, Black and Friedman were all licensed as real estate salesmen at the request of and under the employment of the appellant herein. Their licenses were issued by the state real estate commissioner under the provisions of the act of 1919 (St.1919, p. 1252), and any attempt to create for them the status of independent contractor or broker would have been in violation of the penal provisions of that act."

[9] In Empire Star Mines Co., Ltd., v. California Employment Commission, supra, the factors to be taken into consideration in determining whether one who performed services for another is an employee or an independent contractor are set forth as hereinbefore narrated. Those principles, as well as those contained in Twentieth Century Lites, Inc., v. California Dept. of Employment, Cal., 168 P.2d 699, and Briggs v. California Employment Commission, Cal., 168 P.2d 696 are determinative of the present controversy. Upon the authority of and for the reasons stated in the three cases just cited, it must be held as a matter of law under the uncontradicted evidence herein that as between respondent and the salesmen with whose status we are here concerned there existed an employ-

er-employee relationship within the meaning of the California Unemployment Insurance Act.

For the foregoing reasons, the judgment is reversed.

YORK, P. J., concurs.

DORAN, Justice.

I dissent.

It is my opinion that the California Real Estate Act can not be considered for the purpose of determining who are employees under the California Unemployment Insurance Act. Neither by such test, nor by any test, am I satisfied that these real estate agents were employees in any sense, and in particular, employees for "wages" within the meaning of the latter act.




75 Cal.App.2d 51

## WOOF v. WOOF.

Civ. 3603.

District Court of Appeal, Fourth District, California.

June 20, 1946.

Divorce ⇐303(3)

Under evidence that since previous modification of order regarding custody of child of divorced parents mother had remarried and had a suitable home and was devoting her entire time to home duties, and that boy was living with stepmother while father was working in a different county, and that boy was neither happy nor content in living with his stepmother, modification of order by awarding custody of boy to father during school year and awarding custody to mother during school vacation months and during Christmas school vacation, was not an abuse of discretion.

Appeal from Superior Court, San Diego County; H. S. Schaffer, Judge.

Suit for divorce by J. H. Woof against Josephine Woof. From an order modifying all former orders with reference to custody of the minor son of the parties, the plaintiff appeals.

Affirmed.

George A. Malette, of San Diego, for appellant.

Noon & Noon and Charles A. Brinkley, all of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order modifying all former orders with reference to the custody of the minor son of the parties to the action.

On August 31, 1938, an interlocutory decree of divorce was entered in favor of the wife. Among other things, this decree awarded the wife custody of the child during the school year and gave such custody to the father during the summer vacation months of each year. By orders entered on December 23, 1938, and March 17, 1939, this order for custody was modified by allowing the father to also have the child from 5:00 P.M. Friday evening to 6:00 P.M. Sunday evening through the school months, with the exception of the first weekend in each month. A final decree of divorce was entered on September 1, 1939, which confirmed the order for custody as contained in the interlocutory decree, as thus modified. So far as shown by the record, the order respecting custody was not again modified or changed prior to the making of the order here appealed from.

It appears, however, that on April 18, 1939, the husband filed an affidavit in this case alleging, on information and belief, that the mother had left the jurisdiction of the court and had taken the child to Texas, and requesting the court to make an order awarding custody of the child to him. On April 25, 1939, this motion to award the sole custody of the child to the father came on for hearing in the original case, the mother neither being present nor represented by counsel. There is no showing that service was made on anyone. The court then made an order adjudging the child to be a ward of the juvenile court and directing a probation officer to take

such steps as might be necessary to locate the child and bring it within the jurisdiction of the court. Not only does it appear that this order is void on its face, but it neither purports to modify any pre-existing order in this action, nor to change the actual custody of the child.

While no further orders were made, as far as the record shows, the father seems to have obtained possession of the child at some time and in some manner which does not appear. And on July 20, 1942, the mother filed notice of a motion to have the court modify its order of April 25, 1939, and to have the custody of the child awarded to her. On August 6, 1942, after a hearing thereon, a minute order was entered denying the motion "as per the order to be signed and filed herein hereafter." No such order was signed or filed.

On February 3, 1945, the wife filed an affidavit alleging certain facts material to the custody of the child, who was then 10 years old, and asking for an order awarding custody to her. An order to show cause was issued and a hearing was held on May 10, 1945, with all parties present. On May 12, 1945, the court signed and entered an order modifying the interlocutory and final decrees "and all orders made subsequent thereto" by awarding the custody of the child to the father during the school months of each year, and awarding custody to the mother "during the school vacation months of each year and during the Christmas school vacation period of each year, until the further order of the court." From this order the father has appealed, although it is more favorable to him than the order theretofore existing.

As grounds for appeal the appellant contends that the trial court arbitrarily made the order appealed from without receiving any evidence, and that there is no evidence of any change of circumstances which would justify a modification of the pre-existing order.

In support of the first point it is argued that this matter was transferred by the presiding judge to another department for trial as a contested matter, and that this precedure is entirely different from matters set on the law and motion calendar, which are heard on affidavits. On May 9, 1945, the cause was transferred by the presiding judge to another department for trial. A rule of court provided that motions should be heard on affidavits unless the judge permitted oral testimony. The trial judge not only had before him the affidavit filed by the respondent in support of her motion, but he invited oral evidence. The affidavit filed by respondent was not denied in any way, either by affidavit or orally, and no evidence material to the controversy was offered by the appellant or rejected by the court. After some argument and one implied offer of certain testimony which, with the consent of counsel for the respondent, the court stated would be accepted as a fact, and after the trial judge had twice asked if there was any further evidence to be offered, the matter was submitted. It clearly appears that the trial judge did not act arbitrarily in the matter, that a full hearing was had, and that the appellant had ample opportunity to produce evidence, if any he had.

There is some evidence of change of circumstances. It appears, without dispute in the record, that since the last previous modification of the custody order the respondent has remarried; that since November, 1943, she has been living in a house in San Diego; that she has a suitable home with adequate accommodations; that her husband is willing and desirous of having the child in their home; that she is not now employed but is devoting her entire time to her home duties; that she has not seen the boy in months; that the boy is living with a stepmother at Lemon Grove, in San Diego County; that the father is working and residing in Los Angeles; and that the child is neither happy nor content in living with his stepmother. This evidence is sufficient on that point, and no abuse of discretion appears. Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719.

The order appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.

74 Cal.App.2d 766

**COOPER et al. v. LOS ANGELES HOME CO. et al.**

**Civ. 15108.**

District Court of Appeal, Second District, Division 1, California.

May 31, 1946.

**1. Schools and school districts ⇐103(1)**

Where taxes were levied upon land situated in high school district and for benefit of district, and land was described sufficiently to show that it was within high school district for which tax in part had been levied, irregularity of referring to city school district, which was an elementary district territorially included in high school district, without referring specifically to high school district, was a matter subject to correction by subsequent validating act. Pol.Code 1923, §§ 3650 (11), 3764; Gen.Laws, Act 8443.

**2. Schools and school districts ⇐106**

In action to quiet title to land based on tax deed, where defendants alleged that deed was void on the ground of various irregularities including failure to describe high school district in which land was necessarily located by virtue of its description as being in specified elementary school district, but no questions of lack of notice or other element of due process affecting defendants' rights were involved, and no rights of third parties had intervened, defects were cured by validating act, and holding that deed was void was error. Pol.Code, 1923, §§ 3650(11), 3764; Gen. Laws, Act 8443.

**3. Taxation ⇐630**

Notice of publication, reciting default in payment of taxes and assessments for specified year and that county tax collector, unless total amount of all taxes, assessments, penalties, and costs due were paid, would sell property which was subject to tax lien to state, was sufficient to give notice that property would be sold to state for delinquent taxes, assessments, penalties and costs. Pol.Code 1923, § 3764.

**4. Taxation ⇐630, 688**

Although requirement for publication of tax delinquency and notice constitutes jurisdictional prerequisite to sale of property for taxes, form and contents thereof are details which are subject to legislative or administrative discretion, and defects therein are related to mode of exercise of power, which, being merely directory, may be made effective by a curative act. Pol.Code 1923, § 3764; Gen.Laws, Act 8443.

**5. Taxation ⇐688**

The purpose of the 1943 curative act is to rehabilitate tax-deeded property and procure its return to the tax rolls, and it is a matter of public importance that validating act be applied to effectuate legislative purpose so long as constitutional mandates are observed. Gen.Laws, Act 8443.

**6. Schools and school districts ⇐103(1)**

The irregularity in assessment roll for 1925–26 in omitting reference to Los Angeles City High School District on land described as being within the Newhall School district, which was necessarily in such high school district, was cured by the 1943 curative act. Pol.Code 1923, §§ 3650(11), 3764; Gen.Laws, Act 8443.

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Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Jacob L. Cooper and Sarah Cooper against Los Angeles Home Company and another to quiet title to real property. From interlocutory and final judgment for named defendant, plaintiffs appeal.

Appeal from interlocutory judgment dismissed, final judgment reversed.

John F. Bender and G. Loshoncy, both of Los Angeles, for appellants.

Newton E. Anderson and Arthur E. White, both of Los Angeles, for respondent.

YORK, Presiding Justice.

By the instant action, plaintiffs seek to quiet their title as against defendant corporation to 170 acres of land, particularly described in the complaint herein, it being stipulated that said corporation was the owner thereof on June 30, 1920, and until

September 1, 1931, when the property was deeded to the State of California for delinquent taxes. It was further stipulated that at all material times said property was situate within the Newhall Elementary School District and the Los Angeles City High School District, and that said school districts were separate entities.

At the trial, plaintiffs introduced in evidence (1) a tax deed executed on September 1, 1931, conveying the property in question to the State of California; (2) a tax deed executed on November 22, 1943, conveying said property to the plaintiffs. Defendants introduced (1) a certified copy of page 65, volume 119 of Assessment Book, commonly called the Assessment Roll, for the County of Los Angeles for the fiscal year 1925–1926; (2) certified photostatic copy of certain pages of the minutes of the Board of Supervisors of Los Angeles County for its meeting of September 8, 1925; (3) certified photostatic copy of four pages, being a portion of the published delinquent tax list for the fiscal year 1925–1926. No oral testimony was presented.

Thereafter, the court made its findings of fact to the effect that plaintiffs were not the owners of the property in question; that defendant corporation "is the owner and entitled to possession of the above described real property"; that plaintiffs had paid $501 for the tax deed from the State of California and also $34.01 for subsequent taxes. An interlocutory decree was accordingly entered quieting the title to said property in defendant corporation and enjoining plaintiffs from asserting any claim thereto, provided that defendant within thirty days after entry of said interlocutory judgment, reimburse plaintiffs in the amount of $535.01. Such payment having been made, a final judgment was entered quieting title to said property in said defendant corporation. This appeal is prosecuted by the plaintiffs from both the interlocutory and final judgments.

It is here contended by appellants (1) that their tax title was sufficient to prove their case; (2) that respondent's claimed irregularity, i. e., that the assessment roll for 1925–26 did not comply with sub. 11 (later changed to 12) of sec. 3650 of the Political Code, as it then read, is without foundation; (3) that with respect to respondent's claim that the published delinquent list for 1925–26 did not comply with sec. 3764 of the Political Code, an examination of that list shows that it contained each and all of the requirements of said section; (4) that the irregularities, if any, not being jurisdictional, were cured by the Curative Act of 1943.

Respondent, in support of the judgment of the trial court, argues that the omission of any reference to the Los Angeles City High School District on the assessment roll for 1925–26, rendered the assessment and tax levy void, because, under section 3650 (11) of the Political Code, in effect at that time, the assessment was required to show "The school, road, and other revenue districts in which each piece of property assessed is situated."

In answer to this, appellant urges that the phrase "Newhall School District," as shown on the roll, was intended by the assessor to mean each and every school district serving the Newhall district, in which the property here in question is situated, including elementary and high schools, colleges and universities, and that such phrase, together with the heading of column 8 of the roll, to-wit: "Total State, County, Road and School Tax," constituted a substantial compliance with the provisions of section 3650 (11) supra. Also, that since respondent failed to exercise its remedy to appear before the board of equalization to register its objections to the assessment roll, it is deemed to have waived such objections.

The same question arose in the case of Mais v. Poinsettia Land Co., 71 Cal.App. 2d 347, 162 P.2d 925, one of the points urged for a reversal of the judgment therein being that "the assessment roll failed to show that Compton Union High School District as one of the school or revenue districts in which the property was located, as required by then section 3650(11) of the Political Code." It appears from the opinion therein that on September 6, 1927, the Board of Supervisors of Los Angeles County levied a tax upon all real and personal property in the Compton Union High School

District, including the subject property, for the maintenance of the Compton Union High School District; that subsequently the County Assessor in making up the assessment roll showed opposite the printed words "School Dist." the rubber stamped words "Compton City," that being the only reference on the roll to any school district. The court in said case stated at page 350 of 71 Cal.App.2d, at page 926 of 162 P.2d: "It appears from appellant's brief that the Compton City School District is an elementary school district, the territory of which, with certain surrounding territory, is included in the Compton Union High School District. If the statement on the assessment roll meant only that the property was in the Compton City School District, it would necessarily mean that it was also within the Compton Union High School District and would thus meet the specific objection which appellant makes. It is not contended that the description was inadequate for any other reason. Undoubtedly it would have been competent for the legislature to provide for an assessment roll which would describe the property assessed in any manner that would show it to be within the district covered by the levy which was the foundation of the assessment. The tax was levied upon the lands situated in the high school district and for the benefit of the district; there was also a description of the property which was sufficient to show that it was within the high school district for which the tax had been levied. Under those circumstances an irregularity consisting of a failure to comply with any legal requirement for a more specific description would be subject to correction by a validating act. The construction heretofore given to the 1943 act * * * is broad enough to encompass such irregularities as the one here claimed in the description of the property upon the assessment roll."

[1] In the instant case, it is not contended that the tax levied was incorrect or that it did not include the assessment for the Los Angeles City High School District. There appears to be no doubt that such tax, which was levied by the Board of Supervisors, included assessments for both the Newhall School District and the Los Angeles City High School District, and it is stipulated that the subject property is situated within both districts.

[2] The Curative Act of 1943, Stats. 1943, p. 1993, Deering's Gen.Laws, Act 8443, has been construed and interpreted by the Supreme Court in Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531; Barrett v. Brown, 26 Cal.App.2d 328, 158 P.2d 567; City of Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397; and Chambers v. Duvall, 26 Cal.2d 139, 156 P.2d 921. In the last cited case, a discussion of said Curative Act contains the following language, 26 Cal.2d 139, 156 P.2d at page 923: "Furthermore, in 1943, Stats. 1943, p. 1993, the Legislature enacted a validating and ratifying statute, by which it provided that every act and proceeding theretofore taken relative to the preparation, computing or fixing the budget or tax rate, or to the assessment or equalization of property or to the levy of taxes thereon or to tax sales or certificates of tax sales, tax deeds or other conveyances resulting from such assessment, equalization and levy, were thereby confirmed, validated and declared legally effective. By section 2 of the act its operation was limited to the correction of defects, irregularities and ministerial errors which the Legislature originally could have omitted from the statutory requirements under which the acts validated were taken, and to the validation of acts and proceedings to the extent permitted under the state and federal Constitutions."

In the Boland case, it was stated, 26 Cal.2d 310, 158 P.2d at page 399: "Here no intervening rights are involved and the irregularity complained of, not being such as to deprive the officials of jurisdiction to levy the tax, must be deemed to have been cured by the 1943 act."

In Mais v. Poinsettia Land Co., supra, 71 Cal.App.2d 347, 349, 162 P.2d 925, the defendant, as here, sought to escape from the operation of the Curative Act, contending that since the corporation owned the property before the assessment was levied, it had a vested right which could not be

taken from it by retroactive legislation. The court held against such theory, citing the Boland case as authority.

Other irregularities which it was claimed rendered the sale to the state void, and which were upheld by the trial court, were (1) that because the closing statement in the published delinquent tax list stated "for which the property *was sold* to the State in the manner as follows," a taxpayer reading said notice would be justified in believing his property was already sold and that it was too late for him to redeem it; (2) that the delinquent list failed to show with respect to the property here in question an amount equal to the total amount of all taxes, assessments, penalties and costs due.

[3] The opening statement of said notice of publication reads as follows:

"Default having been made in the payment of taxes and assessments levied in the year 1925 pursuant to law, which said taxes and assessments are shown by the Tax Rolls of the County of Los Angeles for the year 1925, and are collectible by the Tax Collector of the County of Los Angeles for the year ending June 30, 1926, upon the property described in the delinquent tax list hereto appended;

"Now, Therefore, I, W. O. Welch, County Tax Collector, in and for the said County of Los Angeles, by virtue of authority in me vested by law, hereby give public notice that *unless the total amount of all taxes, assessments, penalties and costs due* and which are a lien on the property delinquent as appears by said list *are paid*, I, as said Tax Collector, in the office of the Tax Collector, Hall of Justice, in the City of Los Angeles, County of Los Angeles, State of California, on Wednesday, the 30th day of June, 1926, at the hour of 5 o'clock p.m. *will sell* all of said real estate upon which taxes and assessments are a lien to the State of California." (Emphasis added.)

[4, 5] It would seem that such recital was sufficient to give notice that the property would be sold to the State for delinquent taxes, assessments, penalties and costs, as therein stated. However, as stated in City of Compton v. Boland, supra, 26 Cal.2d 310, 315, 158 P.2d 397, 400:

"We may assume that the requirement for publication of delinquency and notice, Pol.Code, § 3764, constitutes a jurisdictional prerequisite; but the form and contents thereof are details which are subject to legislative or administrative discretion, and defects therein are related to the mode of the exercise of the power, which being merely directory, may be made effective by a curative act. People [ex rel. Amestoy Estate Co.] v. Van Nuys Lighting District, 173 Cal. 792, 797, 162 P. 97, Ann.Cas. 1918D, 255.

"The purpose of the validating statute is to rehabilitate tax-deeded property and procure its return to the tax rolls. The accomplishment of the purpose is conducive to equality in assessments for the support of government and therefore to stability in government. It is a matter of public importance, therefore, that the validating act be applied to effectuate the legislative purpose so long as constitutional mandates are observed.

"We conclude that the irregularity directly under discussion, namely, the statement of incorrect amounts in the notices of delinquency, as well as the irregularities in the fixing of the budget and tax rates, were cured by the 1943 act. The same result follows as to the defendants' remaining claims of irregularity which are: that the words 'penalties and costs' were omitted from a specified statement appended to the notice. * * *

"The asserted omission of the words 'penalties and costs' or 'penalties,' is the same irregularity involved in Bussenius v. Warden, 71 Cal.App. 717, 236 P. 371; Jones v. Walker, 47 Cal.App.2d 566, 118 P.2d 299; Miller v. McKenna, supra, and other cases cited therein. Prior to the adoption of the 1943 curative act an irregularity in the contents of the published delinquent list and appended notice which indicated that the penalties and costs were not included in the amount stated invalidated the tax sale. In view of the effect of the 1943 act in curing that irregularity, the cases relied on by the defendants are not controlling."

[6] From the foregoing, it would appear that the claimed irregularities which formed the basis of the judgment of the trial court were validated by the Curative Act of 1943, supra, and that the tax deeds from the County of Los Angeles to the State of California, and from the State of California to the appellants, vested title to the property conveyed thereby in the latter.

For the reasons stated, the final judgment is reversed. The appeal from the interlocutory judgment is dismissed.

DORAN and WHITE, JJ., concur.




74 Cal.App.2d 778

**PEOPLE v. SCOTT.**

**Cr. 3958.**

District Court of Appeal, Second District, Division 1, California.

May 31, 1946.

**Licenses ⇐42(3)**

Information charging a violation of the Corporate Securities Act by the sale of a security without a permit, which security was generally described as an investment contract, a certificate of interest and participation, a certificate of interest and title to property, profits and earnings and which was specifically described as 10 per cent. of the net earnings of the Coachella cut-off project of the All American Canal subcontract under a named individual, sufficiently stated a cause of action as against contention that there was nothing from which court could determine that contract was one falling within provisions of Corporate Securities Act. Gen.Laws, Act 3814, § 2(a)7.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Allen G. Scott was convicted upon a plea of guilty of violating the Corporate Securities Act and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Robert S. Morris, Jr., Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information containing two counts, filed by the District Attorney of Los Angeles County, defendant was accused in each count of a violation of the Corporate Securities Act. Gen.Laws, Act 3814. The information also charged a prior conviction of a felony. Defendant entered a plea of guilty to the crime charged in count II and admitted the prior conviction. Judgment was pronounced against him whereby he was sentenced to the state prison for the term prescribed by law. Count I was dismissed. Defendant appeals from the judgment.

Appellant's sole contention on appeal is that count II of the information fails to state a public offense. The challenged pleading reads:

"For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charge set forth in Count I hereof, the said A. G. Scott is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of Violation Of The Corporate Securities Act, a felony, committed as follows: That the said A. G. Scott, on or about the 28th day of June 1944, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously sell and issue and cause to be sold and issued for value to M. S. Silengo, a security, to wit: an investment contract, a certificate of interest and participation, a certificate of interest in title to property, profits and earnings, as follows: Ten percent of the net earnings of the Coachella cut-off project of the All American Canal sub-contract under M. H. Hasler, without having applied for, or obtained from the

Corporation Commissioner of the State of California, a permit so to do."

In urging a reversal of the judgment appellant relies solely upon the case of People v. Davenport, 21 Cal.App.2d 292, 69 P.2d 862. In that case the court, after setting out in full the allegations of count XIII, which was comparable to the offense involved in this appeal, said (21 Cal.App.2d at page 294, 69 P.2d at page 863): "The pleader's designation of the character of the contract is a mere conclusion, and since there is no evidence before this court of the nature of the contract, we are unable to determine whether the investment contract was one falling within the provisions of the Corporate Securities Act or not."

In other words, the court was unable to determine from the pleading which characterized the security therein pleaded merely as "Agreement Noel Davenport and Margaret Nelson," whether it came within the terms and meaning of a "security" as defined in the Corporate Securities Act. The pleading with which we are here concerned is not subject to such stricture. After generally describing the security in the language of the statute as "an investment contract, a certificate of interest and participation, a certificate of interest and title to property, profits and earnings," the pleader specifically describes the security in question as "ten percent of the net earnings of the Coachella cut-off project of the All American Canal subcontract under M. H. Hasler."

Section 2(a), subdivision 7, of the Corporate Securities Act, Stats.1917, p. 673, Stats. 1937, p. 1428, Deering's Gen.Laws, Act 3814, defines a security as follows: "The word 'security' shall include any stock, bond, note, treasury stock, debenture, evidence of indebtedness, certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas or mining title or lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in title to property, profits or earnings, guarantee of a security and any certificate of deposit for a security."

We experience no difficulty in determining in the case at bar that the security pleaded in count II of the information was definitely and adequately described as a "profit-sharing agreement," a "beneficial interest in * * * profits or earnings." It must therefore be held that the wording of the information in the instant case distinguishes it from the case of People v. Davenport, supra, for the reason that herein the nature of the investment contract is expressly described and the court was enabled by such description to determine that the same came within the purview of the Corporate Securities Act, and that the reason assigned for reversal of the judgment in People v. Davenport, supra, is not here present.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.




74 Cal.App.2d 780

**PEOPLE v. SCOTT.**

**Cr. 3959.**

District Court of Appeal, Second District, Division 1, California.

May 31, 1946.

**1. Criminal law ⇐15**

Where defendant sold gasoline ration checks for a valuable consideration while the federal gasoline rationing program was still in effect, the subsequent termination of such program did not relieve defendant of penalty of statute, notwithstanding provision in statute for its termination upon termination of federal rationing program. Pen.Code, § 543.

**2. States ⇐4**

State statute prohibiting violation of federal wartime rationing provisions is not unconstitutional as an interference with the exclusive powers or jurisdiction of the federal government or merely because there is a federal statute on the same subject under the general war powers. Pen. Code, § 543.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Allen G. Scott was convicted upon a plea of guilty of selling for a valuable consideration ration checks for gasoline issued by the Office of Price Administration, a federal agency, and he appeals.

Affirmed.

See, also, 169 P.2d 969.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Robert S. Morris, Jr., Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an amended information filed by the District Attorney of Los Angeles County, containing four counts, the defendant was charged with the crime of violating section 543 of the Penal Code, in that he did knowingly sell for a valuable consideration ration checks for gasoline issued by the Office of Price Administration, an agency of the United States Government. The information also charged the defendant with having suffered a prior conviction in the Superior Court of Los Angeles County of the crime of issuing checks without sufficient funds, a felony.

Defendant entered a plea of guilty to count I, which charged the commission of the offense on or about June 27, 1944, and also admitted the prior conviction alleged in the information. The remaining three counts were dismissed. Following the denial of his application for probation, judgment was pronounced against the defendant sentencing him to the state prison for the term prescribed by law. From such judgment defendant prosecutes this appeal.

As grounds for reversal appellant advances two contentions:

(1) "The gas rationing program having terminated, pursuant to the ration program of the United States, the statute by its own terms ended gas rationing, and, therefore, there was no more force or effect to this prosecution."

(2) "The statute was without jurisdiction to provide a state act where there was a Federal statute under the general war powers, which was all-inclusive."

[1, 2] These identical claims were presented in the case of People v. Grosofsky, Cal.App., 165 P.2d 757 (hearing denied by Supreme Court), and rejected. Upon the authority of and for the reasons stated in the case just cited, as well as for the reasons advanced in the case of People v. McCord, Cal.App., 164 P.2d 50, it must be held that the statute upon which the prosecution was founded was operative as to appellant, who was accused of violating the laws governing rationing prior to their becoming inoperative; and it must also be held that the law is not unconstitutional as an interference with the exclusive powers or jurisdiction of the United States Government.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.






74 Cal.App.2d 964

**PEOPLE v. SCOTT.**

**Cr. 3960.**

District Court of Appeal, Second District, Division 1, California.

May 31, 1946.

**1. Criminal law ⇐15**

Where defendant sold gasoline ration checks for a valuable consideration while the federal gasoline rationing program was still in effect, the subsequent termination of such program did not relieve defendant of penalty of statute, notwithstanding provision in statute for its termination upon termination of federal rationing program. Pen.Code, § 543.

**2. States ⇐4**

State statute prohibiting violation of federal wartime rationing provisions is not unconstitutional as an interference with the exclusive powers or jurisdiction of the

federal government or merely because there is a federal statute on the same subject under the general war powers. Pen.Code, § 543.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Allen G. Scott was convicted upon a plea of guilty of selling for a valuable consideration ration checks for gasoline issued by the Office of Price Administration, a federal agency, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Robert S. Morris, Jr., Deputy Atty. Gen., for respondent.

WHITE, Justice.

[1, 2] In an indictment returned by the Grand Jury of Los Angeles County, containing four counts, the defendant was accused in each count of a violation of section 543 of the Penal Code, in that he did feloniously and knowingly sell for a valuable consideration ration books for gasoline issued by the Office of Price Administration, an agency of the United States Government. The indictment also included and by reference incorporated in each count the charge of a prior conviction allegedly suffered by the defendant on April 29, 1927, in the Superior Court of Los Angeles County, of the crime of issuing checks without sufficient funds, a felony.

Upon his arraignment the defendant moved to quash the indictment, which motion was denied. A demurrer to the indictment was overruled, and the defendant entered a plea of not guilty as to all counts. The prior conviction charged against him was admitted by the defendant.

Subsequently the defendant entered a plea of guilty to count I, which charged the commission of the offense therein pleaded on or about the 15th day of July, 1944. Following the denial of his application for probation, judgment was pronounced whereby he was sentenced to the state prison for the term prescribed by law. The remaining counts were dismissed. From the judgment pronounced against him defendant prosecutes this appeal.

The crimes charged, the issues presented on this appeal, as well as the grounds urged by appellant for reversal, are identical (except as to the dates of the commission of the crimes) with those presented in the case of People v. Scott, Cal.App., 169 P.2d 968.

Upon the authority of and for the reasons stated in the case just cited, the judgment from which this appeal was taken is affirmed.

YORK, P. J., and DORAN, J., concur.




74 Cal.App.2d 782

**PEOPLE v. SCOTT.**

Cr. 3961.

District Court of Appeal, Second District, Division 1, California.

May 31, 1946.

**1. Criminal law ⇐576(5)**

The constitutional and statutory right of an accused to a speedy prosecution of charge against him may be waived. Pen. Code, § 1382, subd. 2; Const. art. 1, § 13.

**2. Criminal law ⇐576(5)**

Where information charged defendant in five counts with passing bad checks and defendant entered pleas of guilty to first two counts and of not guilty to remaining three counts, which latter counts were ordered off calendar, and eight months later the last three counts were ordered restored to calendar and defendant changed his plea as to count three from not guilty to guilty, no objection having been made to the proceedings, defendant waived his right to a speedy prosecution of charge against him. Pen.Code, § 1382, subd. 2; Const. art. 1, § 13.

3. Criminal law ⇐576(5)

A defendant's failure to complain of invasion of his right to a speedy prosecution of charge against him in superior court before trial is a waiver of such right. Pen.Code, § 1382, subd. 2; Const. art. 1, § 13.

4. Criminal law ⇐636(9)

Defendant's presence is not required as a necessary prerequisite to court's revocation of probation.

5. Criminal law ⇐982

Court may revoke probation at any time during probationary term.

6. Criminal law ⇐982

Revocation of probation does not amount to a "final disposition" of case, which occurs only when judgment is pronounced. Pen.Code, § 1193.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Disposition".

7. Criminal law ⇐987

Generally judgment must be pronounced in presence of defendant, although it may, under certain conditions, be imposed in defendant's absence. Pen. Code, § 1193.

8. Criminal law ⇐1216(6)

There is no statute of limitations upon the execution of a valid and unsatisfied judgment.

9. Criminal law ⇐982

Where defendant accepted benefits of order suspending execution of sentence and placing him on probation and judgment was valid and sentence imposed thereby remained unserved, the remanding of defendant for execution of such judgment after revocation of probation was proper.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Allen G. Scott was convicted upon a plea of guilty of making, drawing, uttering and delivering a check upon a bank without having sufficient money or credit in bank to pay such check when presented for payment, wherein defendant was placed on probation. From the judgment and from order after judgment revoking probation, defendant appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Robert S. Morris, Jr., Deputy Atty. Gen., for respondent.

WHITE, Justice.

By an information filed by the District Attorney of Los Angeles County on July 9, 1926, the defendant was charged in five counts with the crime of making, drawing, uttering and delivering a check upon a bank without having sufficient money or credit in said bank to pay the same when presented for payment, a felony.

At the time of his arraignment, the defendant entered pleas of "guilty as charged in counts I and II of the information" and "not guilty as to counts III, IV and V." On July 19, 1926, defendant was arraigned for judgment and sentenced to imprisonment in the county jail for one year on each of counts I and II to which he had pleaded guilty. Counts III, IV and V of the information were thereupon ordered off calendar.

On April 29, 1927, the defendant and his counsel appeared in court, at which time counts III, IV and V were ordered restored to the calendar. Upon that occasion, by leave of court, the defendant, represented by counsel, withdrew his former plea as to count III, entered a plea of guilty thereto, and waived time for sentence, whereupon judgment was pronounced sentencing him to imprisonment in the state prison for the term prescribed by law. Execution of the sentence was suspended and defendant was placed on probation for ten years. Counts IV and V of the information were thereupon dismissed.

On January 28, 1929, in the absence of the defendant, representations were made to the court that defendant had violated the terms of his probation, whereupon a bench warrant was ordered issued and a hearing on violation of probation was set for February 20, 1929. Upon this date

the court made an order revoking the probation theretofore granted to the defendant and issued a bench warrant for his apprehension. On March 22, 1945, the defendant, having been apprehended, appeared in court with his counsel, at which time the court made an order that "probation having been heretofore revoked, defendant is remanded into the custody of the sheriff for execution of sentence heretofore imposed on April 29, 1927, committing this defendant to the state prison of the State of California at San Quentin for the term prescribed by law." Thereupon the defendant gave notice of appeal "from the judgment and order after judgment in the above entitled case."

As grounds for reversal appellant contends (1) the original judgment is void; (2) the order after judgment revoking probation is void; (3) the proceedings had upon the order revoking probation are void; (4) the time within which the judgment could be put into force and effect had expired.

[1-3] Appellant's first contention, that the judgment is void, is predicated upon the claim that he was not accorded a speedy prosecution of the charge against him to which he was entitled under Article I, Section 13 of our state Constitution, and that the proceedings were not had within the time provided in subdivision 2 of section 1382 of the Penal Code. This contention cannot be sustained. The right guaranteed by the aforesaid constitutional and code provisions is one which may be waived. In the instant case the record reflects that no objection whatever was made to the proceedings had in the superior court. What was said by our Supreme Court in the case of People v. Newell, 192 Cal. 659, 669, 221 P. 622, 626, is determinative of the question with which we are here confronted. In the cited case we find the following: "First as to the trial: It is shown by the clerk's transcript on appeal that the information herein was filed on February 1, 1922, and that the trial opened on June 14, 1922—134 days after the filing of the information. But there is no showing anywhere that the relief afforded by subdivision 2, § 1382, of the Penal Code, was sought in the superior court. The application must be made, in the first instance, in the court where the prosecution is pending (Ex parte Fennessy, 54 Cal. 101), and if the application is not made therein before the trial is begun, the right is waived (People v. Hawkins, 127 Cal. 372, 374, 59 P. 697)."

It must therefore be held that appellant waived the benefit of the constitutional and statutory provisions by failure to claim it in proper season. Ex parte Apakean, 63 Cal.App. 438, 440, 218 P. 767.

[4-7] The order made after judgment on February 20, 1929, revoking probation was not void because the defendant was not present. His presence was not required as a necessary prerequisite to the court's revocation of the theretofore extended privilege of probation. The court may revoke the probation at any time during the probationary term. People v Williams, 24 Cal.2d 848, 853, 151 P.2d 244; People v. Hunter, 42 Cal.App.2d 87, 91, 108 P.2d 472. The court's action in revoking probation did not amount to a final disposition of the case, which occurs only when judgment is pronounced, and while generally judgment must be pronounced in the presence of the defendant, it may, under certain conditions, be imposed in his absence (Pen.Code, sec. 1193). In the instant case, however, the defendant was present when the judgment was pronounced. All that the court did in the order under attack was to revoke the probation and issue a bench warrant for the arrest of the defendant. This the court had a right to do in his absence during the term of the probation.

[8, 9] Appellant's fourth claim, that the time within which the judgment could be put into force and effect had expired, is equally without merit. Appellant presents no authority in support of his contention, nor do we find any holding that there is a statute of limitations upon the execution of a valid and unsatisfied judgment. There was a legal subsisting judgment, unexecuted, against appellant on March 22, 1945, when he was remanded to the custody of the sheriff for execution of the sentence imposed on April 29, 1927,

committing him to the state prison for the term prescribed by law. Appellant accepted the benefits of the order suspending execution of the sentence and placing him on probation. The judgment being a valid one, and the sentence imposed thereby remaining unserved, the remanding of the defendant for execution of such judgment was legal and valid. In re Collins, 8 Cal. App. 367, 371, 97 P. 188.

The judgment and "order after judgment" are, and each is, affirmed.

YORK, P. J., and DORAN, J., concur.




74 Cal.App.2d 929

**PEASE v. CITY OF SAN DIEGO.**

**Civ. 3393.**

District Court of Appeal, Fourth District, California.

June 17, 1946.

Rehearing Denied July 10, 1946.

**1. Appeal and error ⇐982(1)**
**Judgment ⇐363**

An application to relieve a party from a judgment order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, is directed to trial court's sound discretion, exercise of which will not be reversed on appeal, except for clear abuse. Code Civ. Proc. § 473.

**2. Judgment ⇐143(3)**

Setting aside default judgment under statute for defendant's "mistake, inadvertence or excusable neglect" was not abuse of discretion, where defendant proceeded with diligence, and good reason appeared for delay in answering, although technically the defendant did not take the proper steps to safeguard the result, and plaintiff participated in the other proceedings and gave no notice of his intention to require a prompt answer or demurrer, and the default judgment improperly exceeded the relief prayed for, and no attempt was made to determine the amount justly owed by plaintiff to defendant. Code Civ.Proc. § 473.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action to quiet title by C. C. Pease against the City of San Diego, a municipal corporation. From an order setting aside a default judgment, the plaintiff appeals.

Order affirmed.

C. Coleman Pease, in pro. per.

J. F. DuPaul, City Atty., Thomas J. Fanning, Deputy City Atty., and Shelley J. Higgins, Sp. Counsel, all of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order setting aside a default judgment.

The plaintiff, who is an attorney at law, brought the action on October 1, 1941, to quiet his title to a certain lot in San Diego, but summons was not served on the city for nearly three years. On August 8, 1944, the city filed another action naming this plaintiff as a defendant, seeking to quiet its title to the same lot. On September 19, 1944, this plaintiff filed an answer in that action and also served the city of San Diego with summons in the instant action. However, that summons was not returned to the court until October 17, 1944, more than three years after the commencement of this action.

On October 13, 1944, the city moved to dismiss this action on the ground that summons had not been returned within three years. On November 20, 1944, the court denied this motion, on the ground that by so moving the city had made a general appearance, and gave the city thirty days in which to "file any further proceedings." On December 11, 1944, the city filed in this court a petition for a writ of prohibition, based on the contention that the superior court had lost jurisdiction to proceed with this case since summons had not been returned within three years. That petition was denied on December 19, 1944. The city then filed a petition for hearing in the Supreme Court, which was denied on February 15, 1945. In the meantime, and on Decem-

ber 21, 1944, on application of the plaintiff, the clerk of the trial court had entered the default of the city.

On February 26, 1945, the city served on the plaintiff and filed in the clerk's office a notice of motion to set aside its default, together with its proposed answer, noticing the matter for hearing on March 5, 1945. On March 2, 1945, the plaintiff filed an application for entry of a judgment based upon the default of the city with an affidavit stating, among other things, that the city had intentionally avoided filing a demurrer or answer by taking proceedings in the appellate courts, and that its failure to demur or answer had been willful and deliberate. On the same day, the court entered a judgment quieting title to this lot in the plaintiff as against any and all claims of the city of San Diego.

On March 12, 1945, the city's motion to set aside its default came on for hearing and, apparently, a motion to set aside the judgment was also heard. On March 13, 1945, the court entered an order granting the motions, but reserving for future consideration the question raised as to the jurisdiction of the court to proceed with the action. The order further vacated and set aside the default of the city and the judgment which had been entered in favor of the plaintiff; ordered the city's answer filed; and ordered this action consolidated with the action filed on August 8, 1944. From this order the plaintiff has appealed.

Disregarding immaterial matters, the appellant contends that there was an entire failure to show anything which constitutes mistake, inadvertence, surprise or excusable neglect, within the meaning of section 473, C.C.P., and that the court exceeded its jurisdiction in setting aside this judgment and permitting an answer to be filed.

[1, 2] An application for such relief is directed to the sound discretion of the trial court and an order granting it will not be reversed on appeal unless it clearly appears that such discretion has been abused. Rogers v. Schneider, 205 Cal. 202, 270 P. 451. That there was neglect here may be assumed, but it does not necessarily follow that such neglect was entirely inexcusable. The city proceeded with diligence, both in the trial and appellate courts, to press its claim that it was entitled to have the action dismissed. Good reason appears for the delay in answering although, technically, proper steps may not have been taken to safeguard that result. The appellant not only participated in the other proceedings but gave no notice of his intention to require a prompt answer or demurrer. He says himself that he made a verbal extension of time, in the hope of a compromise, but he does not state the extent thereof. The appellant was an attorney at law and a member of the San Diego Bar Association. One of the rules of that association, to which each member was required to subscribe, provided that no member would take a default against another member "except after notice of intention to do so." It appears that this provision was relied on by the attorneys for the respondent, together with the fact that another action was pending and at issue involving the same matters as those involved in this action. In fact, the appellant had asked that the pleadings in this action should be considered in the other action and, in effect, that the issues of the two actions should be heard together.

It further appears that the default judgment as entered improperly exceeded the relief prayed for in the complaint. In the complaint it was alleged that the city had certain interests in or liens on the property in question through tax assessments and special assessments, although it was alleged that some of these were illegal and that, under a certain compromise and settlement which had been put through, the amounts of certain liens were larger than they should be. It was prayed that the court decree that the city had no interest in the property save and except a lien for such sum as should be determined to be the correct amount due on account of unpaid taxes and special assessments. It was further prayed that the plaintiff be authorized to redeem the property on paying "the true and proper amounts" thus found by the court. In effect, the plaintiff admitted that something was due in this regard, asked that the correct amount be determined, and offered to pay the same. The judgment which was entered quieted title to the property in the appellant and enjoined the respondent from

asserting any claims with respect to it. It is apparent from the record that the issues raised by the complaint were never heard, upon the evidence required, and that no attempt was made to determine the amount justly owed by the appellant.

It cannot be held, under the circumstances here appearing, that the court abused its discretion in setting aside this judgment, with its obvious effect on the other action pending, and permitting the entire controversy to be tried on its merits.

The order appealed from is affirmed.

GRIFFIN, J., concurs.




74 Cal.App.2d 862

**In re KERNS' GUARDIANSHIP.**

**LEABO v. KELLY.**

**Civ. 15119, 15120.**

District Court of Appeal, Second District, Division 3, California.

June 11, 1946.

**1. Guardian and ward ⇐10**

Where infant beneficiary of will had no guardian of its estate and the mother had petitioned for the appointment of a trust company, which petition was opposed by a stranger who petitioned for her own appointment, the appointment of the trust company was within the discretionary power of the court.

**2. Infants ⇐16**

Finding that mother of child had not failed to provide for or communicate with infant for the period of one year with the intent to abandon it was sustained by the evidence. Welfare and Institutions Code, § 701(a).

**3. Infants ⇐16**

In order to constitute "abandonment" there must be an actual desertion accompanied with intent and intention to entirely sever, so far as it is possible to do so, the parental relation and throw off an obligation growing out of it. Welfare and Institutions Code, § 701(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

**4. Abandonment ⇐2**

To "abandon" means to give up a right absolutely with no intention of reclaiming it, and it must be shown by the clear, unequivocal and decisive act of the party.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandon".

**5. Infants ⇐16**

Failure to provide, or failure to communicate for a period of one year is only presumptive evidence of intention to abandon, under the Welfare and Institutions Code. Welfare and Institutions Code, § 701(a).

**6. Guardian and ward ⇐13(7, 8)**

In proceeding for the appointment of guardian of the person and the estate of infant, finding should have been made as to whether petitioner had failed to maintain infant within meaning of Probate Code, but was not prejudicial where finding against petitioner would have been without support in the evidence. Probate Code, § 1409.

**7. Guardian and ward ⇐4**

Under provision of Probate Code that a parent who knowingly or willfully abandons or having the ability to do so, fails to maintain his minor child under 14 years of age, forfeits all right to the guardianship of such child, failure to support a child where due to poverty or other misfortune not resulting from willful acts or omissions of the parent, does not deprive the parent of guardianship rights. Probate Code, § 1409.

**8. Guardian and ward ⇐4**

Mere consent to the voluntary support of a child by others or acquiescence in such voluntary support is not a failure to support infant under section of Probate Code, forfeiting right to guardianship in case of failure to support. Probate Code, § 1409.

**9. Guardian and ward ⇐13(3)**

The giving of notice in conformity with provision of the Probate Code in proceedings for the appointment of a guardian, is jurisdictional. Probate Code, § 1441.

**10. Guardian and ward ⇐18**

Where notice was not given to mother of infant, whose address was known, in proceedings for the appointment of guardian, order of appointment was void and was subject to be set aside at any time and it was court's duty to vacate the order on mother's petition to hear the matter de novo. Probate Code, § 1441.

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Appeal from Superior Court, Los Angeles County; William B. McKesson, John Gee Clark, Judges.

Proceeding in the matter of the guardianship of Donna Marie Kerns, a minor, wherein Ruby Leabo filed a cross-petition praying that she be appointed guardian of the person and the estate of the minor, and proceeding in the matter of Donna Marie Kerns, also known as Donna Marie Leabo, a person under age of 21 years, wherein Ruby Leabo asked the court to have the child declared free from the custody and control of her mother, Margaret E. Kelly, who resisted the petition. From adverse judgments in both proceedings, Ruby Leabo appeals, and the appeals were consolidated.

Judgments affirmed.

Arthur A. Jones, of Los Angeles, for appellant.

Ira C. Doane, of Los Angeles, for respondent.

SHINN, Justice.

Donna Marie Kerns, aged 8 years, is the daughter of Margaret E. Kelly, nee Margaret E. Kerns. Upon the petition of the mother, she was appointed guardian of the person, and Citizens National Trust and Savings Bank was appointed guardian of the estate of said minor. In the same proceeding the court denied a cross-petition of Ruby Leabo praying that she be appointed guardian of the person and estate of the minor. Ruby Leabo also filed with the superior court a petition to have the child declared free from the custody and control of her mother under the Juvenile Court Law, Div. 2, Pt. I, Ch. 2, Art. 6, Welfare and Institutions Code. Her petition was resisted by Mrs. Kelly and, after a trial, was denied. The guardianship proceeding was determined by Honorable John Gee Clark, and the abandonment proceeding by Honorable William B. McKesson, in the exercise of his jurisdiction as Judge of the juvenile court. Ruby Leabo has appealed from the entire judgment made in the guardianship proceeding and also from the one in the abandonment proceeding. The appeals have been consolidated.

[1] That portion of the judgment of Judge Clark which appointed the corporation guardian of the estate of the minor should be affirmed. The minor had an estate as beneficiary of the will of one Grafton Leabo, no guardian of the estate had been appointed, the mother had petitioned for the appointment of the corporation, Ruby Leabo, a stranger, had petitioned for her own appointment, and the selection that was made was within the discretionary power of the court. Appellant in her brief states no reason for a reversal of that provision of the judgment.

The purpose of Ruby Leabo in prosecuting the proceeding in the juvenile court was to have the child freed from the custody and control of the mother so that she would be subject to adoption without the mother's consent. An extended hearing was conducted before Judge McKesson for the determination of a single question of fact, namely, whether the mother had abandoned her child and had thereby rendered the child subject to the jurisdiction of the juvenile court by virtue of section 701(a) of the Welfare and Institutions Code, which extends the jurisdiction to any child under 21 years of age "who has been left by either or both of his parents in the care and custody of another without any provision for his support, or without communication from either or both of his parents, for the period of one year with the intent on the part of such parent or parents to abandon such person. Such failure to provide, or such

failure to communicate for the period of one year, shall be presumptive evidence of the intent to abandon."

The law which governed in the guardianship matter heard by Judge Clark is section 1409 of the Probate Code, which reads: "A parent who knowingly or wilfully abandons or, having the ability so to do, fails to maintain his minor child under fourteen years of age, forfeits all right to the guardianship of such child"; etc. The question of abandonment was involved in both hearings and the finding of each judge was in favor of the mother. Judge McKesson found: "That said natural mother did not fail to provide for or cummunicate with said minor for the period of one year with the intent to abandon said child," etc., and in the conclusions of law he further found: "That the natural mother, Margaret Elizabeth Kelly, did not abandon or intend to abandon her said minor daughter, Donna Marie Kerns, within the meaning of section 701(a) of the Welfare and Institutions Code, or otherwise or at all." Judge Clark found: "That said natural mother did not fail to provide for or communicate with said minor daughter for the period of one year with the intent to abandon said minor. That said natural mother did not abandon said minor." However, no finding was made in the guardianship matter as to whether the mother had knowingly or wilfully failed to maintain the minor, having the ability so to do, which was a question for decision under section 1409, Probate Code. We have, then, two questions which necessitate a consideration of the evidence: first, was there evidence of a substantial character which furnished support for the two findings that there had been no abandonment and, second, was the failure to make a finding as to the alleged failure of the mother to support the child an error which necessitates a reversal of that portion of Judge Clark's judgment which appointed the mother guardian of the person of her child. These questions cannot be disposed of properly without a statement of the evidence, which consisted of a review of the mother's conduct and her circumstances, as well as the life of her daughter, from a date preceding the birth of the child.

In 1936, respondent, Margaret Kerns (Kelly), was 18 years of age and, with her younger sister, was visiting, at Los Angeles, a family named Martin, friends of her own family. The father of the child was a son of the Martins, a young man who was employed and whose marriage to Margaret had been arranged. The baby was born in Denver; the mother returned to Los Angeles with her child, expecting to marry the baby's father, but the latter met his death in an accident before the marriage could take place. The mother went to work as a waitress, placed the child in good hands, and supported her. In 1937, while working in a restaurant owned by Grafton Leabo, she married him but thereafter continued to work and support the baby. The marriage was a mistake and the parties separated. The mother returned to Denver, but continued to support the daughter until September 14, 1938, when Leabo was granted letters of guardianship of the person of the minor by the Superior Court of Los Angeles. The mother at that time was ill and she continued under the care of physicians, being able to work only a part of the time, and then earning only $5 a week as a house servant. In 1939, Leabo, who had married Margaret without being finally divorced from a former wife, sued for and obtained an annulment of his marriage to Margaret. In 1940 Ruby entered the employ of Grafton Leabo as his housekeeper and in 1942 she married him. The child lived with the Leabos until Grafton died, October 8, 1944. On October 11, 1944, Ruby filed a petition for her own appointment as guardian of the person of the minor, and on October 31, 1944, she filed a separate petition for her appointment as guardian of the estate. In the meantime, Margaret had married one Kelly, her present husband, who was then a WPA worker. From December, 1941, until July, 1943, when he joined the Navy, Mr. Kelly held another position, in which he earned about $150 a month. The mother obtained employment in August, 1943, first at $15 a week, and other small wages, and later at about $135 a month, and thereafter she also received $50 a month of her husband's pay. While it does not appear with certainty what wages she

received during the different periods, it is reasonably certain that during the greater part of the year immediately preceding the filing of her petition for guardianship she had the ability to contribute substantially to the support of the child. During all of the earlier years, while she was living in Denver, she was without ability to support the child, due largely to a serious illness.

Judge McKesson made comprehensive findings, all of which have support in the evidence. He found that prior to leaving for Colorado the mother had placed the child in the home of one Hildegarde Wenger and that the mother was supporting her and had made arrangements for the child to be returned to her; that in October, 1944, when Grafton Leabo was appointed guardian, the mother was in Denver, sick and without funds, but that she protested to the judge against Leabo's petition; that she did not thereafter attempt to have Leabo's appointment vacated because she suffered from lack of funds and feared the said Leabo, and that immediately upon learning of his death she sought her own appointment as guardian; that she did not fail to provide for or communicate with the child for a period of one year with intent to abandon the child; that she sent, or caused to be sent, Christmas presents, birthday and Easter presents each year, and that the same were received by the minor; that while he was guardian, Grafton Leabo took the child to Denver to see her mother and offered to give her back to her mother if the latter would return and live with him, but that she refused through fear of the said Leabo and asked for the return of the child; she received a series of photographs of the child which she cherished, and at least once a year, at the request of the mother, a cousin of the mother visited the child and reported as to the child's condition, and the maternal grandmother, with whom the mother lived, corresponded with Leabo at least once a year and received replies, which she read to the child's mother, this continuing throughout the guardianship. It was found to be untrue, as alleged in the petition, that the mother left said minor in the care of said Ruby Leabo without support or communication, with intent to abandon said minor. The mother testified at great length in the hearing before Judge McKesson, and the testimony which she gave fully supported her own summarization, as follows: "I never have given up Donna. I have never abandoned her. I have always—I have been waiting for all these years just so I could have her, but I couldn't fight Mr. Leabo; there was just nothing I could do."

Our own study of the evidence satisfies us that the material conclusions reasonably to be drawn therefrom are the following: the child has always had a good home; at the time Grafton Leabo obtained letters of guardianship there existed an undissolved marriage relation with Margaret, and Leabo's assumption of the duty of supporting the child was voluntary and imposed upon the mother no legal duty to reimburse him for the child's support. The voluntary nature of that support was not thereafter altered by any request by Leabo that the mother contribute to the support of the child; the mother did not fail at any time in the performance of her legal duty to support the child; she did not neglect the child, nor ever lose affection for her nor show any lack of interest in her welfare. She believed at all times that her daughter would eventually be restored to her and she submitted to the arbitrary actions of Leabo because she did not know how to overcome the effect of the court order appointing the latter as guardian of the child; her continued separation from the child was not in accordance with her wishes, and her absence from Los Angeles, she testified, was due to her fear of Leabo. Promptly upon the death of Leabo, the mother asserted, and she has vigorously prosecuted, her right to the custody of her child. In short, her situation is due to extreme misfortune and not to any failure in the performance of her legal or moral obligations, nor, in fact, to any culpable fault or neglect upon her part.

[2-5] We do not see how the issue of abandonment could have been justly decided against the mother. As said in Re Snowball, 156 Cal. 240, 243, 104 P. 444, 446, "In order to constitute abandonment, 'there must be an actual desertion, accompanied

with an intention to entirely sever, so far as it is possible to do so, the parental relation and throw off all obligations growing out of the same.'" To abandon means to give up a right absolutely with no intention of reclaiming it, and it must be shown by the clear, unequivocal, and decisive act of the party. Matter of Petition of Kelly, 25 Cal.App. 651, 658, 145 P. 156; In re Cordy, 169 Cal. 150, 146 P. 532, 534; Matter of Cozza, 163 Cal. 514, 524, 126 P. 161, Ann.Cas.1914A, 214; In re Edwards, 117 Cal.App. 667, 4 P.2d 560; In re Estate of Akers, 184 Cal. 514, 194 P. 706. Failure to provide or failure to communicate for a period of one year is only presumptive evidence of intention to abandon, under the Welfare and Institutions Code. Absence of any such intention was clearly established by the evidence in the hearing of the guardianship proceeding, as well as in the one held in the juvenile court.

[6-8] A finding should have been made in the guardianship proceeding as to whether the mother had failed to maintain her daughter, within the meaning of section 1409 of the Probate Code. The omission to make such finding was error, but we are convinced that it was not an error which resulted in a miscarriage of justice or which requires a reversal for a retrial of that issue. The question is not merely whether the child was supported by the mother or by some one else. It is rather a question of what constitutes a wilful failure on the part of the parent. The provision of the section which would visit upon the parent the extreme penalty of forfeiture of the right to serve as guardian has for its purpose the protection of the child from neglect, and not the mere punishment of the parent. The failure to support a child, which is due to poverty or other misfortune not resulting from the wilful acts or omissions of the parent, does not deprive the parent of the right of custody or control or the right to serve as guardian. This is for the reason that there is in such circumstances no breach of legal or moral duty. There is nothing legally or morally wrong in the conduct of a parent who makes an arrangement for the support of his or her child by a relative or a friend. To fail to meet the burden of support means to cast off that burden, to refuse to bear it, and to make it necessary that others should assume it. Mere consent to the voluntary support of a child by others, or acquiescence in such voluntary support, is not a failure within the meaning of section 1409, supra. Arrangements of this character which may be of advantage to the children, and to the other parties concerned, as well, do not result in a deprivation of parental rights. The courts have so held whenever the question has arisen, and have not hesitated to reverse judgments which have deprived parents of their natural rights by reason of erroneous conclusions as to what constitutes failure to maintain children, or abandonment. Matter of Forrester, 162 Cal. 493, 496, 123 P. 283; In re Green, 192 Cal. 714, 221 P. 903. See also cases last above cited. Mrs. Kelly has been separated from her daughter through misfortune, but the greatest misfortune of all, and a grave injustice as well, would have been a judgment which would have made that separation permanent. The failure of the court to make a finding as to whether she had wilfully failed to maintain her daughter was not a reversible error, for the reason that a finding adverse to her upon that issue would have been without support in the evidence.

[9, 10] There is one other point to be disposed of. Ruby Leabo was appointed guardian of the person of Donna on October 31, 1944, without the giving of any notice of her petition, or order prescribing notice. The mother's address in Denver was stated in the petition. Section 1441 of the Probate Code provides that before making the appointment of a guardian, "such notice as the court or a judge thereof deems reasonable must be given to the person having the care of the minor and to such relatives of the minor residing in the state as the court or judge deems proper. In all cases notice must be given to the parents of the minor or proof made to the court that their addresses are unknown, or that, for other reason, such notice cannot be given." This requirement of notice to the parents is jurisdictional. The order of appointment was void and was subject to

be set aside by the court at any time. It was, in fact, the duty of the court to vacate the order upon the mother's petition and to hear the matter de novo. In re Dahnke, 64 Cal.App. 555, 222 P. 381; In re Pryor, 68 Cal.App. 312, 229 P. 60. It may also be mentioned that Ruby Leabo's first petition to be appointed guardian of the estate came on for hearing with the Margaret E. Kelly petition, and with Ruby Leabo's counter petition, and was disposed of by the judgment of Judge Clark.

The judgments are affirmed.

DESMOND, P. J., and WOOD, J., concur.




74 Cal.App.2d 954

## LANDON v. LANDON.

Civ. 15294.

District Court of Appeal, Second District, Division 2, California.

June 18, 1946.

Rehearing Denied July 8, 1946.

Hearing Denied Aug. 15, 1946.

**1. Judgment ⇐375**

The concealment of facts which, if revealed to a trial court, may result in a postponement of an adjudication until absent party can be heard, constitutes "extrinsic fraud" which will warrant setting aside of the judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

**2. Divorce ⇐161**

Where wife obtained default decree in divorce suit without informing trial court that husband was being restrained in Shanghai by the Japanese, and presented an affidavit in which she made a false statement that husband voluntarily remained in Japan, wife was guilty of "extrinsic fraud" entitling husband to have divorce decree set aside, though wife had subsequently married another.

**3. Marriage ⇐1**

Courts are solicitous to protect the marriage status.

**4. Divorce ⇐161**

Courts favor a hearing on the merits in divorce cases and require only slight evidence to set aside a default judgment on showing of equitable grounds.

**5. Appeal and error ⇐187(3)**

Where no objection is made in the trial court that some person not joined in an action is a necessary party, the right to raise such objection is waived and need not be heard for the first time on appeal.

**6. Appeal and error ⇐187(3)**

On appeal by wife from judgment in favor of her first husband setting aside a divorce decree obtained by her, wife could not contend that her second husband was a necessary party, where she made no objection in the trial court because second husband was not made a party.

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Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Harold N. Landon against Elma A. Landon, also known as Elma A. Phillips, to set aside, on ground of extrinsic fraud, a default, interlocutory decree, and final decree of divorce. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Wiseman & Elmore and Oscar Z. Wiseman, all of Los Angeles, for appellant.

Boyle, Holmes, Fry & Garrett, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to set aside, on the ground of extrinsic fraud, (1) a default, (2) interlocutory decree, and (3) final decree of divorce, defendant appeals.

The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are:

Defendant and plaintiff were married in 1926. In 1939, plaintiff and defendant, with their two children, went to Japan where plaintiff engaged in a business venture. In October, 1940, defendant and the children of the parties returned to the

United States. At the time defendant left Japan, she had $548.00. Thereafter defendant received no further financial aid from plaintiff. She maintained herself and supported her two chidlren, aided by some assistance from Mrs. Case, an aunt of plaintiff. Plaintiff remained in Japan to complete his business enterprise. On September 12, 1941, defendant filed a complaint for divorce and obtained an order for publication of summons. On or about October 18, 1941, plaintiff was served with a copy of the summons and complaint in Tokyo, Japan. He immediately cabled his attorney in California requesting that he file a demurrer to the complaint and obtain a continuance of the action pending plaintiff's return to the United States. Plaintiff's attorney did not follow the instructions he had received and failed to appear in the action because he believed that by so doing he would prevent a personal judgment being entered against plaintiff herein.

On November 25, 1941, plaintiff left Japan for the United States via Shanghai, China. He was in Shanghai on December 7, 1941 (the official date of the commencement of the war between the United States of America and Japan). On December 8, 1941, plaintiff was arrested by the Japanese in Shanghai, interned, and held in restraint by the enemy until November, 1943, when he was released, arriving in the United States in December, 1943.

On January 12, 1942, Mrs. Bouton, mother of plaintiff, presented to the superior court an affidavit that plaintiff was unable to appear in the divorce action because of the outbreak of the war and requested a stay of proceedings pending his return to the United States. Such an order was issued. Shortly thereafter, defendant communicated with Mrs. Bouton's attorney stating in substance that if Mrs. Bouton continued to interfere with the divorce proceedings she would obtain a statement from the State Department of the United States that plaintiff was working in the interests of the Japanese government, and that the probable consequence would be trouble for plaintiff. Mrs. Bouton, fearing the consequences of the action threatened by defendant, refrained from further participation in the divorce proceedings.

On January 30, 1942, defendant moved to set aside the stay order. Though Mrs. Bouton had notice of the motion, she did not appear because of the threats made by defendant. At the hearing of the motion, defendant presented an affidavit to the court in which it was stated that plaintiff voluntarily absented himself from the United States, had failed to support his family and was drinking heavily. At the time of the hearing defendant knew that plaintiff was absent due to his business difficulties and his physical restraint by the Japanese government; also that plaintiff had cabled his aunt, Mrs. Case, on November 28, 1941, stating that he was on his way home and in need of funds for his passage, and that Mrs. Case had attempted to cable funds for such purpose but that the outbreak of the war between Japan and the United States of America had prevented delivery of the funds to Shanghai. These latter facts defendant did not divulge to the court when seeking to have the order staying proceedings in the divorce trial vacated.

Defendant's motion to vacate the stay order was granted and subsequently plaintiff's default in the divorce action was entered and an interlocutory decree of divorce was granted defendant herein on February 18, 1942. On March 9, 1943, a final decree of divorce was entered. On November 21, 1943, defendant married James Phillips. Mr. Phillips was not made a party to the present action, nor does the record disclose that he has received notice thereof or made an appearance in this action.

There are three questions presented for our determination which will be stated and answered hereunder seriatim:

First: *Was there substantial evidence to sustain the trial court's finding that the interlocutory and final decrees of divorce entered in favor of defendant herein were the result of extrinsic fraud practiced upon the trial court?*

[1] This question must be answered in the affirmative and is governed by this pertinent rule of law. The concealment of

facts which, if revealed to the trial court, might result in the postponement of an adjudication until the absent party can be heard constitutes extrinsic fraud. (Olivera v. Grace, 19 Cal.2d 570, 576, et seq., 122 P.2d 564, 140 A.L.R. 1328; Williams v. Williams, 57 Cal.App. 36, 42, 206 P. 650.

[2] Applying the foregoing rule to the facts in the instant case the evidence discloses that defendant concealed from the trial court, when she caused plaintiff's default to be entered in the divorce action and at the time of the hearing of her application for a divorce, that she was in possession of a letter from plaintiff in which he explained to her in detail the reasons for his continued stay in Japan; that due to his physical condition, resulting from his ill treatment by the Japanese, he had for some time during his stay in Tokyo drunk as much as a quart of whiskey a day, but that at the time he was writing, September, 1941, he was able to get along with much less liquor; and anticipated being with defendant before Christmas, 1941. Defendant also concealed the fact from the trial court that she knew that plaintiff was in Shanghai endeavoring to gain passage to the United States; was in need of funds for such purpose and that plaintiff's aunt, Mrs. Case, had attempted to cable funds to him but was unable to do so because of the outbreak of the war between the United States of America and Japan.

It is further to be noted that defendant presented to the trial court an affidavit in which she made a false statement to the effect that plaintiff voluntarily remained in Japan. It appears evident that had the trial court been apprised of the true facts it would have continued the hearing of defendant's application for divorce until after plaintiff had had the opportunity to return to the United States and present his defense to the divorce complaint. Clearly such concealment of pertinent facts constituted extrinsic fraud upon the trial court and such evidence sustains the trial court's finding that extrinsic fraud had been practiced upon it.

Second: *Does the judgment in the instant case do equity?*

[3, 4] This question must likewise be answered in the affirmative. After a trial lasting seven court days, the trial court found, supported by substantial evidence, that justice and equity required the setting aside of the default, interlocutory and final decrees of divorce on the ground of extrinsic fraud practiced upon the trial court. The trial court properly found that plaintiff was entitled to be heard upon the merits before his marriage and family ties were broken up, his property sequestered and his children taken away from him. It is axiomatic that courts are solicitous to protect the marriage status; favor a hearing on the merits in divorce cases and require only slight evidence to set aside a default judgment upon the showing of equitable grounds.

Third: *Was defendant's second husband an indispensable party to the present action?*

[5] This question will not be considered by this court for the reason that the law is settled in California that by failing to make an objection in the trial court that some person not joined in the action is a necessary party the right to raise such objection is waived and may not be urged for the first time on appeal. (Jolley v. Clemens, 28 Cal.App.2d 55, 75, 82 P.2d 51; Alhambra Bldg. & Loan Ass'n v. DeCelle, 47 Cal.App.2d 409, 412, 118 P.2d 19; Dewey v. Parcells, 137 Cal. 305, 306, 70 P. 174; Kippen v. Ollasson, 136 Cal. 640, 641, 69 P. 293. See also 20 Cal.Jur. (1925), p. 581, § 59.)

[6] The foregoing rule is applicable in the present case because defendant had ample opportunity to make objection in the trial court that her second spouse was a necessary party to the action. This she failed to do.

In view of our conclusions it is unnecessary to discuss other questions argued by counsel.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; TRAYNOR, and SCHAUER, JJ., dissenting.

74 Cal.App.2d 870

## PEOPLE v. MOREHOUSE.

Civ. 15106.

District Court of Appeal, Second District, Division 1, California.

June 12, 1946.

1. Nuisance ⇐84

In action to abate nuisance and to enjoin maintenance of apartments in alleged violation of Health and Safety Code, evidence sustained finding that the Code had been violated and justified preliminary injunction. Health and Safety Code, §§ 15024, 15290, 17821.

2. Nuisance ⇐84

In action to abate nuisance and to enjoin defendant from maintaining certain apartments in alleged violation of Health and Safety Code, court had authority to grant a preliminary injunction compelling defendant to make alterations and changes on her premises. Health and Safety Code, §§ 15290 et seq., 19300.

3. Appeal and error ⇐954(1, 2)
Injunction ⇐135

The granting or refusing to grant a temporary injunction is a matter addressed to discretion of trial court and action of trial court may not be disturbed on appeal except where an abuse of discretion is shown.

4. Nuisance ⇐84

In action to abate nuisance and to enjoin maintenance of apartment building in violation of Health and Safety Code, where evidence established violation of Code, the granting of preliminary injunction was not an abuse of discretion, even though court failed to make finding that violations rendered premises unfit for human habitation and occupancy or constituted one of the elements of statute defining nuisance. Health and Safety Code, § 15024.

5. Pleading ⇐192(2)

In action to abate nuisance and enjoin maintenance of apartment building in violation of Health and Safety Code, complaint alleging inadequate toilet and bathing facilities, filthy and insanitary conditions, inadequate ventilation and air space, leaky plumbing and gas pipes, sleeping in kitchens, defective and unsafe stairways, walls, floors, fixtures, etc., was not demurrable on ground of uncertainty for failure to allege facts constituting a nuisance. Health and Safety Code, §§ 15024, 15290, 17821.

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Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action by the People, Department of Industrial Relations, Division of Immigration and Housing, against M. K. Morehouse, a widow, to abate a nuisance and to enjoin defendant from maintaining certain apartments in alleged violation of the Health and Safety Code. From an order granting a preliminary injunction, defendant appeals.

Affirmed.

W. P. Butcher, of Santa Barbara, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

DORAN, Justice.

The action herein is one to abate a nuisance and enjoin the appellant and other defendants from maintaining certain apartments in the City of Santa Barbara, in alleged violation of the California Health and Safety Code. The alleged violations, as particularized in the complaint, include inadequate toilet and bathing facilities, filthy and insanitary conditions, inadequate ventilation and air space, leaky plumbing and gas pipes, sleeping in kitchens, defective and unsafe stairways, walls, floors, fixtures, etc. The property involved consists of a two story frame building at 1127 Chapula Street containing 7 apartments on the first floor and 17 apartments on the second floor; a two story frame building at 1123 Chapula Street with 4 apartments on the first floor and 8 apartments on the second floor; and Parcel C, "known as one story frame structures at rear of and connected to No. 1123 and No. 1127 Chapula Street, containing two single sleeping rooms and 12 apartments". The appel-

lant testified that she had owned and operated the apartments for about thirty-five years. Several photographs were introduced in evidence showing the interior of various apartments and alleged defective conditions, the photographs being identified by the appellant.

The complaint was filed on May 2, 1945, appellant filed a demurrer thereto, but no answer, and on May 15, 1945, the demurrer and an order to show cause in re a preliminary injunction, were heard together, and the demurrer overruled. Thereafter the trial court heard evidence in reference to the preliminary injunction, including appellant's testimony; certain stipulations in open court were entered into, and a preliminary injunction granted. Testimony was also received from John Frederick Murphy, an architect who had inspected the Morehouse property; from Dr. Roome, physician and city health officer; and from Buren Thorleifson, State Housing Inspector. In answer to the Court's inquiry whether appellant wished to produce any evidence, appellant's counsel stated, "No, your Honor; in the light of what my client has stated on the stand, that she intends to put in some additional toilets and baths, I will concede that point so far as any order of the Court it may make; * * * toilets, baths and the cooking we are willing to proceed and whatever repairs may be necessary on the stairway to make that comply with the State statutes. * * * I will stipulate that an order may be made as to those features." The record then reveals the following:

"The Court: That takes care of everything then, except the partitions.

"Mr. Kegley: Well, there are numerous citations, so to speak, listed as corrections for the defective plumbing under certain sinks and wash basins.

"The Court: That's why I asked, all plumbing?

"Mr. Butcher: Whatever usual repairs have to be made to make them correct and fit to use, why, she'll do that anyway. * * *

"Mr. Kegley: Those plumbing citations and corrections are all listed, Mr. Butcher, and that leaves us the one item about the—

"The Court:—partitions.

"Mr. Kegley: Partitions, and the adequate ventilation.

"Mr. Butcher: That I will have to leave to the Court's discretion; I have no authority to make a stipulation on that."

In regard to such partitions and ventilation the Court then ordered, "that those partitions in each instance where they are violating the State Housing Act, as contained in the Health and Safety Code, that they be either removed or relocated; and that the ventilation be made such that it comes within the provisions of the State Housing Act as contained in the Health and Safety Code".

The preliminary injunction, dated June 15, 1945, "absolutely enjoined and restrained (the appellant, tenants and occupants) from maintaining and/or continuing to maintain or keeping and maintaining said premises described in said complaint as a public and common nuisance * * * in a manner contrary to the force and effect of the statutes of the State of California, as more particularly described and set forth in the complaint herein, and specifically as follows:" The injunction then orders the defendants to "Discontinue sleeping or cooking in kitchen" of certain described apartments; repair or remove leaky plumbing and gas pipes in designated apartments; provide additional toilets and baths in separate compartments with required outside window area and reconstruct present combination toilet and bath rooms to comply with law; recondition designated stairways with handrails; "A general clear-up of all toilets and bathrooms"; remove water closet from kitchen; "Provide not less than 12 square feet of window area to the outside" in certain apartments; "provide not less than 500 cubic feet of air space in sleeping rooms" designated. The appellant was ordered to conform to the provisions of the injunction on or before August 20, 1945. On July 2, 1945, appellant's motion to set aside the preliminary injunction was heard, argued and denied, and the present appeal followed.

The State Housing Act, under which the present proceeding was instituted, in Sec-

tion 15024 of the Health and Safety Code, defines a nuisance as follows:

"(a) Any public nuisance known at common law or in equity jurisprudence.

"(b) Whatever is dangerous to human life or detrimental to health.

"(c) Overcrowding a room with occupants.

"(d) Insufficient ventilation or illumination.

"(e) Inadequate or insanitary sewerage or plumbing facilities.

"(f) Uncleanliness.

"(g) Whatever renders air, food, or drink unwholesome or detrimental to the health of human beings."

Section 15290 of the Health and Safety Code, contains the following provision: "If any building is constructed, altered, converted, or maintained in violation of any provision of, or of any order or notice issued by an enforcement agency pursuant to, this part, or if a nuisance exists in any building or upon the lot on which it is situated, the enforcement agency may institute any appropriate action or proceeding to prevent, restrain, correct, or abate the violation or nuisance."

Section 17821 of the same act provides: "Any building which has become unfit for human habitation or occupancy, as definded herein, is hereby declared to be a nuisance. * * *

[1] It is evident, from a review of the record, that the conclusions reached by the trial court are abundantly supported by the evidence to the effect, in substance, that there were serious violations of the State Housing Act in almost all of the particulars enumerated in Section 15024 hereinbefore quoted. For example, the testimony of Dr. Roome, the City Health Officer, is to the effect that he made an inspection of appellant's premises, as a result of which appellant was served with a notice to abate a nuisance, specifying in detail the alleged defects previously noted herein. Dr. Roome's conclusion, expressed in this notice, was that "All of the buildings * * * are in a generally delapidated, insanitary and unsafe condition. The buildings in their present condition constitute a fire hazard and are detrimental to health." A similar conclusion was reached by Buren Thorleifson, state housing inspector, who testified in support of an affidavit previously made. Mr. Thorleifson had inspected appellant's premises in company with the Sanitary Inspector of Santa Barbara on July 19 and 20, 1944, and "found the entire place to be in a generally filthy, insanitary and unsafe condition, a fire trap and detrimental to public health". A notice to abate the nuisance was sent to and received by the appellant on August 31, 1944. On May 14, 1945, the day before the hearing, Thorleifson again inspected the premises and found the same conditions existing with the one exception that a sign, "Community Kitchen" had been placed over the door of one room which had previously been a combined sleeping and kitchen room. At the hearing on the preliminary injunction a stipulation in court was arrived at in relation to toilets, baths, defective plumbing, etc., as hereinbefore mentioned, which, in the language of the trial court, "takes care of everything then, except the partitions". As to the matter of partitions, which, of course, related to adequate room space and ventilation in connection therewith, appellant's attorney stated, "That I will have to leave to the Court's discretion". Concerning this matter, Mr. Thorleifson testified that he had measured the cubic footage in appellant's sleeping rooms and found it less than the five hundred cubic feet required by Health and Safety Code, Section 19300. Thereafter, the trial court did exercise its discretion as suggested by appellant's attorney, and granted the preliminary injunction now complained of, which action seems to have been amply justified under the evidence and stipulations placed before that court.

[2] Appellant's contention that "The Court is without authority to grant a preliminary injunction in this proceeding by expressly compelling the appellant to make alterations and changes upon her premises", cannot be sustained. It is conceded in the appellant's opening brief that "under Section 15290 of the Health and Safety Code and the following sections authority is given for the abatement of nuisances,

but the power of the legislature to define and abate nuisances must be restricted by constitutional guaranties. See 20 Cal.Juris. 265." This citation, however, does not support appellant's argument and the article states that "Within reasonable limits, there is no question but that the legislature may declare certain uses of property to be nuisances". This the legislature has done in Section 15024 hereinbefore quoted. Appellant has also cited Gardner v. Stroever, 81 Cal. 148, 22 P. 483, 6 L.R.A. 90, where the court remarks that "mandatory preliminary injunctions are seldom granted, and only in a peculiar class of extreme cases". The Gardner case did not relate to the Health and Safety Code, was wholly dissimilar to the case at bar, and is not authority in the appellant's favor. Moreover, as mentioned in respondent's brief, "there has been no attempt to compel Mrs. Morehouse to do any specific particular act other than to cease violating the law in the operation of her premises. She has the alternative right to terminate the occupancy of any portion of the premises and thus cease violating the law, or to make the necessary changes in her apartments to comply with the ventilation requirements and the cubic-footage requirements of the Health and Safety Code". In connection with appellant's argument that such a preliminary injunction should only be granted in extreme cases, may be noted the trial judge's statement made at the hearing of a motion to set aside the injunction: "In the Court's opinion this is an extreme case or the Court would not have signed the injunction in the first place".

In reference to the above contention, it is further argued that "Appellant did not have an opportunity to fully present her case", and that "it would be extremely difficult for her to obtain the materials"; that "these units were filled with old age pensioners and members of the armed forces and their families", and that the housing situation would be seriously interfered with by the court's order. The point is also made that appellant had been operating these premises for more than a quarter of a century, and "during all of that time there never had been an epidemic nor any cause for danger to the public health". The record discloses that appellant was given abundant opportunity to present her case and that all of the objections now raised were presented to and considered by the court. No cases are cited in appellant's briefs which would justify a disapproval of the trial court's order, nor are the above arguments persuasive.

[3, 4] The appellant's assertion that "The failure of the Court to make findings as the basis for the order that the violations rendered the premises unfit for human habitation and occupancy or constituted one of the elements defined in Section 15024 of the Health and Safety Code rendered the order of the court void", is answered by the case of Pavilion Ice Rink v. O'Brien, 60 Cal.App. 185, 186, 212 P. 632, where the court says, "As no findings are required in a proceeding of this nature [order refusing a preliminary injunction], we must presume in support of the order * * *. Such being the case, this court may not disturb the order of the trial court." Apropos the present situation, the court's further statement is particularly applicable: "The granting or refusing to grant a temporary injunction is a matter which is addressed to the discretion of the trial court (Kendall v. Foulks, 180 Cal. 171, 174, 179 P. 886), and the action of the trial court may not be disturbed on appeal, except where an abuse of that discretion is shown". No abuse of discretion is apparent in the instant case.

[5] Finally, appellant's opening brief contends that "The Court should have sustained the demurrer to the complaint upon the ground of uncertainty for failure to allege facts constituting a nuisance". In re Cohn, 37 Cal.App.2d 39, 98 P.2d 769, cited in support thereof, is not authority for appellant's contention. This court there held that where it was contended that the keeping of peacocks was a nuisance amounting to a misdemeanor, it was necessary to allege facts in support of such contention. In the instant case, not criminal in nature, the complaint was, as respondent's brief submits, "extensive, particular, precise, and contained far more than the minimum requirements of such pleadings". And, if any further facts con-

cerning appellant's premises were desirable, such facts were, as the trial court stated, "particularly within her own knowledge".

In the reply brief filed by appellant it is contended that, "In granting an injunction the court must balance the equities and interests of the parties"; that "the rights of the tenants to housing is superior to the interests of the State as to the alleged technical violations of the Housing Act", and that "the trial court did not have jurisdiction to enforce the Housing Act when certificates of occupancy have been issued by the Rent Director authorizing the use of these premises by the tenants during the emergency". In this connection it may be noted that the record supports the implied conclusion of the trial court that the violations charged to appellant were not "technical" but substantial and serious and that dangerous and insanitary conditions cannot be condoned because of the housing situation. The record discloses that due consideration was given these matters by the trial court, and as hereinbefore indicated, no abuse of discretion appears.

The order granting a preliminary injunction is therefore affirmed.

YORK, P. J., and WHITE, J., concur.




74 Cal.App.2d 846

**PEOPLE v. DUENAS et al.**

**Cr. 1961.**

District Court of Appeal, Third District, California.

June 7, 1946.

**1. Homicide ⇐228(1)**

The elements necessary to be proved in homicide case to establish corpus delicti are merely to identify body of deceased, and to show that deceased was killed by means of unlawful agency.

**2. Homicide ⇐228(2)**

In murder prosecution, wherein physician who performed autopsy on body of deceased testified that deceased died as result of bleeding from artery which was cut by sharp instrument, that wound was near the groin and it was half an inch wide and three inches deep, and three witnesses testified that they saw a knife in hands of accused at time of affray, corpus delicti was sufficiently established notwithstanding physician on cross-examination stated that wound "could have been caused by a stick".

**3. Homicide ⇐332(2)**

The weight of evidence in murder prosecution was for jury.

**4. Homicide ⇐250**

Evidence sustained conviction of manslaughter.

**5. Witnesses ⇐319, 397**

When a witness is successfully impeached, jury may disregard his testimony, but fact that witness made statements at another time which were contradictory of his testimony given at the trial did not necessarily require jury to reject his entire testimony, but such impeaching evidence is received only for purpose of testing his credibility, and weight of such impeaching evidence is solely for jury or trial judge.

**6. Criminal law ⇐1159(2, 4)**

Reviewing court cannot pass upon weight or effect of impeaching evidence, or weight to be given to testimony of a witness at trial unless his evidence clearly appears to be inherently improbable.

**7. Criminal law ⇐742(3)**

The credibility of witness and weight to be given to impeachment testimony were for jury.

**8. Criminal law ⇐785(12, 16)**

In murder prosecution wherein accused claimed that he was not present when conflict occurred, and prosecution witness who had stated at preliminary hearing that he did not see a knife in accused's hands testified at trial that he saw a knife in accused's hands, instructions that witness may be impeached by evidence

he has made at other times and that jury had sole discretion to determine weight of evidence and credibility of witnesses and that when witness wilfully swore falsely upon a material issue his entire evidence might be distrusted or rejected, amply protected accused's rights. Code Civ.Proc. § 2052.

**9. Criminal law ⇐1144(14)**

In support of verdict and judgment, appellate court must assume that rejected instructions were adequately covered by proper instructions given.

**10. Criminal law ⇐829(1)**

An instruction adequately covered by instructions given was properly rejected.

**11. Criminal law ⇐780(1), 808½**

Where accused charged with murder testified that he was not present at time of affray but stood at a distance of 60 paces or more away from place where affray occurred, court properly instructed jury upon necessity of corroborating testimony of an accomplice defining that term in language of the statute. Pen.Code, § 1111.

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Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Carlos Topete Duenas and Adiodato Cuevas were convicted of manslaughter, and the first-named defendant appeals.

Affirmed.

George E. Foote, of Sacramento, for appellant.

Robert W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendants were jointly charged and tried by a jury for the crime of murder. They were represented by separate counsel. A verdict of manslaughter was rendered against each. The defendant, Carlos Topete Duenas, moved for a new trial, which was denied. The codefendant, Cuevas, has not appealed. From the judgment and order denying a new trial this appeal was perfected by the defendant Carlos Topete Duenas.

It is contended that the verdict and judgment are not supported by the evidence; that the prosecution failed to prove the corpus delicti, and that the court erred in refusing to give to the jury two instructions regarding the proof which is necessary to convict an accused person as an accessory to a crime.

The defendants were friends. They lived in Sacramento. The appellant was unmarried. The wife and family of the codefendant, Cuevas, live in Mexico. At about nine or ten o'clock on the night of July 16, 1945, the defendants went together to the Nordeste Club on N Street in Sacramento, where they ate a meal. At 11:30 o'clock that night, Rosendo Meza and his wife, Irene, who live at Vina, eighteen miles from Chico, arrived at the Club. They went there with the deceased, Edwin Chabez, and a woman by the name of Jane, with whom he was living. They were seated at the bar. Mrs. Meza is a niece of Jane. The defendants were first seated at a table in the same room. They went to the bar and ordered beer to drink. There is a conflict of evidence regarding the identity of the defendant who offended Jane by pouring some beer upon her, but she testified that the appellant, Carlos Duenas, whom she identified as "the man in the blue shirt," offered her a drink, which she refused, and that he then poured the beer on her leg. That incident started a quarrel between the men of the respective parties. Mr. Nordeste, the proprietor of the Club, stopped the argument by saying to the defendants, "You better leave, you have to go." The defendants then left the Club and crossed the street, remaining on the sidewalk on the opposite side of the street beyond a parked car, for several minutes, until Mr. Meza, Edwin Chabez, the deceased, and the women emerged from the building. Regarding the affray which then followed, there is a serious conflict of evidence, even between the defendants themselves.

Regarding the actual affray, Rosendo Meza testified to the spilling of beer on the person of Jane Chabez, the quarrel which

resulted therefrom, and the departure of the defendants at the request of the proprietor. Mr. Meza then said "They [the defendants] went across the street and they waited there for us to come out;" that "we stayed there about a half an hour more and it was 12:00 o'clock. We came out together, * * * Eduardo Chabez, Jane, Irene and myself." The witness said they were walking on Third Street toward Capitol Avenue, when the defendants came toward them, cursing them and demanding that they "come out and fight." He said that Chabez then "gathered a piece of stick that was near a fence and he went to the middle of the street;" that both of the defendants were then in the middle of the street, and that the "taller man had * * * a piece of stick; a broom handle or something." He then testified that the appellant, Duenas, who was identified by the witness in the courtroom, struck Chabez with a knife, and that the deceased fell and was lying on the street, and that "He ran, that man." On cross examination the witness was asked "Did you or did you not see Duenas have a knife in his hands that night?" to which he replied "Yes, I did see it." The witness then picked up the wounded man and assisted him to walk toward the sidewalk. He said Chabez was unable to walk and that he "then sat down on the street." The witness said "I saw his pants full of blood and he asked me to call a car *because he was already cut.*" A cab was called and Chabez was taken to the hospital, and died the following day, as the result of that wound.

Doctor John Kassis testified that he performed an autopsy on the body of the deceased and that he died as the result of a wound near the left groin which severed the femoral artery. He said "it was about a half inch cut * * * three inches deep." He said that the artery was cut and that the deceased bled to death from that wound.

Jane Chabez corroborated much of the material testimony of the witness, Rosendo Meza. Irene Meza testified that both defendants "were together" in the street at the time of the affray; that she saw "this man Duenas * * * bending over Edward;" that "the short guy * * * had a knife in his hand." She admitted that she did not see the fatal blow struck but said, "when I followed him up * * * he had a knife in his hand." She said that both defendants came across the street toward them when they came out of the Club; that she saw "both these men close to him [the deceased]. * * * they were very close to him," and that the shorter man (Duenas) had a knife in his hand. She also testified that after Chabez fell down, both defendants "ran * * * around the corner toward Fourth on N."

The codefendant, Cuevas, contradicted the appellant's claim that he was not present during the affray but stood sixty paces or more away. Cuevas testified that after they left the Club and crossed the street they remained on the sidewalk a few minutes and that Duenas asked him to return with him to the building so that he could pay for the drink which he had ordered; that they then crossed the street together; that they did not then enter the building, but the deceased and his party soon came out, and Chabez armed himself with a club. The witness admitted that he also picked up a stick. The witness testified that when they saw the people coming out of the saloon, Carlos Duenas "crossed the street first and followed them;" that the deceased had the stick in his hand, and when he stepped off the sidewalk he hit Duenas, breaking the stick. He said that Chabez then "fell down and rolled over to the middle of the street." The witness denied that either he or Duenas had a knife or that they used one in that affray. He did testify that Chabez was armed with a knife. He said that after the incident "Duenas told me, 'Come on, let's go, *because I have stuck him,*' and then we walked together on the street and turned the corner and went away." The defendants then went to a restaurant and ate another meal together. They were subsequently arrested and jointly tried for the crime of murder. Each was convicted of manslaughter.

[1, 2] The corpus delicti was sufficiently established. The elements necessary to be proved in a homicide case to establish

the corpus delicti are merely to identify the body of the deceased, and to show that he was killed by means of an unlawful agency. People v. Spencer, 58 Cal.App. 197, 221, 208 P. 380; People v. Cornett, 61 Cal.App. 2d 98, 105, 141 P.2d 916; 13 Cal.Jur. 676, sec. 68. In the present case, the physician who performed the autopsy testified that Chabez died as the result of bleeding to death from an artery which was cut by a sharp instrument; that the wound was near the groin and it was half an inch wide and three inches deep. That wound indicates that it was inflicted by a knife. Three witnesses saw a knife in the hands of the appellant at the time of the affray. On cross examination the doctor did answer the question, "It could have been caused by a stick?" by replying, "Yes." There is evidence that the deceased had a stick in his hand, but our attention is not called to any evidence indicating that it had a sharp point which could have inflicted that wound. Evidently the jury did not think so. There is an abundance of evidence to satisfactorily show that the deceased was cut while he was engaged in the affray with the appellant, Duenas. Chabez then fell down, and he said "he was already cut." It is highly improbable that he was cut in any manner other than by means of the knife which was seen at that time in the hands of the appellant.

[3] The evidence adequately supports the verdict and judgment of conviction of manslaughter. It is true that, upon cross examination of the witness Meza, it appeared from the transcript of his preliminary examination that he had made statements contradictory of his testimony at the trial, with respect to his claim that he had seen a knife in the hands of the appellant at the time of the affray, and possibly regarding some other essential incidents of the conflict. That evidence was offered for the purpose of impeachment. We must assume that the jury, under proper instructions, gave full consideration to that impeachment evidence. The question of the weight of the evidence was exclusively within the province of the jury. We may not interfere with that province. The testimony of other witnesses corroborates his statement at the trial that the appellant did have a knife in his hands at the time of the affray.

[4] The chief contention of the appellant is that he was not present when the conflict occurred. He claims that he was sixty paces or more away from the scene. But that claim is refuted by all of the other witnesses, including his codefendant. Cuevas not only testified that Duenas was present and that he was hit by a stick in the hands of Chabez just prior to the time the deceased fell to the ground, but he also said that Duenas then said to him, "Come on, let's go, because I have stuck him." Regardless of the conflict of evidence and of the apparent conflicting statements of the witness, Rosendo Meza, we are satisfied there is ample evidence to support the judgment of conviction of the appellant of the crime of manslaughter.

[5-7] A witness may be impeached by evidence that he has made, at other times, statements inconsistent with his testimony given at the trial. Sec. 2052, C.C.P. When a witness is successfully impeached, the jury may disregard his testimony. People v. Phillips, 70 Cal. 61, 69, 11 P. 493. But the fact that a witness made statements at another time which were contradictory of his testimony given at a trial, does not necessarily require the jury to reject his entire testimony. Such impeaching evidence is received only for the purpose of testing his credibility. The weight of such impeaching evidence is solely a question for the jury or the trial judge. Goodwin v. Robinson, 20 Cal.App.2d 283, 288, 66 P.2d 1257; 27 Cal.Jur. 182, sec. 156; 70 C.J. p. 1152, § 1338. It is not the privilege of the reviewing court to pass upon the weight or effect of impeaching evidence, or the weight to be given to the testimony of a witness at the trial, unless his evidence clearly appears to be inherently improbable, which we may not hold to be the fact under the circumstances of this case. The witness, Meza, denied at the trial that he had previously stated he did not see a knife in the hands of the appellant, Duenas. At the trial, he positively asserted that he did see the knife in the hands of the appellant. That fact was corroborated by two other witnesses. The

proceedings at the preliminary hearing indicates that Rosendo Meza did state that he did not see a knife in his hands. At the trial he insisted that he did see the knife in his hands. The defendants were strangers to the prosecuting witnesses. The evidence satisfactorily shows that one of the defendants cut the deceased with a knife. It indicates that the appellant cut the deceased. Since they were both engaged in the affray it is immaterial which one actually used the knife. It is not surprising that there may have been some confusion on the part of the witness in identifying the defendant who was seen with the knife in his hands. The credibility of the witness and the weight to be given to the impeachment testimony was exclusively the province of the jury.

[8] The court properly instructed the jury, pursuant to Section 2052 of the Code of Civil Procedure, that a witness may be impeached by evidence that he has made, at other times, statements inconsistent with his testimony at the trial. It was also instructed that the jury has the sole discretion to determine the weight of the evidence and the credibility of witnesses and that when a witness has wilfully sworn falsely upon a material issue that his entire evidence may be distrusted or rejected. Those instructions amply protected the appellant's rights. The jury could not have been misled upon that principle of law.

[9, 10] The appellant failed to show that the rejected instructions upon the subject of aiding and abetting the commission of the crime were prejudicial. We must assume in support of the verdict and judgment that the two rejected instructions were adequately covered by other proper instructions which were given to the jury. Podesta v. Delucchi, 100 Cal.App. 249, 279 P. 1061; Goldman v. Dahlberg, 79 Cal.App. 380, 249 P. 536; 2 Cal.Jur. 869, sec. 509. The record discloses the fact that the first asserted omission was actually given to the jury in almost the exact language contained in appellant's proffered instruction, and that appellant's instruction number seven was adequately covered by other instructions which were given to the jury.

The appellant assigns the alleged refusal of the court to give to the jury his proposed instructions numbers one and seven as prejudicially erroneous. They are based on the provisions of Section 31 of the Penal Code, which declares that all persons concerned in the commission of a crime are deemed to be principals, whether they directly commit the act constituting the offense, or "aid and abet in its commission." That instruction was given to the jury. The appellant is mistaken in asserting that his instruction number one was refused. It was given to the jury in the following language:

"For one person to abet another person in the commission of a criminal offense, simply means, to knowingly and with criminal intent, aid, promote, encourage or instigate, by act or counsel, or by both act and counsel, the commission of such criminal offense."

[11] Since the appellant had testified that he was not present at the time of the affray, and upon the contrary that he then stood at a distance of sixty paces or more away from the place where it occurred, the court fully and fairly instructed the jury upon the necessity of corroborating the testimony of an accomplice, and defined that term in the language of Section 1111 of the Penal Code.

The appellant does not complain of the refusal to give several of his proffered instructions which were drawn on the theory that he was not present at the time of the affray. We assume that is because all of the other witnesses, including the codefendant, Cuevas, testified that he was present. The evidence is very convincing that the appellant was present and that he participated in the affray.

The appellant's instruction number seven, which was refused, is inconsistent with his testimony that he was not present. It merely states that it is not sufficient to prove that a defendant is present and has the opportunity to commit the offense, but that the prosecution must prove that he "aided, promoted, encouraged and instigated by act or counsel or by both act and counsel, the commission of such criminal offense."

The essential language of that refused instruction was included in the foregoing quoted instruction which was given to the jury. The court further fully instructed the jury that the burden was on the prosecution to prove every essential element of the crime beyond a reasonable doubt, and that if a doubt remained in the minds of the jurors as to the guilt of the accused, it was their duty to acquit the defendant. We are convinced that the defendant was not prejudiced by the refusal to give instruction number seven.

Moreover, the evidence satisfactorily shows that the appellant participated in the controversy and in the affray as a principal whether he or his codefendant actually stabbed the deceased. There is no miscarriage of justice.

The judgment and the order are affirmed.

ADAMS, P. J., and PEEK, J., concur.




74 Cal.App.2d 891

## WILMERTON v. MORTON et al.

Civ. 13018.

District Court of Appeal, First District, Division 1, California.

June 17, 1946.

**1. Fixtures ⇐27(2)**

A lessor and lessee can covenant away any right that they might otherwise have under the trade fixture rule, and when their lease speaks on the subject it controls the implications that might otherwise arise under such rule.

**2. Landlord and tenant ⇐157(2)**

A refrigeration system installed by lessee in apartment building constituted an "alteration, addition or improvement" to building, within provision in lease that all alterations, additions and improvements made by lessee shall become property of lessor at termination of lease, notwithstanding that system would have been removable under trade fixture rule in absence of any covenant in the lease.

See Words and Phrases, Permanent Edition, for all other definitions of "Alteration, Addition or Improvement".

**3. Evidence ⇐571(10)**

Finding that plaintiff was damaged to extent of $1,500 by defendant improperly removing a refrigeration system installed by him in apartment building in violation of terms of lease was supported by evidence, where plaintiff's expert witness testified that replacement value of the system was between $1,980 and $2,250 and that such amount would be its value to the building, less cost of any repairs that the system might need.

**4. Damages ⇐111**

The proper measure of damages for wrongful removal of a fixture is the value of the fixture in place as part of the realty, and not what it would sell for on the open market removed from the building.

**5. Damages ⇐62(1)**

Generally, a person wronged at law must make reasonable effort to prevent expansion of his injury.

**6. Damages ⇐188(3)**

Where trial court fixed replacement value of refrigeration system wrongfully removed by defendant from plaintiff's apartment building in violation of terms of lease at time of removal at $1,500, testimony of defendant's witness did not establish that plaintiff failed to minimize his damages in accordance with his duty to do so.

**7. Appeal and error ⇐994(3)**

The determining of which witnesses should be believed was a function of trial court, and not of appellate court.

**8. Appeal and error ⇐1011(1)**

Trial court's finding, based on substantial, although conflicting evidence, cannot be disturbed on appeal.

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Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Action by Hazel Wilmerton, formerly known as Hazel Lawson, as executrix of

the last will and testament of Elizabeth Lawson, deceased, against A. W. Morton and others, to recover damages resulting from alleged wrongful removal by named defendant of a certain refrigeration system from leased premises in violation of terms of the lease. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

Joseph A. Brown, of San Francisco, for appellant.

Malone & Sullivan, of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, executrix of the estate of her mother, brought this action against defendant for damages, it being alleged that defendant, in violation of the terms of a lease, wrongfully removed from the leased premises a certain refrigeration system. The trial court found in favor of plaintiff and defendant appeals.

The facts are as follows: In 1932 plaintiff's mother owned a three-story apartment house in San Francisco which contained eighteen two-room apartments. In August of 1932, defendant, by written contract, leased that apartment house from its owner for a period of five years, with an option in the lessee for an additional five-year term. The option was exercised by defendant so that he held the premises under the lease until August of 1942. When the premises were leased in 1932 there was no electrical refrigeration system in the building. Each kitchen then had a conventional cooler of the shelved compartment type, with a small opening in the exterior wall of the building which was screened to allow the admission and circulation of air. Early in 1936 defendant, the lessee, installed in the leased premises a Kelvinator multiple unit electrical refrigeration system. Defendant purchased the system secondhand for $150. What it cost to install does not appear. It was composed of a central plant consisting of a compressor and motor, which was installed in the basement of the premises, and from this control plant copper tubing branched out to the refrigerating units located in each of the eighteen apartments. In the cooler in each kitchen a freezing unit was installed. To do this the shelving was taken out. There is a conflict as to whether any structural changes in the building were made. This conflict must be resolved in favor of respondent. Her testimony and that of an independent witness was to the effect that the floor in each cooler was removed, and that the freezing units were about a foot deeper than the coolers. As a result, defendant cut large holes in the exterior of the building and then constructed box-like additions over the holes to accommodate the freezing units. Just how the tubing from the basement plant to the freezing units was installed is not clear. Defendant testified that he had his employees run the tubing along the ceiling of the basement and then up the exterior walls of the building, at least on the west side. He was not certain whether the tubing went up the exterior walls on the east side or up through the partitions.

Defendant surrendered the premises on the expiration of the lease as extended in August of 1942. In February or March of that year he removed the entire refrigeration system from the leased premises and installed the same in another apartment house operated by him. It was still being used in that apartment at the time of trial, which was in January, 1945, except that a new motor had been installed and other repairs costing about $700 made.

The theory of this action is that the refrigeration system installed by the lessee belonged to the lessor under the express terms of the lease, and that the lessee acted wrongfully in removing it. The lease is a printed form of lease. It provides that the lessee shall keep the premises in repair, and shall not alter or repair or improve the premises without the written consent of the lessor. It is then provided that "all such alterations, repairs, additions, or improvements, (except counters, shelving and movable partitions placed therein by the lessee for the requirements of his business), shall, unless otherwise provided by written agreement, be the property of the lessor and shall remain upon and be surrendered with the premises upon the expiration of this lease or any sooner determination thereof * * *."

[1] In his opening brief defendant argues that the refrigeration system was not so annexed to the realty as to become a part thereof, but constituted a trade fixture which he had the legal right to remove before surrendering the leasehold. This argument is not referred to in the closing brief. The reason for this apparent abandonment of the point is obvious. The rules applicable to trade fixtures as between lessor and lessee are rules that apply by operation of law when the lease is silent. While it would appear that the material changes here made in the exterior and interior of the building make it at least doubtful whether the trade fixture rule would apply, it is not necessary to determine whether that rule is or is not applicable. The rule is well settled in this and other states that a lessor and lessee can covenant away any rights that they might otherwise have under the trade fixture rule, and that where the contract speaks on the subject it controls the implications that might otherwise arise under that rule. The leading case in this state is Realty Dock, etc., Corp. v. Anderson, 174 Cal. 672, 164 P. 4. In that case the premises were leased for banking purposes, and the lessee installed a safe deposit vault in the basement of the leased property. The question was whether the lessee had the legal right to remove the vault on the termination of the lease. The lease there contained a covenant almost word for word the same as the one here involved. The trial court found that the vault was a trade fixture and could be removed by the lessee. In reversing the case the Supreme Court used the following language which is equally applicable to the present appeal at page 676 of 174 Cal., at page 6 of 164 P:

"We do not think, however, as we have just said, that the finding of the court, in as far as it determines that the vault is a trade fixture, and that it could be removed from the building without causing any injury thereto, is of any consequence. Nor do we think it of any moment in the consideration of this appeal whether the vault was imbedded in or affixed to the main building and had become an integral part thereof, except in so far as these matters may bear on what we consider the determinative question in the case, namely, whether its construction constituted an 'alteration, addition, or improvement' in the premises which under the terms of the lease inured to the lessor. It is not a matter of controlling importance whether the vault as constructed was a permanent or a movable fixture. We are not here considering the rights arising by operation of law only between landlord and tenant as to the articles placed upon the leased premises by the latter. On the contrary, these rights are to be determined from the terms of the lease under which the parties undertook to fix them. The lease provided that no 'alterations, repairs or changes' should be made by the tenant except with the consent of the lessor, and that, as to them provided that all 'alterations, additions, and improvements' should be the property of the lessor. This vault was built under the terms of the lease and with the consent of the lessor. Hence, the only question is, Did this construction of the vault result in an 'alteration, addition, or improvement, to the premises leased? If it did not, the defendants as representing the lessee, had a right to remove it as they did. If it did, then it belonged to the plaintiff and the defendants had no right to interfere with it.

"It appears to us as assuming rather an idle task if we were to discuss at length the question whether the character of this vault built by the bank did or did not constitute 'an alteration, addition, and improvement' in the premises. It is, of course, quite apparent that the term 'improvement' is comprehensive enough to embrace all additions or alterations which may be made by a tenant for the convenience of his business upon the premises. It is much more comprehensive than the word 'fixture,' and while including these, includes also many things that may not be classed as fixtures. In fact, if force is to be given to a provision in a lease which provides that all 'improvements' made in premises shall inure to the lessor, it is difficult to conceive of any subsequent addition, alteration, or repair to the premises during the tenancy which would not be embraced within the term 'improvement.' That the construction of this vault was intended to and did amount to all of these—an addition, alteration, and improvement—and was embraced within

the terms of the lease we think is evident." For cases reaching a similar conclusion see R. Barcroft & Sons Co. v. Cullen, 217 Cal. 708, 20 P.2d 665; Parker v. Wulstein, 48 N.J.Eq. 94, 21 A. 623; French v. Mayor, etc., of New York, 29 Barb., N.Y. 363; Harris v. Kelly, Pa.Sup., 13 A. 523; Wright v. La May, 155 Mich. 119, 118 N.W. 964; In re Bahl's Ice Cream & Baking Co., D.C., 195 F. 986; Levin v. Improved Property Holding Co., 141 App.Div. 106, 125 N.Y.S. 963.

[2] Tested by the rules laid down in the Realty Dock case, supra, and the other cases cited above, there can be no doubt at all that the finding of the trial court that the refrigeration installation constituted an alteration, repair, addition or improvement to the building is amply supported by the facts. Whether it was removable or non-removable, is a false factor. That question would be pertinent only if the contract were silent. But since the parties have spoken, it is their expressed intent that must control. Under the covenant reasonable minds cannot but agree that the refrigeration system here involved was an improvement, an addition or an alteration in the premises.

[3, 4] The second main contentions of defendant are that the findings as to damages are unsupported, and that the damages are excessive. There is no merit in these contentions. Wallace Scott, a qualified refrigeration expert, testified that he had seen and serviced the unit in question shortly after it was installed in the premises here involved, and that he had seen the equipment after it was removed by defendant and installed by him in another apartment house. He testified that, except for the replacement of the motor, the system he had seen in the new building was the same as that installed in plaintiff's premises; that in March, 1942, the replacement value of that system was between $110 and $125 per unit, or between $1,980 and $2,250 for the entire assembly. This he fixed as the value to the building of the installation. He assumed this was the value in fair operating condition, and stated if the system needed repairing, its value to the building would be the value fixed less the cost of repairs. The useful life of such a complete unit he fixed at about thirty years. Another witness, a real estate appraiser, gave it as his opinion, that the building deteriorated between $2,500 to $3,000 as the result of the removal. Defendant attacks this opinion evidence and urges that his witnesses who testified that in March of 1942 an entire refrigeration assembly similar to the one here involved could be purchased for $150, should be believed. The point need not be labored that the weight to be given the evidence was for the trial court. It found that the reasonable replacement value of the refrigeration system, in place, immediately preceding defendant's wrongful removal, was $1,500. This finding is amply supported by the evidence of Scott who fixed the value at between $1,980 and $2,250. If the cost of repairs be deducted the finding of $1,500 damage is approximated. That the proper measure of damages was applied is clear. As early as Rhoda v. Alameda County, 58 Cal. 357, it was established that the proper measure of damages for the wrongful removal of a fixture is the value of the fixture in place as part of the realty, and not what it would sell for on the open market removed from the building. This rule has been reaffirmed as recently as 1942 in Givens v. Markall, 51 Cal.App.2d 374, 124 P.2d 839.

[5-8] The last point urged by defendant is that plaintiff was under a duty to minimize damages but failed to do so. It is undeniably the rule that in general a person wronged at law must make reasonable efforts to prevent expansion of his injury. (See discussion 8 Cal.Jur. p. 779, § 41.) But that rule has no application to this case. Appellant assumes that the testimony of his witness that such a system could be purchased in March of 1942 for $150 is controlling, and upon this assumption argues that plaintiff should have purchased a system for that amount and thus minimized damages. This is but another way of arguing that the finding as to damages is unsupported. The trial court, on conflicting evidence, fixed the replacement value at the time of removal at $1,500. That finding is supported. The trial court apparently was not impressed with the

evidence that the system could then be bought for $150. It did not choose to follow that testimony, but relied on the testimony of plaintiff's witnesses. It is not our function or within our power to pass on which witnesses should be believed. That was the function and within the power of the trial court. Its finding, based as it is on substantial although conflicting evidence, cannot be disturbed by this court.

The order denying the motion for a new trial is non-appealable. The appeal therefrom is dismissed. The judgment is affirmed.

KNIGHT and WARD, JJ., concur.




74 Cal.App.2d 903

## SHIFFLETTE et ux. v. WALKUP DRAYAGE & WAREHOUSE CO. et al.

Civ. 13025.

District Court of Appeal, First District, Division 2, California.

June 17, 1946.

Rehearing Denied July 17, 1946.

Hearing Denied Aug. 15, 1946.

**1. Automobiles ⇐243(3)**

In action for damages resulting from collision between plaintiff's automobile and defendant's truck, plaintiff's evidence that truck driver had no operator's license, that his previous license, which had expired required him to wear adequate glasses, and that he wore no glasses, was admissible, subject to showing of defendant's knowledge of such facts, as alleged in complaint. Vehicle Code, §§ 268, 334, 335.

**2. Automobiles ⇐245(35)**

Whether officers of corporation, owning truck which collided with automobile, knew that truck driver had no operator's license and that his eyesight was defective, was fact question for jury under evidence. Code Civ.Proc. § 2101; Vehicle Code, §§ 334, 335.

**3. Automobiles ⇐245(14)**

In action for damages sustained in collision between plaintiff's automobile and defendant's truck at street intersection, evidence was sufficient to take to jury question of truck driver's negligence, imputable to defendant employer, in entering intersection when traffic signal showed "stop". Vehicle Code, § 402(a).

**4. Automobiles ⇐246(42)**

In action for damages resulting from collision between plaintiff's automobile and corporate defendant's truck, allegation in complaint and evidence that defendant knew that truck driver had no operator's license was sufficient to warrant instruction submitting to jury fact question whether defendant knew of, or had ample notice to put it on inquiry as to, driver's incompetency. Vehicle Code, §§ 334, 335.

**5. Automobiles ⇐245(35)**

While truck driver's lack of operator's license was not evidence that he was not competent driver or was negligent at time of collision between truck and automobile, truck owner's knowledge that driver had no such license was sufficient to put owner on inquiry as to driver's incompetency and raise question for jury as to owner's negligence in permitting such driver to operate truck. Vehicle Code, §§ 334, 335.

**6. Automobiles ⇐246(16)**
**Trial ⇐234(1)**

An instruction to jury that evidence that driver of truck colliding with automobile had no operator's license was admitted only for consideration on question whether truck owner knew of or was put on inquiry as to driver's incompetency and that jury could consider what knowledge evidence showed owner to have concerning driver's lack of such license in determining whether owner was guilty of negligence, proximately causing damages sustained by automobile owner, in permitting such driver to operate truck, was not contrary to law. Vehicle Code, §§ 334, 335.

**7. Automobiles ⇐246(47)**

In action for damages sustained in collision between plaintiff's automobile and defendant's truck at street intersection, instruction to return verdict for plaintiff, if jury found that truck driver violated code section as to passing standing street car in safety zone and such violation was sole proximate cause of collision, was not er-

roneous, in absence of evidence as to whether discharged or prospective street car passengers were present in such zone at time of collision. Vehicle Code, § 571(b).

**8. Automobiles ⇐171(4), 206**

Driver of automobile, proceeding at proper speed and lawfully in street intersection before truck entered it from right, had right of way and could assume that truck driver would yield right of way so that automobile could pass through intersection without danger of collision. Vehicle Code, § 550.

**9. Automobiles ⇐171(13)**

In action for damages sustained in collision between plaintiff's automobile and defendant's truck at street intersection, instruction to find for plaintiff, if jury found that condition of traffic signals was factor contributing to collision, but also found that truck driver was not using care demanded by circumstances, was proper as against objection that truck driver was not required to look into cross streets because intersection was controlled by signals, in view of evidence that he was forced to pass safety zone and standing street car, which obstructed his view. Vehicle Code, § 571 (b).

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Appeal from Superior Court, San Francisco County; Thos. M. Foley, Judge.

Action by Charles H. Shifflette and wife against the Walkup Drayage & Warehouse Company, a corporation, and another, for damages resulting from a collision between plaintiff's automobile and named defendant's truck. From a judgment for plaintiffs against named defendant, it appeals.

Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

Elmer P. Delany and James A. Himmel, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

The plaintiffs, Charles H. and Harriette Shifflette, brought this action against Walkup Drayage and Warehouse Company and its employee, Charles Hameister, for damages resulting from a collision of motor vehicles on the city streets of San Francisco. Hameister, the driver of defendant's truck, died prior to the trial of the case from causes not connected with the collision and the suit abated as to him. The jury unanimously awarded plaintiffs a verdict in the sum of $5,000 and the court entered a judgment thereon. The defendant's motion for a new trial was denied and the company appeals from the judgment.

The collision occurred at the intersection of Ninth and Bryant Streets where there are four automatic signals for the control of traffic. Ninth Street runs in a general north and south direction while Bryant Street, upon which there are two sets of street car tracks, runs east and west. A few minutes before 5 o'clock on the afternoon of February 20, 1945, Charles H. Shifflette was driving his automobile in a southerly direction along Ninth Street. His wife, Harriette, coplaintiff herein, accompanied him, riding in the front seat of the vehicle. Viewing their testimony in the light most favorable to them as respondents herein it appeared that they approached the intersection with Bryant Street at a speed which they said was from 12 to 15 miles per hour. Both at a distance of 50 feet to the north and at the time that the plaintiffs entered the intersection the traffic signal appeared to show "Go" in their favor. As they started to cross Bryant Street the plaintiffs noticed automobiles stopped to their left, and to their right they saw a street car on the eastbound tracks which was being switched back. At about the time that the rear wheels of the automobile were crossing the southernmost street car track defendant's truck, driven by Hameister in an easterly direction along Bryant Street, came out from alongside the standing street car and collided with plaintiffs' automobile. The front end of the truck hit the car in the center of the right side carrying it approximately 25 feet east.

According to the evidence offered by plaintiffs the Ninth Street signals governing plaintiffs' movement read "Go" at the time they started to cross Bryant Street, but there is a conflict as to what the Bryant Street signals showed when the defendant's driver entered the intersection. The plaintiffs did not notice the Bryant Street signals and the truck driver's deposition

was not admitted into evidence because it had not been signed by him prior to his death. Two witnesses who had been working on an automobile on Bryant Street at the time of the collision testified that the signal showed "Stop." The street car conductor and two witnesses who looked out of a second-story office window when they heard the collision testified that the Bryant Street signal read "Go." One of these witnesses stated that the signals had been out of order for several weeks. A truck driver who was proceeding west along Bryant Street testified that he entered the intersection pursuant to a "Go" signal in his favor and that the accident occurred just after he had passed the rear of plaintiffs' automobile. A city electrician who went to the corner that afternoon in response to a complaint testified that he watched the signals for a period of from twenty minutes to a half hour during which time they worked correctly. A police officer who was called to the intersection to investigate an accident stated at 4:45 p.m. the signals were operating in a normal manner but that at 5:09 p.m. he noticed that the signals were out of order.

[1] The main portion of the appellant's attack on the judgment below concerns the admission of certain evidence showing that its truck driver did not have an operator's license at the time of the accident and that the license last held by Hameister was limited. The court admitted the following evidence over appellant's objections and subject to a showing of knowledge on the part of the company. Hameister did not have a license to drive a truck at the time of the accident; his previous operator's license, which had expired in the early part of 1942 and had not been renewed, was qualified and required him to wear adequate glasses because of inferior vision rated at 20/200. The evidence also showed that Hameister had not worn glasses for several months prior to the collision having broken them in 1944 and that he used a small glass for the purpose of reading waybills. Mrs. Shifflette testified that immediately after the accident the truck driver was not wearing glasses.

On the instant appeal the appellant renews its objection to the admission of this evidence and contends that the trial court committed error in not requiring the respondents to prove that the company had knowledge of these conditions. Section 334 of the Vehicle Code prohibits the employment of any person as a chauffeur of a motor vehicle who is not then duly licensed to drive. Section 335 of the Vehicle Code provides as follows: "No person shall knowingly permit or authorize the driving of a motor vehicle, owned by him or under his control, upon the highways by any person whether as operator or chauffeur unless such person is then duly licensed hereunder so to drive." These sections of the code and the sections requiring a test of the competency as well as the mental and physical fitness of prospective operators of motor vehicles (Vehicle Code sec. 268) were undoubtedly designed for the protection of the public upon the streets and highways. Owens v. Carmichael's U-Drive Autos, Inc., 116 Cal.App. 348, 352, 2 P.2d 580.

In order to establish a violation of these sections of the Vehicle Code and to show negligence on the part of appellant respondents alleged in their amended and supplementary complaint that the company "knew, or in the exercise of ordinary care should have known" that its truck driver was not competent nor licensed to operate a motor vehicle and that the former license held by Hameister was restricted to such times as he was wearing adequate glasses. Respondents were entitled to support these allegations in their complaint by the introduction of evidence on the particular subject and they could not be expected to present the entire matter simultaneously.

[2] The respondents' evidence established that the truck driver did not have an operator's license and that his eyesight was defective. In accordance with their allegations respondents then attempted to prove that the company had knowledge of these facts. Several of appellant's officers were called as witnesses. The vice president in charge of operations was questioned relative to his knowledge of the restriction on Hameister's previous license, the investigation made to determine if the drivers held licenses and whether Hameister wore glasses. He explained that their drivers were sent to them by the union and that

they accepted those who presented the union order without any further inquiry. The company's dispatcher was questioned relative to his connection with the truck drivers as to whether Hameister wore glasses and the manner in which the employee read his freight bills. This examination of these witnesses was an attempt by the respondents to establish knowledge on the part of appellant which was a question of fact properly submitted to the jury. C.C.P. sec. 2101; Ward Land etc. Co. v. Mapes, 147 Cal. 747, 752, 82 P. 426. Though respondents were unable to prove by any direct evidence the requisite knowledge of appellant to establish the issue, that fact does not determine that it was error to admit the evidence at the time it was offered. And we cannot now say that it was reversible error since it does not appear that the testimony was elicited in bad faith.

[3] The evidence of negligence submitted to the jury in this case including the testimony of plaintiffs, the testimony of the two witnesses who stated that the Bryant Street signal showed "Stop", and the testimony of the city electrical worker that the signals were working correctly was sufficient, if accepted by the jury as true, to support the jury's determination of negligence on the part of the truck driver which must be imputed to his employer. Vehicle Code, sec. 402(a); McCalla v. Grosse, 42 Cal.App.2d 546, 549, 109 P.2d 358; Gorzeman v. Artz, 13 Cal.App.2d 660, 662, 57 P.2d 550; Withey v. Hammond Lumber Co., 140 Cal.App. 587, 595, 35 P.2d 1080.

[4-6] The court instructed the jury that the evidence to the effect that the truck driver had no license was admitted only for the purpose of consideration in connection with all other evidence of the question of whether the owner knew or was put on inquiry to know that it was entrusting the operation of its truck to one who was not a competent driver. It was also stated in the instruction that in determining whether the company was negligent and whether its negligence was a proximate cause of the injury the jury could consider what knowledge, if any, the evidence showed the owner to have concerning the lack of an operator's license. The appellant contends that the instruction submits the question of knowledge to the jury when there is a complete absence of testimony tending to show knowledge and further that the instruction is contrary to law. But we must bear in mind that the evidence offered might have supported an inference that appellant had ample notice to put it on inquiry as to the driver's qualifications. For the reasons stated above we believe that the inclusion within the complaint of the allegation of knowledge and the proof offered to substantiate that allegation was sufficient to constitute a question of fact for the jury. Hence the submission of the issue of knowledge was not error. In support of its contention that the instruction is contrary to the law appellant relies on Strandt v. Cannon, 29 Cal.App.2d 509, 85 P.2d 160, and Hunton v. California Portland Cement Co., 50 Cal.App.2d 684, 123 P.2d 947. Those cases are readily distinguishable from the case before us since they do not involve the employment of an operator of a motor vehicle; but notwithstanding that fact the instruction under attack on the present appeal is in accord with the general principles of law set forth therein. The instruction in the instant case stated that "the possession or lack of an operator's license is not evidence that defendant, Charles Hameister, was or was not generally a competent driver; nor is it evidence that he was or was not negligent on the occasion in question." This statement is in accord with the principles enumerated in the Strandt case, supra, 29 Cal.App.2d at page 518, 85 P.2d 160, and in the Hunton case, supra, 50 Cal.App.2d at page 691, 123 P.2d 947. However, it is just as well settled that where a company knows that its driver had no operator's license that knowledge is sufficient to put it on inquiry as to his competency, and it is for the jury to determine under the circumstances whether the company was negligent in permitting him to drive its vehicle. Owens v. Carmichael's U-Drive Autos, Inc., supra, 116 Cal.App. at page 352, 2 P.2d 580; Strandt v. Cannon, supra, 29 Cal.App. 2d at page 514, 85 P.2d 160. The instruction, therefore, was not contrary to law.

[7] The court read section 571(b) of the Vehicle Code relative to passing a

street car where a safety zone has been established, and instructed that if the jury found that the truck driver violated the code section and that the violation was the sole proximate cause of the collision the verdict should be in favor of plaintiffs. Appellant complains of the instruction on the ground that section 571 was designed for the protection of pedestrians rather than for the regulation of the conduct of motorists toward each other at intersections. It is undisputed that in order to enter the intersection it was necessary for Hameister to pass a safety zone and a standing street car which obstructed his view of the southbound traffic on Ninth Street. The record does not show whether discharged or prospective passengers were present in the zone at that particular time. In view of the evidence it cannot be held that the court erred in the giving of this instruction.

[8] Appellant argues that because the traffic was controlled by automatic signals the court erred in reading to the jury section 550 of the Vehicle Code which provides that "The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway" and in instructing that the driver of a car which is already in the intersection may assume that he will be given the right of way by an approaching vehicle. At the time respondents entered the intersection the automatic signal controlling the Ninth Street traffic showed "Go." In view of the fact that they were proceeding at a proper rate of speed and that they were lawfully in the intersection prior to the appellant's truck the court was correct in telling the jury that the respondents had the right of way and could assume that the driver of the other vehicle would yield that right of way so that they could "pass through the intersection without danger of collision". Page v. Mazzei, 213 Cal. 644, 645, 3 P.2d 11, 12; Couchman v. Snelling, 111 Cal.App. 192, 195 and 196, 295 P. 845.

[9] Finally, appellant attacks an instruction which stated that if the jury found that the condition of the signals was a contributing factor but also found that the truck driver "was not using the care and caution which the circumstances properly demanded" and was thereby negligent that the verdict should be in favor of the plaintiffs. The appellant objects to the quoted portion of the instruction requiring its driver to use care and caution on the ground that since the intersection was controlled by signals there was no requirement to look into the cross streets. Taylor v. Sims, Cal.App., 164 P.2d 17. However, since appellant's driver was forced to pass a safety zone and a street car which obstructed his view the mandate of the instruction requiring him to use due care and caution under such circumstances was entirely proper. Potapoff v. Mattes, 130 Cal.App. 421, 423, 19 P.2d 1016.

The verdict and judgment in this case were supported by substantial evidence and the record fails to disclose any error which would permit a reversal under Article VI, Section 4½ of the California Constitution.

The judgment is affirmed.

GOODELL and DOOLING, JJ., concur.




74 Cal.App.2d 818

**VETERANS' WELFARE BOARD et al. v. CITY OF OAKLAND et al.**

**Civ. 13027.**

District Court of Appeal, First District, Division 1, California.

June 7, 1946.

Hearing Denied Aug. 6, 1946.

**1. Appeal and error ⇐854(3)**

If general and special demurrers are sustained with leave to amend and plaintiff fails to do so, judgment thereafter entered must be affirmed if any ground of special demurrer is good.

**2. Appeal and error ⇐959(1)**
**Pleading ⇐225(2)**

Sustaining demurrer without leave to amend is an abuse of discretion if only sound basis of order is a defect challenged

by special demurrer, and in such case the judgment will be reversed notwithstanding one or more grounds of special demurrer may have been good.

**3. Appeal and error ⇐863**

Where demurrers to plaintiffs' first amended complaint and plaintiffs' motion to file a second amended complaint were argued on same day and court denied plaintiffs' motion and sustained demurrers with leave to amend which permission in fact was granted only if plaintiffs desired to amend in some way differently than amendment set forth in proposed second amended complaint, and plaintiffs stated that only amendment they desired to make was set forth in proposed pleading, appellate court on appeal from judgment sustaining demurrer would apply the rules applicable to appeals where plaintiffs had been denied the right to amend.

**4. Highways ⇐208(1)**

In action against counties for damage to plaintiffs' property caused by construction of low level tunnel between counties wherein plaintiffs admitted failure to comply with claim statutes, in so far as complaint was based on theory of damage caused by defective condition of public property, complaint failed to state a cause of action against such counties. Gen.Laws, Act 5149, § 1.

**5. Eminent domain ⇐277**

A cause of action for taking or damaging of private property under the Constitution is subject to operation of claim statute or charter provision, provided terms thereof are broad enough to embrace it. Const. art. 1, § 14.

**6. Eminent domain ⇐277**

The statute providing that all claims against any county "whether such claim be founded upon contract, express or implied, or upon any act or omission of the county" shall be presented to board of supervisors before any suit may be brought, etc., is broad enough to include inverse condemnation cases. Pol.Code, § 4075 et seq.; Const. art. 1, § 14.

**7. Eminent domain ⇐277**

That a state agency is involved as a plaintiff does not affect the rule that filing of a claim against county is essential to maintenance of action for damage caused by damaging or taking of property. Pol. Code, § 4075 et seq.; Const. art. 1, § 14.

**8. Eminent domain ⇐293(1)**

In action against counties for damage to plaintiffs' property by construction of low level tunnel between counties, complaint in so far as it was based on theory of inverse condemnation was demurrable for failure to allege compliance with claim statute requiring as condition precedent to maintenance of action, the filing of claim based upon "any act or omission" of county. Pol. Code, § 4075 et seq.; Const. art. 1, § 14.

**9. Limitation of actions ⇐55(6)**

An action filed October 20, 1941, against joint highway district for injuries to plaintiffs' property caused by district's excavation in August 1935 was not barred by three or five-year statute of limitations where no damage was suffered until March 5, 1940 as result of original excavation and damages were continuous, so that at the earliest cause of action did not arise until March 5, 1940. Streets and Highways Code, § 25050(d); Code Civ. Proc. §§ 325, 338, subd. 2.

**10. Limitation of actions ⇐127(1)**

As to any particular cause of action, it is the date of filing of original complaint setting forth that cause of action and not the date of filing amendment that controls so far as statute of limitations is concerned.

**11. Eminent domain ⇐2(6)**

A joint highway district could not escape liability for damages caused by excavation on ground that damage was result of exercise of police power, since doctrine of police power cannot be invoked to protect public agencies where damage to private parties can be averted by proper precautions in the first instance. Streets and Highways Code, § 25050(d).

**12. Highways ⇐115**

In action against counties and joint highway district for damage to plaintiffs' property caused by excavation, complaint did not fail to state cause of action on ground that it attempted to charge all defendant joint tort-feasors but failed to al-

lege that any of defendants and particularly highway district acted unlawfully where district alone of the public agencies named remained in case as defendant, and plaintiffs alleged in detail how district was organized and what it did in construction of the project, which allegations were sufficient to show that district authorized making of excavation. Streets and Highways Code, § 25050(d).

**13. Evidence ⇐29**

The appellate court would take judicial notice of terms of statute under which low level tunnel between Alameda and Contra Costa counties was constructed. Streets and Highways Code, § 25050.

**14. Highways ⇐118**

If contractor of tunnel between counties followed plans and specifications furnished by joint highway district, and damage resulted to adjacent property, the district and not the contractor was liable. Streets and Highways Code, § 25050(d).

**15. Highways ⇐118**

If plaintiffs' constitutional rights were adversely affected by construction of tunnel on behalf of joint highway district, plaintiffs were entitled to compensation from district authorizing and supervising the work regardless of whether contractor followed plans or specifications. Streets and Highways Code, § 25050(d); Const. art. 1, § 14.

**16. Pleading ⇐193(5)**

A complaint in action against joint highway district for damage to plaintiffs' property caused by excavation was not demurrable for failure to state that plaintiffs were the owners of realty involved, where complaint was replete with such allegations as "defendants did cause damage and injury to the above described property of plaintiffs" making it clear that plaintiffs were the owners of the property involved. Streets and Highways Code, § 25050(d); Const. art. 1, § 14.

**17. Eminent domain ⇐293(1, 3)**

A complaint in action against highway district for damage caused by excavation was defective for failure to allege value of property taken at time of alleged taking but such defect could be corrected by amendment. Streets and Highways Code, § 25050(d); Const. art. 1, § 14.

**18. Pleading ⇐225(2)**

Where first amended complaint stated cause of action against one of defendants but some of grounds of special demurrer might have been good, denying plaintiffs the right to file their proposed second amended complaint was error.

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Appeal from Superior Court, Alameda County; Benjamin C. Jones, Judge.

Action by the Veterans' Welfare Board and another against the City of Oakland and others to recover damages resulting from an excavation causing plaintiffs' property to slip into the excavation, wherein defendants filed demurrers. From a judgment for defendants, plaintiffs appeal.

Affirmed in part and reversed in part.

Thos. J. Riordan, of San Francisco, Warren H. Atherton, of Stockton, and Chellis Carpenter, of San Francisco, for appellant.

Francis P. Healey, Dist. Atty., Contra Costa County, of Richmond, and John L. Garaventa, Deputy Dist. Atty., of Concord, for respondent Contra Costa County.

Ralph E. Hoyt, Dist. Atty., Alameda County, Cal., R. Robert Hunter, Asst. Dist. Atty. and Douglas R. Dunning, Deputy Dist. Atty., all of Oakland, for respondent Alameda County.

F. Bert Fernhoff, City Atty., and John W. Collier, Asst. City Atty., both of Oakland, for respondent City of Oakland.

Archibald B. Tinning, of Martinez, for respondent Joint Highway Dist. No. 13 of California.

PETERS, Presiding Justice.

Plaintiffs, the Veterans' Welfare Board and Fred A. Beck, appeal from a judgment in favor of certain of the defendants entered after the sustaining of demurrers to the complaint. The complaint names the city of Oakland, the counties of Alameda and Contra Costa, Joint Highway District No. 13, The Six Companies of California and certain John Does as defendants. So far as the present record shows, only the first four defendants demurred, and the

judgment appealed from is in favor of those four defendants alone. Reference to defendants, hereafter, will be to these four parties.

In their closing brief and at the oral argument plaintiffs frankly and fairly conceded that they have not stated a cause of action against the city of Oakland, and have agreed that the judgment in favor of that defendant should be affirmed.

The action grows out of the construction of a low level tunnel between Alameda and Contra Costa Counties. The plaintiffs' property adjoins one of the approaches on the Oakland side of the tunnel. The basic theory of plaintiffs' pleadings is that the defendants, in constructing the approach in question and on land immediately adjacent to the property of plaintiffs, cut through a hill and made a deep excavation, with the result that plaintiffs' property was left unsupported, and has partially slipped into the excavation.

The original complaint was filed October 20, 1941. Defendants demurred. The demurrers were sustained with leave to amend. A first amended complaint was filed May 14, 1943. Defendants demurred generally and specially. Before these demurrers were heard the following situation developed. In June of 1944 plaintiffs moved the trial court for leave to file a proposed second amended complaint, which was erroneously designated "First Amended Complaint." Defendants opposed the motion and promptly moved to have their pending demurrers heard. By stipulation it was agreed that the two motions should be heard on August 29, 1944, and they were argued on that date. At the conclusion of the argument the court ruled that plaintiffs' motion to file the second amended complaint should be denied, and that the demurrers of the four defendants should be sustained, plaintiffs being granted 60 days to amend. Plaintiffs' counsel then frankly stated: "If the Court please, it will be impossible for plaintiffs to file any complaint setting forth matters which show that plaintiffs have filed timely claims as required by the Claims Statutes [the filing of such claims having been defectively alleged in the original and first amended complaints, and one of the main grounds of the demurrers of the city and two counties being that the complaints failed to show the timely filing of proper claims] as I have already informed Your Honor: the fact is, no claims were filed or presented within the time specified for such presentation or filing. The most that plaintiffs can allege for causes of action is that which is alleged in the said proposed second amended complaint erroneously designated 'First Amended Complaint.' I would like to now make, for the purpose of the record, an offer to amend by serving and filing the said amended complaint." On the same day a minute order was made denying the motion to file the second amended complaint and sustaining the demurrers to the first amended complaint with leave to amend.

[1, 2] Plaintiffs argue, with considerable logic, that although the order actually made was to sustain the demurrers with leave to amend, the practical effect of the entire proceedings was to deny them the right to amend in the manner they desired, i. e., by the filing of the proposed second amended complaint. If plaintiffs are correct in this contention it has a material effect on the appeal insofar as such appeal affects the highway district. This is so because, as will later appear, while we are of the opinion that the judgment in favor of the city and two counties must be affirmed, we are of the opinion that the first amended complaint states a cause of action against the highway district and that, as to it, the general demurrer should have been overruled. But this defendant likewise demurred on many special grounds. Some of these grounds of special demurrer may be good. The rule is, of course, that if general and special demurrers are sustained with leave to amend, and the plaintiff fails to take advantage of the permission to amend, the judgment thereafter entered must be affirmed if any ground of the special demurrer is good. On the other hand, under the rule announced in Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; Washer v. Bank of America, 21 Cal.2d 822, 136 P.2d 297, 155 A.L.R. 1338, and other cases, it is now the rule that if a demurrer is sustained without leave to

amend, it is an abuse of discretion to deny the right to amend if the only sound basis of the order is a defect challenged by special demurrer. In such a case the judgment will be reversed even though one or more grounds of special demurrer may have been good.

[3] In the present case the plaintiffs were faced with a very practical situation. They had prepared a second amended complaint. This complaint has been made part of the record on appeal and is different from the first amended complaint in several material respects. Whether they could have filed the second amended complaint without permission of the court while demurrers to the first amended complaint were pending and undetermined need not now be decided. The fact is that they proceeded by formal motion upon notice. The defendants demanded that their pending demurrers be heard. They opposed the filing of the second amended complaint. These motions were argued on the same day. Plaintiffs contend that the main problem argued was the applicability of the claim statutes to the causes of action pleaded. Be that as it may, the court was of the opinion that the demurrers to the first amended complaint were good, and so ruled. But at the same time it refused to permit the plaintiffs to file their proposed second amended complaint. It never passed on the sufficiency of that complaint. Its allegations have never been challenged by defendants. The attorney for plaintiffs then very fairly stated to the court that so far as the claim statutes were concerned he could not truthfully allege compliance. He then told the court that "the most that plaintiffs can allege for causes of action is that which is alleged in the said proposed second amended complaint." Thus, he informed the court that the only amendments he desired to make were set forth in this proposed pleading. In that pleading there is no reference to compliance with the claim statutes. He formally requested permission to file the second amended complaint. The record does not disclose a formal ruling upon this request, but it does show the entry of a minute order filed the same day denying permission to file the second amended complaint. Defendants urge that, regardless of the rulings made by the trial court, inasmuch as it had also given plaintiffs permission to amend, plaintiffs, any time within the 60 days granted, could have filed the second amended complaint. Even if it be assumed that this could have been done, such action, in view of the formal order of the court denying permission to file the proposed pleading, would have been wasted effort. Plaintiffs reasonably were entitled to believe that if they filed their proposed pleading, demurrers thereto would be sustained. In fact, the rulings of the trial court reasonably can be explained only on the theory that it believed that neither the first amended or proposed unfiled second amended complaint stated a cause of action against any of the defendants. Plaintiffs were in the position of having been told by the trial court that the first amended complaint was defective and had been denied permission to file the pleading that they believed cured the defects. Thus the permission to amend that was made part of the order was in fact granted only if they desired to amend in some way differently than the amendments set forth in the proposed second amended complaint. Plaintiffs are clearly entitled to have the trial court pass upon the sufficiency of the allegations set forth in the proposed second amended complaint. This right has been denied them. It would be a denial of justice to now hold that, although the first amended complaint states a good cause of action against the highway district, inasmuch as it may be subject to several grounds of special demurrer, the judgment must be affirmed, without giving plaintiffs the chance to amend so as to cure these defects, where plaintiffs have prepared a proposed amended complaint but have been denied permission to file it. Under the circumstances we must apply the rules applicable to appeals where plaintiffs have been denied the right to amend.

The only pleadings that are before us for review are the first amended complaint and the demurrers thereto. This is now conceded by all concerned. The first amended complaint is a rather lengthy document. So far as pertinent here it alleges the corporate existence, rights and powers of plaintiff Veterans' Welfare

Board, and then alleges that plaintiff Fred Beck under a contract of repurchase is and has been purchasing from the board since May 5, 1937, a piece of described real property located in Oakland. The complaint then sets forth in detail the formation and subsequent reorganization of a joint highway district to construct a public highway and tunnel in Alameda and Contra Costa Counties. The complaint sets forth how the plans were prepared, how the project was financed, and how constructed. The district prepared the plans and specifications and generally supervised the financing and construction. The actual construction work was done by the defendant, The Six Companies, who was engaged by the other defendants for this purpose. This defendant is not involved on this appeal.

The first amended complaint then attempts to set forth two causes of action. The first is based on the alleged negligence of defendants. It alleges that within three years preceding the date this action was commenced (the original complaint was filed October 20, 1941) defendants caused damage to the property of plaintiffs which resulted from an improper cut and excavation on land to the rear of plaintiffs' land, and immediately adjacent thereto and on which plaintiffs' land was dependent for lateral support; that such damage and injury was proximately caused by excavations negligently made by defendants in constructing the approach and entrance to the low level tunnel, particularly in cutting through a large hill which adjoined plaintiffs' property in such a negligent manner as to leave an unsupported cut which was almost perpendicular; that because of this cut the plaintiffs' land has tended to slip, slough and slide away, leaving the real property of plaintiffs without adequate lateral or subjacent support; that on or about March 5, 1940, and subsequent to the completion of defendants' excavations, the soil embankment in question slipped, sloughed and slid away to such an extent that large portions of the yard and gardens of plaintiff were caved in and destroyed and the foundations for the house on plaintiffs' property were so seriously damaged as to render the house unsafe and unfit for habitation; that since March 5, 1940, to date the damage to plaintiffs' property has been continuous and progressive in character and has resulted from the act of defendants in leaving an open, unprotected and unsupported cut adjacent to said real property; that plaintiffs' land has gradually slipped, slid and fallen away and plaintiffs' house has been cracked and damaged to such an extent that plaintiffs have been forced to install additional supports, drains and gutters at great expense; that said house is in constant danger of slipping off its foundations and sliding down into the cut made by defendants.

The second count of the first amended complaint is not based upon negligence at all but is based upon the theory that defendants' acts amounted to a taking and damaging of plaintiffs' property without payment of compensation and without due process. It should be here mentioned that the proposed second amended complaint drops the cause of action based on the theory that the excavation was negligently made. In a first cause of action it alleges a damaging of their property because of the claimed slipping and sliding of such property, and the second cause alleges that plaintiffs' property was taken by defendants.

[4] We are of the opinion that plaintiffs have not stated, and in view of their admissions cannot state, a good cause of action against either of the two defendant counties. It is our view that there are certain claim statutes applicable to both causes of action pleaded and that it is indispensable to such actions that timely claims be filed. The first amended complaint pleads an admitted defective compliance with the claim statutes, and counsel have admitted that no claims were filed or presented within the time and in the form specified in such statutes. The proposed second amended complaint makes no reference to compliance with the appropriate claim statutes.

The first amended complaint first pleads a cause of action based upon negligence; the second for inverse condemnation for either a damaging or a taking of private property for public use. Insofar as the complaint is based on the theory of negli-

gence, and that the damage resulted from the defective condition of public property, without reference to the constitutional provision relating to the taking of property for a public use, there can be no doubt, and no serious contention is made to the contrary, that Stats. of 1931, Chap. 1167, p. 2475, Deering's Gen. Laws, Act 5149, requires the filing of a claim. Section 1 of Act 5149 provides: "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." Admittedly, there was no compliance with this statute. It is obvious, therefore, and plaintiffs make no serious contention to the contrary, that, insofar as the complaint is based on the theory of damage caused by the defective condition of public property, without regard to any theory of inverse condemnation, the complaint fails to state a cause of action against the two counties.

[5-7] But when we come to that phase of the complaint based on the theory of an inverse condemnation different rules are applicable. Art. 1, § 14 of the Constitution, provides in part: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *." It will be noted that the Constitution applies to both a taking or damaging. It is a well settled and admitted principle of law that a cause of action for either a taking or damaging of private property under the Constitution is subject to the operation of a claim statute or charter provision, provided the terms thereof are broad enough to embrace it. Natural Soda Prod. Co. v. City of Los Angeles, 23 Cal.2d 193, 143 P.2d 12; Miramar Co. v. City of Santa Barbara, 23 Cal.2d 170, 143 P.2d 1; Powers Farms v. Consolidated Irr. Dist., 19 Cal.2d 123, 119 P.2d 717; Davis v. East Contra Costa Irr. Dist., 19 Cal.2d 140, 119 P.2d 727; Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505; Crescent Wharf etc. Co. v. Los Angeles, 207 Cal. 430, 278 P. 1028; Los Angeles Athletic Club v. City of Long Beach, 128 Cal.App. 427, 17 P.2d 1061; Sala v. City of Pasadena, 162 Cal. 714, 124 P. 539; Ghiozzi v. City of South San Francisco, Cal.App., 164 P.2d 902. The controversy in most of the cases has been over the question of interpretation, that is, whether the terms of a particular statute or charter provision are broad enough to include actions in inverse condemnation, or are limited to actions where the gravamen of the action is negligence or contract. There has been a wide difference of opinion in the Supreme Court as to whether Act 5149, supra, or charter provisions with similar language, apply to inverse condemnation actions at all. See concurring and dissenting opinions in Miramar v. City of Santa Barbara, 23 Cal.2d 170, 177, 180, 143 P. 2d 1; see, also, Ghiozzi v. City of South San Francisco, Cal.App., 164 P.2d 902, wherein a petition for hearing before the Supreme Court was denied, but three justices voted for a hearing. The majority of the court has held that Act 5149 is applicable to inverse condemnation actions, at least where they are based on a damaging as distinguished from a taking. But it would seem that the question as to whether Act 5149, or charter provisions containing similar language, apply at all to a taking of real property has been left open. In all of the cases, however, in which the judges have disagreed, the disagreement has not been over the principle that a claim statute constitutionally can apply to a condemnation proceeding. That principle is admitted by all. Were Act 5149 the only claim statute involved in the present proceeding it would be necessary to analyze the complaint to ascertain whether the cause of action was for a damaging or taking, and, if the latter, it would be necessary to determine whether Act 5149 is applicable. While it would appear that there was no taking here inasmuch as no title has passed to the counties or district and that the essence of

the action is for a damaging of plaintiffs' property (and therefore Act 5149 according to the majority ruling of the Supreme Court is applicable), it may be assumed that the complaint also pleads a cause of action for a taking, and also it may be assumed that Act 5149 is not applicable to a taking. There is another claim statute applicable to counties alone that clearly applies whether the action be one for a damaging or for a taking. Section 4075 of the Political Code was amended in 1931 to provide in part: "All claims against any county * * * *whether such claim be founded upon contract, express or implied, or upon any act or omission of the county* * * * shall be presented to the board of supervisors as herein provided before any suit may be brought on any such claim, and no suit shall be brought on any such claim until said claim has been presented as herein provided and rejected in whole or in part. * * *" (Italics added.) This and the following sections provide the form of such claim, the time within which it must be filed, and the time within which the board of supervisors must act. It is quite clear that this claim statute is broad enough to include inverse condemnation cases within its terms. None of the cases cited, supra, involved § 4075 of the Political Code or any provision as broad. There is at least one case directly in point—Rhoda v. County of Alameda, 134 Cal.App. 726, 26 P.2d 691. The action in that case was for damages for injury alleged to have been done to certain property of plaintiff by the county when it caused the Webster Street bridge between Oakland and Alameda to be removed and a tube constructed in its place. The cause was tried and judgment entered for defendants. The trial judge granted a new trial. From this order the defendants appealed. Solely on the ground that the pleadings and evidence failed to show that plaintiffs had filed or presented a claim as required by § 4075 of the Political Code the order was reversed. After quoting § 4075, the court stated (134 Cal. App. at page 734, 26 P.2d at page 695): "The section as so amended is broad enough to require the presentation of a claim for the damages herein sued for as a condition precedent to suit." And again 134 Cal.App. at page 736, 26 P.2d at page 695, it is stated: "The requirement of the filing of a claim by respondents as a condition precedent to suit falls well within this legislative power. There is no pleading or proof that any claim was filed, and on this ground we must hold that the evidence was insufficient to support a judgment in respondents' favor. * * * We are reversing the order granting a new trial on the sole ground that there was no pleading or proof of the presentation and rejection of a claim as required by sections 4075 and 4078 of the Political Code." There are other cases where it has been held that a particular claim statute or charter provision containing language not substantially different from that contained in § 4075 of the Political Code is applicable to inverse condemnation proceedings. See Crescent Wharf etc. Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028; Los Angeles Athletic Club v. City of Long Beach, 128 Cal.App. 427, 17 P.2d 1061; Musto-Keenan Co. v. City of Los Angeles, 139 Cal.App. 506, 34 P.2d 506; Young v. County of Ventura, 39 Cal.App.2d 732, 104 P.2d 102; see, also, Artukovich v. Astendorf, 21 Cal. 2d 329, 131 P.2d 831; Parker v. County of Los Angeles, 62 Cal.App.2d 130, 144 P.2d 70. The fact that a state agency is involved as a plaintiff in no way affects the rule that the filing of a claim in such actions against counties is essential. State Dept. of Pub. Health v. Imperial County, 67 Cal.App.2d 244, 153 P.2d 957.

The plaintiffs concede that if the rule of the Rhoda case, supra, is still the law, the filing of the claim required by § 4075 is a condition precedent to the bringing of their action against the two counties, but they urge that the recent decisions of the Supreme Court indicate a change in attitude toward these claim statutes, and they suggest that if the Rhoda case has not already been overruled it should be overruled in this case. While it may be true that the recent decisions of the Supreme Court, some of which have already been cited, indicate a change in attitude toward claim statutes in general on the part of that court, no case to which we have been referred has ever challenged the rule that

a claim statute, if broad enough in its terms, applies to inverse condemnation proceedings, whether the action involves a damaging or a taking. In fact, all of the recent cases, in express terms, have restated that rule.

[8] Plaintiffs place considerable reliance on the case of Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818. There the action was brought under Art. 1, § 14, of the Constitution, against the state for dimunition in value of property caused by the construction of the San Francisco-Oakland Bay Bridge. No claim was filed. It was urged that § 688 of the Political Code required the filing of such a claim in actions against the state. That section provides in part: "Any person who has, or shall hereafter have, a claim on express contract or for negligence against the State" must file a claim. The court properly held that a cause of action for inverse condemnation is based neither on "express contract" nor "negligence" and that therefore the statute has no application. Plaintiffs point to the language in § 4075 of the Political Code which requires claims to be filed "whether such claim be founded upon contract, express or implied," and urge that § 4075 is no broader than § 688, and should be construed to have no broader effect. The obvious fallacy in plaintiffs' argument is that it completely disregards the further phrase in § 4075 but not contained in § 688 which requires claims to be filed where the claim is based "upon any act or omission of the county." These words are clearly broad enough to include actions for inverse condemnation. This conclusion makes it unnecessary to pass upon the debatable question as to whether inverse condemnation actions fall within the "implied contract" provision of § 4075. In Crescent Wharf, etc., Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028, it was held that actions under Art. 1, § 14, of the Constitution are based upon an implied promise to pay. This holding was questioned in Rose v. State of California, 19 Cal.2d 713, at page 724, 123 P.2d 505. Without reference to that controversy, it is clear that an action in inverse condemnation is an action based upon some, i.e. "any act or omission" on the part of the county.

From what has been said it is obvious that the demurrers of the two counties were properly sustained.

There remains for consideration the question as to the propriety of the judgment in favor of the joint highway district. It is conceded that there is no claim statute applicable to this entity, and that if its demurrer was properly sustained some other ground than the claim statute must be found. It is also conceded that this entity possesses the power of eminent domain. Section 25050, subd. (d) of the Streets and Highways Code; Stats. of 1931, Chap. 1025, § 2, p. 2073.

[9] This defendant asserts that the first amended complaint shows that the causes of action pleaded were barred by the provisions of § 338(2) of the Code of Civil Procedure requiring actions for trespass upon or injury to real property to be brought within three years. In this connection certain dates must be kept in mind. The pleadings disclose that the excavation made by defendants on the property adjoining that of plaintiffs was made in August of 1935. But the first amended complaint alleges that it was not until March 5, 1940, that the plaintiffs' property was injured and started to slide into the excavation. The original complaint was filed October 20, 1941. The theory of the first amended complaint is that no damage was suffered until March 5, 1940, when, as a result of the original construction of the excavation, damage was first suffered by plaintiffs. Moreover, the complaint alleges that the damages have been continuous and progressive since that date. It is obvious that at the earliest, the cause of action did not arise until March 5, 1940. It is immaterial, therefore, whether the three-year statute contained in § 338, subd. 2, or the five-year statute required to get title by adverse possession, Code Civ.Proc. § 325 (see Katenkamp v. Union Realty Co., 36 Cal.App.2d 602, 98 P.2d 239; Id., 11 Cal.App.2d 63, 53 P.2d 387; Martin v. Western States G. & E. Co., 8 Cal.App.2d 226, 47 P.2d 522) applies—in either event the action was filed in time.

[10] Much is made of the fact that the superseded original complaint did not al-

lege that the damage first occurred on March 5, 1940, that allegation first appearing in the first amended complaint. This defendant urges that since the first amended complaint was not filed until May 14, 1943, that is the date that must be considered in determining whether the statute has run. The argument is unsound. The original complaint may have defectively alleged the cause of action, and this was corrected in the first amended complaint, but it is elementary that as to any particular cause of action it is the date of the filing of the original complaint setting forth that cause of action that controls so far as the statute of limitations is concerned.

The date the excavation was made—August, 1935—is likewise immaterial. No cause of action arose by the construction of the excavation alone. All of the work was done by defendants on their own land. There was no trespass in injury to plaintiffs' land at the time of the excavation. The injuries complained of did not occur, according to the allegations of the first amended complaint, until March 5, 1940. They were consequential injuries. That is the date from which the running of the statute must be computed.

[11] The argument that the damage here, if any, was the result of the exercise of the police power, needs but passing comment. There is no reason to invoke the doctrine of the police power to protect public agencies in those cases where damage to private parties can be averted by proper construction and proper precautions in the first instance. House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950.

[12, 13] This defendant also argues that the first amended complaint fails to state a cause of action in that it attempted to charge all the defendants as joint tortfeasors, but failed to allege that any of the defendants, and particularly it, acted unlawfully. It is urged that "by attempting to join these creatures of the law as joint tort feasors, without specifically alleging that the defendant public agencies alleged to have acted jointly, did so unlawfully in excess of their respective powers, the plaintiffs failed to state a cause of action." Respondent Joint Highway District Brief, p. 21. The answer to this contention is that at the present time this defendant alone, of all the public agencies named as defendants, remains in the case as a defendant. The allegations of joint action are immaterial. Moreover, the plaintiffs have alleged in great detail how this defendant was organized and what it did in the construction of this project. Those allegations are sufficient to show that this defendant authorized the making of the excavation that injured plaintiffs. This was done, if the allegations of the complaint are true, in violation of the constitutional rights of plaintiffs. The allegations that the defendants acted jointly are immaterial. The statute under which this project was constructed, Streets and Highways Code, § 25050, the terms of which we take judicial notice, permitted them to act jointly. The unlawful nature of the acts performed clearly appears from the allegations. The district has no power to violate, without payment of compensation, the property rights of plaintiffs. The allegation that such rights were violated without payment of compensation is necessarily a direct allegation that the district acted unlawfully.

[14, 15] This defendant next contends that the first amended complaint failed to allege whether or not the work was done in accordance with the plans and specifications, or that the public agency negligently departed from the plans and specifications. It is urged that such allegations are indispensable. Some attempt was made to correct this in the proposed second amended complaint. See Trans. pp. 269, 270. More point to this contention might exist if the alleged defect were being urged by The Six Companies, the actual contractor. If the contractor follows the plans and specifications furnished by the public agency, and damage results to the adjacent property, the public agency and not the contractor is liable. Marin Mun. Water Dist. v. Peninsula P. Co., 34 Cal.App.2d 647, 652, 94 P. 2d 404; see, also, De Baker v. Southern Cal. Railway Company, 106 Cal. 257, at page 284, 39 P. 610, 46 Am.St.Rep. 237. Whether the contractor followed the plans

or specifications or not, if plaintiffs' constitutional rights have been adversely affected they are entitled to compensation from the public agency authorizing and supervising the work. What the rights of the plaintiffs may be against The Six Companies are not involved on this appeal.

[16] This defendant also insists that the first amended complaint failed to state a cause of action in that it failed to plead that plaintiffs were the owners of the real property in question. This defendant contends that a direct and unequivocal averment of ownership is indispensable, and that this is so whether the complaint is based upon damage caused by this defendant's negligence or whether it is an inverse condemnation proceeding. The questioned pleading is replete with such allegations as "defendants did cause damage and injury to the above described property of plaintiffs" (Trans. 200); and "which adjoined plaintiffs' said real property" (Trans. 201); and "leaving the real property of plaintiffs without adequate lateral or subjacent support" (Trans. 201); and "plaintiffs' land has gradually slipped" (Trans. 201), etc., but this defendant urges that this is merely inferential and indirect pleading of the ultimate fact and is not sufficient. It is quite obvious that no one could possibly interpret this pleading to mean anything else but that plaintiffs are the owners of the property. While it would undoubtedly have been better pleading practice to have alleged the ultimate fact of ownership more directly, it certainly would be a miscarriage of justice to hold that where the pleading is clear enough so that no one could possibly misinterpret it, a demurrer may be sustained because the pleading is not a model one.

[17] It is also urged that the complaint is defective in that it fails to allege the value of the property taken at the time of the alleged taking. Both the first amended complaint, and the proposed second amended complaint (where the value at the time the excavation was made is set forth) are defective in this respect. See 10 Cal.Jur. p. 439, § 128. This is the type of allegation, however, that obviously can be corrected by amendment, and such permission should be granted.

Other minor objections to the pleading have been made. All of them may be corrected by amendment.

[18] From what has been said it is obvious that, so far as the highway district is concerned, it was error to deny the plaintiffs the right to file their proposed second amended complaint which, in effect, denied to them the right to amend. The first amended complaint states a cause of action against this defendant.

The judgment in favor of the City of Oakland, the County of Alameda and the County of Contra Costa is affirmed; the judgment in favor of Joint Highway District No. 13 is reversed, with instructions to the trial court to permit plaintiffs to file their proposed second amended complaint, or, if they be so advised, to otherwise amend their complaint.

KNIGHT and WARD, JJ., concur.

28 Cal.2d 402

**PEEBLER et al. v. OLDS et al.**

**L. A. 19063.**

Supreme Court of California, in Bank.

June 25, 1946.

**Cemeteries** ⇐20

Where plaintiffs and one of the defendants formed a partnership owning private cemetery, but difficulties arose, and pursuant to arbitration award and judgment, all lots except those already sold to various grantees for burial purposes were sold to plaintiffs and also the cemetery records pursuant to arbitration award judgment, defendants were enjoined from going into cemetery and not just onto those lots included in commissioner's deed to plaintiffs.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Suit by Byron Peebler and others against B. C. Olds and others to enjoin defendants from going on realty known as the Olive Lawn Memorial Park, a private cemetery, and ordering defendants to deliver to plaintiffs the possession of certain cemetery lots, personalty, books, and records. From a judgment in favor of the plaintiffs, defendants appeal.

Judgment affirmed.

J. M. Danziger, of Los Angeles, for appellants.

Roland Maxwell, of Pasadena, for respondents.

SHENK, Justice.

This is an appeal by the defendants from a judgment enjoining them from going upon real property known as Olive Lawn Memorial Park, a private cemetery, and ordering them to deliver to the plaintiffs the possession of certain cemetery lots, personal property, books and records.

The plaintiffs and defendant Olds formed a partnership in 1923. In 1929 they accepted a conveyance of Olive Lawn Memorial Park, consisting of about five acres of land located near Norwalk in Los Angeles County. The land previously had been in the ownership of Graceland, a corporation whose charter was suspended in 1926 for nonpayment of franchise tax. The property was operated under the partnership agreement until 1940 when difficulties arose between the partners followed by an arbitration. From that time the history of the dealings between them is reflected in the following decisions: Graceland v. Peebler, March 18, 1942, 50 Cal. App.2d 545, 123 P.2d 527, wherein the Graceland corporation sued to quiet title to the realty and it was held that the suspended corporation had no authority to sue; Peebler v. Olds, December 8, 1942, 56 Cal.App.2d 8, 132 P.2d 233, wherein a judgment based on the award of the arbitrators, providing among other things for the sale of the partnership assets, was affirmed; Peebler v. Olds, December 8, 1942, 56 Cal.App.2d 13, 132 P.2d 236, being the affirmance of an order (granted on defendants' motion) setting aside the commissioner's first sale under the arbitration judgment because it was conducted without the required notice; Olds v. Peebler, September 28, 1944, 66 Cal.App.2d 76, 151 P.2d 901, wherein, after a second commissioner's sale of the partnership assets, the plaintiff Olds sought to recover damages by reason of the first unadvertised sale, the defendants Peebler interposed a plea of res adjudicata based on the dismissal of a prior similar action, and a judgment on the pleadings for the defendants was reversed; Peebler v. Olds, October 29, 1945,

71 Cal.App.2d 382, 162 P.2d 953, in which a judgment for the plaintiffs in an action for malicious prosecution was modified and affirmed.

The plaintiffs were the successful bidders at both sales conducted pursuant to the arbitration award and judgment. The first sale, later set aside, took place on March 12, 1942, and the second on May 27, 1942. In the meantime, on March 28, 1942, the plaintiffs brought the present action to obtain possession of the property and the cemetery records, and to have the defendants enjoined from entering upon the cemetery grounds. A supplemental complaint was filed alleging the facts concerning the setting aside of the first sale and the conduct of the second sale. On November 25, 1942, judgment was entered restraining the defendant from possessing any part of the property known as Olive Lawn Memorial Park. The court also ordered the defendants to deliver to the plaintiffs the possession of all of the lots described in the commissioner's deed, and of the personal property, books and records, and restrained the defendants from removing any of the personal property acquired by the plaintiffs under the deed. This appeal followed. On June 29, 1945, this court denied the plaintiffs' motions to strike the reporter's transcript on the ground that it was not prepared and certified within the time or in the manner prescribed by law, and to dismiss the appeal for failure of the defendants to file an opening brief. Peebler v. Olds, 26 Cal. 2d 656, 160 P.2d 545.

There is no contention that the second commissioner's sale of partnership assets was not conducted after due notice, and the trial court found that the sale was duly and fairly conducted. The property purchased at the sale included specified lots as yet unconveyed to purchasers for burial purposes. They comprised only a portion of the entire cemetery area and were sold to the plaintiffs subject to the use thereof as a cemetery. The court found that the defendants had no title or interest in, nor any right to go upon any part of Olive Lawn Memorial Park, nor any right to continue in possession of the specific property purchased by the plaintiffs at the commissioner's sale.

The defendants contend, in effect, that the court should have confined its judgment to those lots which were included in the commissioner's deed. There is no merit in the contention. The pleadings tendered the issue of the rights of the parties to go on the entire property known as Olive Lawn Memorial Park, and to the possessive rights of a portion thereof comprising, among other property, the lots which were sold to the plaintiffs. By their pleadings the defendants admitted that they did not claim a right to the possession of any of the lots which were sold to various grantees for burial purposes and which were not involved in the commissioner's sale. It sufficiently appears that the partnership assets consisted only of the item sold to the plaintiffs pursuant to the judgment in the arbitration proceedings.

The finding that the sale of the unoccupied lots and other property constituting the partnership assets was duly and fairly conducted is based on sufficient evidence. The conclusion that the defendants have no right, title or interest in or to any portion of the real property known as Olive Lawn Memorial Park follows as a matter of course. Only those entitled to the possessory rights of the unoccupied lots would have the right to conduct the park as a cemetery. That right accrued to the plaintiffs by virtue of the judgment in the arbitration proceedings and the sale of the unoccupied lots and other property pursuant thereto.

The court also found and determined that none of the roads or parkways in the cemetery was dedicated to public use, that none of the defendants, nor any of the corporations or persons whom they claimed to represent, had any right or interest in any of the property; further, that the defendants' threats to continue their unlawful trespass and their conduct in that respect would deprive plaintiffs of the rights acquired by virtue of the arbitration judgment and render said judgment ineffectual; also that pecuniary compensation would not afford adequate relief to the plaintiffs.

The findings are based on sufficient evidence which in turn support the judgment. A complete answer to all of the contentions made by the defendants is thus shown.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.




28 Cal.2d 344

## DIVISION OF LABOR LAW ENFORCEMENT v. MORONEY.

L. A. 19713.

Supreme Court of California, in Bank.

June 14, 1946.

**1. Master and servant** ⇐80(18)

In action by the Division of Labor Law Enforcement to recover as assignee of wage claims pursuant to statute authorizing the Division to bring actions for collection of wages where the employee needs assistance, the Division is entitled to filing of the complaint without paying of fee. Labor Code, §§ 79 et seq., 101 ; Pol.Code, § 4300a; Code Civ.Proc. § 261b; Government Code, § 6103.

**2. States** ⇐215

Statute providing generally for certain court fees to be paid by the parties did not impliedly repeal statute providing that as to particular actions by a department of the state government, fees need not be paid, in so far as $3 fee in counties of a certain class was concerned. Code Civ.Proc. § 261b; Labor Code, § 101.

**3. Statutes** ⇐225½

A specific statute upon a subject controls over a general provision.

**4. Statutes** ⇐162

A general statute will not repeal by implication a former one which is special or which is limited in its application unless there is something in the general law that makes it manifest that Legislature contemplated and intended a repeal.

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Mandamus proceeding by the Division of Labor Law Enforcement against J. F. Moroney, as County Clerk of Los Angeles County.

Peremptory writ granted.

Pauline Nightingale and Fred Houghton, both of Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Douglas De Coster, Deputy County Counsel, both of Los Angeles, for respondent.

CARTER, Justice.

Petitioner, a division of the Department of Industrial Relations of the State of California, seeks a writ of mandate to compel the respondent, County Clerk of Los Angeles County, to accept for filing without charge a complaint in an action in which plaintiff seeks to recover as the assignee of wage claims pursuant to chapter 4, of division 1 of the Labor Code, authorizing the division to bring actions for the collection of wages where the employee needs assistance. Respondent's refusal to accept the complaint for filing without the payment of a fee is based upon People v. Moroney, 24 Cal.2d 638, 150 P.2d 888.

[1, 2] The issue involved is the construction of section 261b of the Code of Civil Procedure, and section 101 of the Labor Code in the light of People v. Moroney, supra.

Section 261b, as added to the Code of Civil Procedure in 1943, Stats.1943, ch. 1031, and amended in 1945, Stats.1945, ch. 965, after providing for the payment of annual salaries to phonographic reporters in superior courts in counties of a certain class, and establishment of a salary fund from which to pay such salaries and that no other fees shall be paid to the reporters in taking down testimony, requires that parties shall pay a fee of $3 when certain papers are filed or steps taken in actions in addition to any other fees. Reference is made to section 4300a of the Political Code in regard to the instances in which fees are collected. The latter section provides

what and when fees shall be charged by the clerk. In the reference to section 4300a, section 261b provides that the $3 fee shall be collected "where" section 4300a requires the payment of a fee to the clerk. Section 4300a contains a provision stating that "No fee shall be charged by the clerk * * * for any service to the State of California." Opposed to that is the provision in section 261b that: "Such fee [the $3] shall not be subject to the provisions of Section 6103 of the Government Code." That section (6103) reads: "Neither the State nor any county, city, district, or other political subdivision, nor any public officer or body, acting in his official capacity on behalf of the State, or any county, city, district or other political subdivision, shall pay or deposit any fee for the filing of any document or paper, for the performance of any official service, or for the filing of any stipulation or agreement which may constitute an appearance in any court by any other party to the stipulation or agreement. This section does not apply where a public officer is acting with reference to private assets or obligations which have come under his jurisdiction by virtue of his office, or where it is specifically provided otherwise." We held in People v. Moroney, supra, that the specific exclusion embodied in section 261b of the exemption provided for in section 6103 controlled, and that the state when proceeding in an action, acting through the Franchise Tax Commissioner, must pay the $3 fee. In the instant case an additional statute is involved. Section 101 of the Labor Code provides: "When a civil action is brought by the division [the kind of action here involved], no court costs of any nature shall be payable by the division." It will be remembered that in the provision of section 261b excluding the application of section 6103 of the Government Code exempting the payment of fees, specific reference is made to that section, and it is specifically declared to be inapplicable. Nothing is said about the application of section 101 of the Labor Code. There being no other provision in section 261b excluding statutes exempting the payment of fees, it follows that fees need not be paid in actions coming within the purview of section 101 of the Labor Code as the exemption provided for in that section is not specifically excluded. People v. Moroney, supra, therefore, has no application. Here we have a case where a statute provides generally for certain court fees to be paid by the parties and also a statute stating that as to particular actions by a department of the state government, fees need not be paid. In such a situation we cannot say that the former statue impliedly repealed the latter insofar as the $3 fee in counties of a certain class is concerned; nor that the former carves out of the latter an exception.

[3, 4] A specific statute upon a subject controls over a general provision. People v. Moroney, supra. And "a general statute will not repeal by implication a former one which is special or which is limited in its application unless there is something in the general law that makes it manifest that the Legislature contemplated and intended a repeal." Boyd v. Huntington, 215 Cal. 473, 482, 11 P.2d 383, 386. There is nothing in section 261b which compels the conclusion that a repeal has been accomplished. It is general in dealing with the payment of fees by any and all parties in all actions in counties of a certain class, whereas section 101 specifically refers to certain actions brought by the state for the benefit of employees who have unpaid wage claims.

It is suggested that by reason of the provision in section 261b eliminating the general rule of exemption of the state from payment of fees as embodied in section 6103, the Legislature has manifested a general intent that as to the $3 fee there shall be no state exemption in any case, and that the purpose of section 261b, that is, to replenish the salary fund for payment of phonographic reporters, will be thwarted if the exemption in section 101 is permitted. That, however, is a matter of the Legislature where, as here, specific reference is made to section 6103 alone and no other section. Presumably it knew of the exemption in section 101, and has had an opportunity to exclude it from the operation of section 261b but has not done so. Moreover it does not necessarily follow that section 6103 expresses an exemption for fees so broad that it includes the exemption here involved. It will be remembered that the

last sentence in section 6103 provides that the section (the exemption) does not apply where the public officer is acting with reference to "private obligations" which have come under his jurisdiction. It may well be that the obligations, that is, the wage claims between private employer and employee, which are being enforced by a public officer, pursuant to the Labor Code, are such private obligations.

Petitioner is therefore entitled to a writ of mandate directing the respondent to accept for filing and to file without the payment of the fee mentioned in section 261b of the Code of Civil Procedure, the pleading as prayed for.

Let a peremptory writ issue accordingly.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE JJ., concur.




28 Cal.2d 394

**JOHNSTON v. DE LA GUERRA PROPERTIES, Inc., et al.**

**L. A. 19496.**

Supreme Court of California, in Bank.

June 21, 1946.

**1. Landlord and tenant ⇐167(8)**

An owner who leases a part of premises, retaining control of other portions, such as common walks or passages which tenant is entitled to use, is subject to liability to persons lawfully on the land with consent of tenant for damages caused by dangerous condition existing on the part under the owner's control, if by reasonable care the owner could have discovered the condition and made condition safe.

**2. Landlord and tenant ⇐167(8)**

A tenant's invitees, while on passageways which invitees have a right to use and which are under owner's control, are owner's invitees to whom owner is liable for damages caused by dangerous condition.

**3. Negligence ⇐32(3)**

An invitor's duty to exercise reasonable care to invitee applies only to the portion of the premises to which invitee under the circumstances of the invitation would be likely to go.

**4. Negligence ⇐32(3)**

An invitee who has been intentionally or negligently misled into reasonable belief that particular passageway or door is an appropriate means of reaching business area is entitled to the protection of a visitor while using such passageway or door.

**5. Negligence ⇐32(1), 48**

An invitor is not an insurer and is not liable for harm resulting from dangerous conditions of which the invitor does not know and could not be discovered by reasonable inspection.

**6. Negligence ⇐32(1)**

An invitor owes a duty to business invitees to use reasonable care as to all portions of the premises over which the invitor has control, whether such portions be within the precincts of the building or on the outside and used by the general public in common with invitees.

**7. Landlord and tenant ⇐169(8)**

In action by patron of restaurant against owner of building for injuries sustained when patron fell on private walk serving as an approach to building, evidence that owner encouraged restaurant patrons to park automobiles on adjoining property and to approach building by way of private walk, and had knowledge of condition causing accident, and should have foreseen that patrons parking at night unaided by any lighting, might step onto walk at a dangerous place, warranted finding that owner was negligent in failing to light premises, or provide guard rails, or protecting or warning prospective patrons against the danger inherent in the particular approach.

**8. Landlord and tenant ⇐167(8)**

Ordinarily, tenant is not liable for injuries to invitees occurring outside of leased premises on common passageways over which tenant has no control, and responsibility in such cases rests on the own-

er, but a tenant exercising control over a common passageway outside the leased premises may become liable to business invitees if tenant fails to warn invitees of a dangerous condition existing on such passageway.

**9. Landlord and tenant ⇐169(8)**

In action by patron against tenant leasing restaurant for injuries sustained when patron fell on unlighted private walk serving as an approach to the restaurant building, evidence that tenant maintained light and sign on private walk not leased by tenant, and that such light and sign illuminated the general area and constituted an invitation to use the entranceway, warranted finding that tenant had a limited right of control over walk and entrance way and knew of danger in using such way at night, and negligently failed to warn patron of the dangerous condition.

**10. Landlord and tenant ⇐169(11)**

In action by prospective patron against tenant leasing restaurant and owner of restaurant building for injuries sustained when patron fell onto unlighted private walk serving as an approach to the restaurant building, evidence that patron picked her way carefully and that patron had used the private way on a previous visit to the restaurant, was insufficient to show that patron was contributorily negligent as a matter of law.

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Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action by Laura B. Johnston against De La Guerra Properties, Inc., and another, to recover damages for personal injuries. From a judgment of nonsuit, the plaintiff appeals.

Reversed.

For prior opinion see 160 P.2d 597.

W. P. Butcher, of Santa Barbara, for appellant.

Spray, Davis & Gould, of Los Angeles, and Norris Montgomery, of Santa Barbara, for respondents.

GIBSON, Chief Justice.

Defendant De La Guerra Properties, Inc., owned a building, part of which was leased to the El Paseo Restaurant, operated by defendant Smith. Both owner and tenant were sued for damages for injuries suffered by plaintiff, a prospective patron of the restaurant, when she fell onto a private walk which served as one of the approaches to the building. At the conclusion of plaintiff's evidence, the trial court took the case from the jury and granted a nonsuit. Plaintiff appeals from the judgment entered upon such order. The De La Guerra building was located at the corner of Anacapa and De La Guerra Streets in the city of Santa Barbara. The northerly line of the property adjoined the southerly property line of a service station and parking lot owned and operated by an oil company. The private walk was located on the northerly 10 feet of the De La Guerra property and ran the full length of the building, joining at its easterly end the public sidewalk on Anacapa Street and terminating westerly at the rear of the building. This walk was used as an entrance to the various establishments in the building. Three doors opened onto the walk, one of them leading into a passageway which was used as a side entrance for customers of the restaurant. Signs were maintained over this door by the owner, or by the tenant with the permission of the owner, reading "El Paseo"—"De La Guerra Studios"—"Restaurante Del Paseo Entrance." There were three or more other entrances to the restaurant, consisting of passageways leading through the building to the adjoining streets.

For a period of several years after construction of the private walk, and before the oil company acquired the adjoining property, patrons of the establishments in the building used the adjoining property as a parking lot, which had been graded by defendant De La Guerra Properties, Inc., so that it sloped down to the private walk. After the oil company acquired the adjoining premises, it constructed a concrete wall on the southerly edge of its property which abutted and ran the entire length of the walk. The wall varied in height from approximately six inches above the walk at

the easterly end to two feet at the westerly end. On the adjoining property, and adjacent to the wall, there was an unpaved parkway ten feet wide. A concrete curb approximately seven inches high separated the parkway from the service station area, which was paved with asphalt and painted with white lines extending from the curb outward diagonally to indicate parking spaces for automobiles. A concrete ramp about 3 feet wide led from the parking area through the parkway to the private walk at a point directly opposite the door which served as a side entrance to the El Paseo Restaurant.

Defendant Smith had at one time made arrangements with the oil company for patrons of his restaurant to park their cars on the service station property without charge, and persons availing themselves of the privilege went directly from the parking lot to the private walk to gain entrance to the restaurant. At the time of plaintiff's injuries, these parking arrangements had been terminated, but, to the knowledge of both defendants, many patrons continued to park on the adjoining property and to approach the De La Guerra establishments from that direction.

At about 8 o'clock on the night of the accident, plaintiff, who was 65 years of age, was driven by her husband, in the company of her sister and two friends, to the parking lot adjoining the De La Guerra property. The service station was closed but plaintiff's husband parked his automobile facing toward the El Paseo Restaurant where the parties contemplated taking dinner. Plaintiff had been to the restaurant on one occasion prior to the accident, at which time the car had been parked near Anacapa Street in the service station lot, and she had walked across the parkway and stepped down to the private walk at a point where the concrete wall was only six or seven inches higher than the walk. On the night of the accident, however, plaintiff's car was parked closer to the westerly end of the parking lot. The night was dark and the surrounding area was unlighted. Plaintiff and her sister got out of the parked automobile and made their way toward the private walk and the restaurant. Because of the darkness they could not see where they were going, so they "picked [their] way along very carefully," heading toward the private walk which plaintiff knew was there by reason of her prior visit. Plaintiff testified that because of her previous experience she "thought there was just a low step from that curb down to the walk, when you walked across there. And I put my foot—my left foot on the curb, and I went to step down with my right. I did not trip. I went to step down with my right foot six or seven inches, and instead of that I stepped right down into space. * * * I lost my balance and fell and broke my hip." The wall was 18 inches above the walk at the point where plaintiff stepped off. The condition of the De La Guerra premises in relation to the adjoining property was thus an important factor in causing the accident. The general area was unlighted and because of the darkness plaintiff had no knowledge and no means of determining that the wall at this point was 18 inches above the walk. There were no guard rails or other protective devices along the walk which might have served to prevent the happening of the accident which occurred when plaintiff fell from the wall onto the private walk.

Negligence of Owner.

[1, 2] At the outset, it should be noted that the liability of owner and tenant must be based on the respective negligence of each. Because of the circumstances of this case, we need not concern ourselves with the general rule that an owner is not subject to liability during the term of a lease for harm caused to third persons upon the leased premises resulting from the condition of the premises or the activities of the tenant, nor with any of the established exceptions to this rule. See Prosser on Torts (1941), pp. 648–657; Burroughs v. Ben's Auto Park, Inc., 27 Cal.2d 449, 453, 164 P.2d 897. The liability of the owner in this case is to be determined upon a separate and equally well-settled principle of law. One who leases a part of the premises, retaining control of other portions such as common walks or passages which the tenant is entitled to use, is subject to liability to persons lawfully on the land with the consent of the tenant for damages caused by a dangerous condition

existing on the part under the owner's control, if by reasonable care he could have discovered the condition and made it safe. Bellon v. Silver Gate Theatres, Inc., 4 Cal. 2d 1, 14, 47 P.2d 462; Spore v. Washington, 96 Cal.App. 345, 274 P. 407; see Brown v. Pepperdine, 53 Cal.App. 334, 336, 200 P. 36; Rest, Torts, § 360; Prosser on Torts [1941], pp. 656, 657; 32 Am.Jur. 561; 15 Cal.Jur. 741. Accordingly, invitees of the tenant are regarded as being invitees of the owner while on passageways which invitees of the tenant have a right to use and which are under the owner's control. Spore v. Washington, 96 Cal.App. at page 350, 274 P. 407; see 15 Cal.Jur. 741.

[3, 4] The duty of the invitor to exercise reasonable care toward an invitee applies, however, only to that portion of the premises to which the invitee under the circumstances of the invitation would be likely to go. But where the invitee has been intentionally or negligently misled into the reasonable belief that a particular passageway or door is an appropriate means of reaching the business area, he is entitled to the protection of a visitor while using such passageway or door. Tschumy v. Brook's Market, 60 Cal.App.2d 158, 164–166, 140 P.2d 431; Rest., Torts, § 343, Comment b. In other words, the invitation, and consequently the duty, of the invitor are sufficiently extensive to protect the business visitor in his use of such means of ingress and egress as by allurement or inducement, express or implied, he has been led to employ. Gastine v. Ewing, 65 Cal.App.2d 131, 141, 150 P.2d 266; Stewart v. Lido Cafe, 13 Cal.App.2d 46, 50, 52, 56 P.2d 553; 19 Cal.Jur. § 56, p. 622.

[5] An invitor is not an insurer, however (Adams v. Dow Hotel, 25 Cal.App. 2d 51, 76 P.2d 210; Jones v. Bridges, 38 Cal.App.2d 341, 346, 101 P.2d 91; Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 560, 296 P. 76; Goldstein v. Healy, 187 Cal. 206, 211, 201 P. 462); and he is not liable for harm resulting from dangerous conditions of which he does not know and which could not be discovered by reasonable inspection. Mondine v. Sarlin, 11 Cal.2d 593, 597, 81 P.2d 903; Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 599, 111 P. 2d 346; Van Wye v. Robbins, 48 Cal.App. 2d 660, 662, 120 P.2d 507; see Rest., Torts, § 343.

[6] Defendants rely on the cases of Gabriel v. Bank of Italy, 204 Cal. 244, 267 P. 544, 58 A.L.R. 1039, and Davis v. West Shore Co., 55 Cal.App.2d 220, 130 P.2d 459. There is language in the Gabriel case suggesting that the duty which an invitor owes with respect to a portion of his premises usable by invitees in common with the general public is different from the duty he owes with respect to the portion of his premises inside a building. The Davis case, citing the Gabriel case as authority, held that an invitor was not liable for an injury to a business invitee caused by an obvious structural defect on a part of his premises that adjoined a public sidewalk and was used by the general public as well as by invitees. The language in the Gabriel case is confusing and led to the holding in the Davis case, which is clearly unsound and must be disapproved. The rule is that an invitor owes a duty to business invitees to use reasonable care as to all portions of the premises over which he has control, whether they be within the precincts of the building or on the outside and used by the general public in common with invitees. Leighton v. Dean, 117 Me. 40, 102 A. 565, L.R.A.1918B, 922; Crogan v. Schiele, 53 Conn. 186, 207, 1 A. 899, 5 A. 673, 55 Am.Rep. 88; see Zetley v. Jame Realty Co., 185 Wis. 205, 201 N.W. 252; Tomle v. Hampton, 129 Ill. 379, 21 N.E. 800; 58 A.L.R. 1042; cf. Rest., Torts, § 367.

[7] The evidence is sufficient to support a finding that the defendant owner was negligent. It encouraged patrons of its tenants to park their cars on the adjoining property and approach the building by way of the private walk. It had knowledge of the condition which caused the accident, and a jury could find that defendant owner should have foreseen that patrons parking at night, and unaided by any lighting, might fail to discover the ramp, and, in attempting to gain entrance to the building, step onto the walk at a dangerous place. Under these circumstances, it cannot be said as a matter of law that defendant owner was not negligent in failing

to light the premises, or provide guard rails, or otherwise to protect or warn business invitees against the danger inherent in this particular approach.

Negligence of Tenant.

[8] The accident took place on a portion of the De La Guerra property that was not within the premises leased by defendant Smith. A tenant ordinarily is not liable for injuries to his invitees occurring outside the leased premises on common passageways over which he has no control. Readman v. Conway, 126 Mass. 374; Kirby v. Boylston Mkt. Ass'n, 80 Mass. 249, 14 Gray 249, 74 Am.Dec. 682; Murphy v. Alpine Press, 291 Mass. 239, 196 N.E. 841; Reid v. Mimico, Ont., 1 D.L.R. 235; Security Savings & Commercial Bank v. Sullivan, 49 App.D.C. 119, 261 F. 461; Wilkens v. Western States Grocery Co., 167 Or. 103, 114 P.2d 542; Creek v. Nonpareil Inv. Co., 66 Colo. 550, 185 P. 473; 2 Underhill on Landlord & Tenant (1909), § 493, p. 813. Responsibility in such cases rests on the owner, who has the right of control and the duty to maintain that part of the premises in a safe condition. It is clear, however, that if the tenant exercises control over a common passageway outside the leased premises, he may become liable to his business invitees if he fails to warn them of a dangerous condition existing thereon.

[9] There is evidence in the present case that the tenant, defendant Smith, assumed some responsibility for, and exercised control over, the means of lighting the approaches to the side entrance to the De La Guerra building. When the building was first constructed, a single light was placed on the outside wall immediately above the door opposite the ramp. Smith installed a Neon sign, reading "El Paseo," a few feet above the single light and connected the sign and the light in such a manner that they operated on one switch. Thus the Neon sign, which was under the control of Smith, served not only as an invitation to use the entranceway to the restaurant, but also to illuminate the general area. This evidence would support a finding and conclusion that Smith had a limited right of control over this portion of the premises and of the means of illuminating the entranceway, that he knew of the danger involved in using this approach at night, and that he negligently failed to warn plaintiff, a business invitee, of the dangerous condition.

Contributory Negligence of Plaintiff.

[10] Defendants contend that plaintiff was guilty of contributory negligence as a matter of law. In support of their contention, it is asserted that there were three safe means of access to the side entrance available to plaintiff: By entering the private walk from Anacapa Street, by way of the ramp, and by crossing the dirt area and stepping off the wall at the point where plaintiff had stepped down to the private walk on the occasion of her previous visit. Defendants argue that, instead of using any of these means, plaintiff groped her way in the dark, through shrubbery, to a point where the wall was 18 inches above the walk, and stepped off, although she could not see the walk below. Plaintiff testified that she picked her way very carefully, that as she crossed the dirt area she did not see or feel any shrubbery, and that because of her prior experience in the area she thought there was a low step down to the private walk, like stepping from a sidewalk curb to a street. In view of the fact that plaintiff had found a safe means of reaching the private walk from the parking lot on the occasion of her prior visit, and of her ignorance of the variation in the height of the wall, we cannot say as a matter of law that she was guilty of contributory negligence in attempting to reach the walk by the same general method of approach that she had used before.

The judgment is reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

28 Cal.2d 379

## PULLMAN CO. v. INDUSTRIAL ACCIDENT COMMISSION.

S. F. 17295.

Supreme Court of California.

June 18, 1946.

1. Workmen's compensation ⇐1761

The commission's finding that on or about April 20, 1940, employee sustained an injury which caused total temporary disability from and after January 22, 1942, and that claim was not barred because it was filed within six months after applicant suffered disability, brought case within rule that injury dates from time employee's condition culminates in incapacity for work and employee knows or should know he suffers from occupational disease or industrial injury which is the cause of his disability.

2. Workmen's compensation ⇐2014

Where issues on employee's petition for new and further disability indemnity were nature, extent, and duration of disability and need for further treatment, employer waived reopening of the defense of the statute of limitations by failure to present it to the Commission before submission of the cause. Labor Code, §§ 5409, 5803–5805.

3. Workmen's compensation ⇐1778

Where evidence on employee's petition for new and further disability indemnity was not directed to date of injury, evidence could not support an amendment of original findings on that question. Labor Code, §§ 5409, 5803–5805.

4. Workmen's compensation ⇐1778

Where commission's order amending prior orders did not state that findings of original award were amended, failure to copy original findings as to date of disability and statute of limitations did not amount to a determination that those findings were incorrect and such findings still stood. Labor Code, §§ 5409, 5803–5805.

5. Workmen's compensation ⇐1937

A compensation award must be supported by the commission's findings, rather than by referee's statements, and any misapprehension of referee as to date of injury is immaterial where commission's findings are correct. Labor Code, § 5952(d).

6. Workmen's compensation ⇐1778

The commission's findings amending prior orders and awarding compensation for permanent partial disability were sustained by the evidence.

7. Workmen's compensation ⇐1939

The commission's findings on conflicting evidence are conclusive.

8. Workmen's compensation ⇐1857

Contentions not presented to commission by petition for rehearing were waived. Labor Code, § 5904.

9. Workmen's compensation ⇐1778

That compensation claimant's petition seeking amendment of prior awards was misnamed did not affect commission's jurisdiction nor prejudice employer, where evidence was directed to the nature, extent, and duration of disability and employer had opportunity to contest proposed finding of permanent partial disability. Labor Code, §§ 5803–5805.

10. Workmen's compensation ⇐1785

The commission's continuing jurisdiction is independent of any petition, and on notice and opportunity to be heard the commission may reopen proceeding on its own motion and consider the character, duration, and extent of disability. Labor Code, §§ 5803–5805.

11. Workmen's compensation ⇐1781

Where commission determined that evidence was then insufficient to show that condition was permanent and that claimant take nothing on account thereof at that time, the commission had power to reopen its determination. Labor Code, §§ 5803–5805.

12. Workmen's compensation ⇐1778, 1781

The continuing jurisdiction of the commission is not limited to the consideration of changes in the physical condition of the workman, but extends to rescinding, altering, or amending orders, decisions, or awards on good cause therefor. Labor Code, §§ 5803–5805.

**13. Workmen's compensation ⇐1939**

The determination of the commission of what constitutes good cause for reopening an award is entitled to great weight, but is not conclusive. Labor Code, §§ 5803–5805.

**14. Courts ⇐107**

Any statement in an opinion must be considered in its context.

**15. Workmen's compensation ⇐1778**

The commission can amend its findings and award based thereon when there exists some circumstance unknown to the commission at time of original award which renders it inequitable. Labor Code, §§ 5803–5805.

**16. Workmen's compensation ⇐1778**

Where, at time of prior findings and award, commission did not know that even light work cumulated to cause disability, the commission could properly determine that good cause existed for amending prior orders that injury was temporary and that it had terminated. Labor Code, §§ 5803–5805.

Proceeding under the Workmen's Compensation Act by Adeline Mira, claimant, opposed by the Pullman Company. To review an order of the Industrial Commission amending a compensation award so as to grant further compensation to Adeline Mira for permanent partial disability, the employer petitions for a writ of review.

Order affirmed.

Prior opinion 164 P.2d 955.

Corbet & Selby, Russel Shearer, and Paul Thomas, all of San Francisco, for petitioner.

Everett A. Corten, Dan Murphy, Jr., and R. C. McKellips, all of San Francisco, for respondents.

SCHAUER, Justice.

On February 13, 1942, respondent Mira, a seamstress employed by petitioner Pullman Company, filed her application for workmen's compensation. After a hearing respondent Industrial Accident Commission found that the employee sustained industrial injury on April 20, 1940, that temporary disability resulted on January 22, 1942, and awarded compensation therefor. From time to time, after further hearings, the award was amended in particulars, hereinafter related. On April 10, 1945, the commission made an order which amends previous orders and awards compensation for permanent partial disability. Petitioner seeks annulment of this award. Its main contentions are: (1) The award violates section 5804 of the Labor Code. That section provides, "No award of compensation shall be rescinded, altered, or amended after 245 weeks from the date of the injury." (2) The original application for compensation was not filed within six months from the date of the injury as required by section 5405 of the Labor Code. (3) The award is not supported by any evidence and is contrary to the medical evidence. (4) The award is beyond the power of the commission because it grants compensation for permanent partial disability, whereas the employe alleged, and asked compensation for, new and further temporary total disability. (5) An interim order of the commission that liability for temporary disability be terminated and that the employe "take nothing by reason of her claim of permanent disability, at this time," amounted to a final determination that there was no permanent disability. (6) "Good cause" for amending the prior awards, within the purview of section 5803 of the Labor Code, does not appear. We have concluded that none of petitioner's contentions can be sustained.

The employe's disability is the loss of grasping power of the right hand and disabling pain extending from the middle finger of the hand up the right arm and into the neck, aggravated by any use of the hand and arm. Her condition has been described by the various doctors who examined her from time to time during the lengthy history of this proceeding as "a seamstress' version of 'writer's cramp,'" "occupational neurosis," "bursitis," "myositis," "neuritis," "arthritis," "so-called tennis elbow," etc. The commission found that the injury was "Radial-humeral bursitis, epicondylitis and deltoid myositis." It is apparent from the record as a whole that the original award is based on the theory,

ever since adhered to by the commission, that the disability is in the nature of an occupational disease, arising out of the work of sewing heavy carpets since 1929, aggravated by the employe twisting her finger while sewing on April 20, 1940, and culminating in disability in January, 1942, when the employe had to quit work.

Chronologically the history of these proceedings is as follows:

*February 13, 1942.* Employe filed application for compensation alleging that she sustained industrial injury April 20, 1940, by twisting the thimble finger of her right hand while sewing, and that she left work on January 26, 1942.

*May 11, 1942.* Commission found industrial injury sustained April 20, 1940, "from repeated motions of hand and arm while sewing carpets and curtains over a period of years beginning in 1929, * * * caused total temporary disability from and after January 22, 1942, to and including March 20, 1942, and indefinitely thereafter"; claim not barred by statute of limitations; awarded compensation beginning January 30, 1942.

*June through October, 1942.* Employer's petition for rehearing denied by commission; petitions for writ of review and for rehearing denied by District Court of Appeal, First Appellate District, Division Two; petition for hearing denied by this court; all without opinion. In each petition the employer contended that the claim was barred by the six-month statute of limitations.

*November 24, 1942.* Employe petitioned for permanent disability rating.

*February 5, 1943.* Commission amended findings and award of May 11, 1942, "to read as follows: * * *" repeated findings that industrial injury sustained April 20, 1940, caused total temporary disability from January 22, 1942; found temporary partial disability commencing December 1, 1942, and continuing indefinitely; found that employe's "condition has not yet become permanent"; reserved jurisdiction to rate for permanent disability, if any, when condition stabilized, "provided application therefor is filed within 245 weeks from the date of injury"; awarded compensation as indicated.

*March 2, 1943.* Employe returned to work. She was given light work, sorting screws, which she could do with her left hand.

*September 7, 1943.* Employer petitioned for termination of liability.

*September 18, 1943.* Employe petitioned for permanent disability rating. Such petition came on for hearing with employer's petition of September 7.

*November 30, 1943.* Commission made "supplementary findings" that temporary disability terminated March 2, 1943; that "The evidence is insufficient to show that the injury has resulted in permanent disability or that the condition, at the present time, is permanent"; ordered that liability for temporary disability be terminated and that employe "take nothing by reason of her claim of permanent disability, at this time."

*January 31, 1944.* Employe petitioned for compensation for "new and further temporary total disability."

*February 23, 1945.* After hearing and filing of medical reports, referee notified parties that case would be submitted on recommended rating of 51¼ per cent permanent disability "unless good cause be shown to the contrary in writing."

*April 10, 1945.* Commission amended orders of February 5, 1943, and November 30, 1943, "to read as follows: * * *" repeated finding that industrial injury was sustained April 20, 1940; fixed permanent disability at 51¼ per cent; awarded compensation therefor commencing January 30, 1942.

*April 30, 1945.* Employer petitioned for rehearing on grounds that commission disregarded medical evidence, that evidence does not support findings, and that claim was barred by statute of limitations.

*May 29, 1945.* Commission denied petition for rehearing.

(While the amendatory orders above referred to were made by a referee there is no suggestion that such orders were not approved or adopted by the commission.)

[1] The contentions of petitioner first above stated—that the commission sought to amend its award more than 245 weeks after date of injury and that the original claim was barred—are based on petitioner's view that the commission in 1945 reopened the question of date of injury, determined that its original finding on that question was erroneous, and found that the date of injury was not January, 1942, but April, 1940. The May 11, 1942, finding that the date of injury was January, 1942, is necessarily implied. The express findings are that the employe "on or about April 20, 1940, * * * sustained injury arising out of and occurring in the course of * * * employment," that "Said injury caused total temporary disability from and after January 22, 1942," and that "The claim herein is not barred by any provision of limitation * * *, the claim having been filed within six months after applicant first suffered disability as a result of said condition." The quoted findings bring the case within the proposition that for purposes of compensation the injury dates from the time when (1) the employe's condition, whether disease or injury, culminates in incapacity for work and (2) the employe knows or in the exercise of ordinary care should know that he is suffering from occupational disease or industrial injury which is the cause of his disability. (Marsh v. Industrial Acc. Comm. (1933), 217 Cal. 338, 351, 18 P.2d 933, 86 A.L.R. 563, and cases therein digested; Price v. Industrial Acc. Comm. (1935), 9 Cal.App. 2d 213, 49 P.2d 294; Continental Cas. Co. v. Industrial Acc. Comm. (1936), 11 Cal. App.2d 619, 54 P.2d 753; Argonaut M. Co. v. Industrial Acc. Comm. (1937), 21 Cal. App.2d 492, 497, 70 P.2d 216; Travelers Ins. Co. v. Industrial Acc. Comm. (1939), 32 Cal.App.2d 643, 645, 90 P.2d 327; Williams v. Industrial Acc. Comm. (1945), 71 Cal.App.2d 136, 140, 161 P.2d 979.) It was on this proposition that the commission relied in successfully opposing the petitions filed with the District Court of Appeal and this court in 1942.

[2-5] We cannot agree with the argument that the commission in the exercise of its continuing jurisdiction to change its orders and awards (Lab.Code, §§ 5803–5805) reopened the question of date of injury and, on April 10, 1945, found that the date of injury was April, 1940. The issues at the hearing of the employe's January 31, 1944, "petition for new and further disability indemnity" were, as stated by the referee, "nature, extent and duration of disability and need for further treatment." Petitioner waived the question of the reopening of the defense of the statute of limitations by failure to present it to the commission before submission of the cause. (Lab.Code, § 5409.) There is nothing in the record to indicate that the commission or the parties treated the date of injury as in issue when the commission took the evidence on which it based its 1945 order here sought to be annulled. Such evidence is not directed to the question of date of injury; it could not support an amendment of the original findings on that question. The order of April, 1945, states that the orders of February 5, 1942, and November 30, 1943, are amended; it does not state that the findings of the original award are amended. The omission to copy the original findings as to date of disability and statute of limitations does not amount to a determination that those findings were incorrect. They stand unchanged. By reference to them we determine that the commission's award of April 10, 1945, was not foolish, meaningless, and beyond the power of the commission, as petitioner would have us hold, but proper and sustainable. It is true as petitioner points out, that the referee who heard the evidence appears to have been of the view that the date of injury was originally found to be April, 1940. But it is the findings of the commission, not the statements of the referee, which must support the award. (Lab.Code, § 5952, subd. (d).) So considered the hearing referee's misapprehension becomes unimportant.

[6, 7] Petitioner contends that there is no evidence of permanent disability and that the commission ignored medical evidence. Six doctors examined the employe after November 30, 1943 (when the commission found the evidence then before it insufficient to show permanent disability "at the present time"). The following excerpts from their reports indicate the conflict of expert opinion: Dr. Roberts: "This wom-

an is still unable to resume her regular occupation due to trauma of her right hand and arm. I have advised * * * physiotherapy and massage * * * to expedite her recovery." Dr. Dickson: "I would have expected the symptoms resulting from her industrial injury to have long ago subsided. From this patient's physical examination, I am unable to account, from an objective standpoint, for the marked weakness in the patient's grip in her right hand. It would appear that she does, unconsciously exaggerate her symptoms." Dr. Fender: "There is little doubt that the patient simulates findings that scarcely can be credited. In spite of this, I feel that she has real disability proceeding from her work. * * * I believe the applicant suffers from partial temporary disability. Probably no specific treatment will avail." Dr. Howard: "I would not feel that this [condition of the employe] is connected with her work." Dr. Harbaugh: "[M]y impression is that the complaints are on a functional basis. I believe that settlement or some other form of closure of the case would be to the best interests of all parties concerned." Dr. Fraser: "From the long-standing symptoms which this patient has had, it appears to me that [suggested treatment] * * * should be followed if ultimate recovery is to be obtained." In addition to the medical evidence there is testimony of the employee as to her subjective symptoms. From the employe's testimony and work records of the employer it appears that from October 1, 1943, to the time of hearing even light work (sorting screws with the left hand) caused her such pain that she was absent an average of at least one working day each week. The commission's findings on this conflicting evidence are conclusive. (Hart v. Industrial Acc. Comm. (1931) 119 Cal.App. 200, 202, 6 P.2d 348; County of Los Angeles v. Industrial Acc. Comm. (1936), 14 Cal.App.2d 134, 137, 138, 57 P.2d 1341 [finding that a disability not apparent to the eye was permanent upheld in absence of medical testimony of permanence]; Employers', etc., Corp. v. Industrial Acc. Comm. (1941), 42 Cal.App.2d 669, 671, 109 P.2d 716 [finding that employe was disabled upheld on the basis of his testimony as to subjective symptoms where medical testimony was only that there had been an injury].)

[8] Other questions now raised by petitioner were not presented by the petition for rehearing filed with the commission and, therefore, were finally waived. (Lab.Code, § 5904; Pacific Coast Casualty Co. v. Pillsbury (1915), 171 Cal. 52, 151 P. 658; Great W. P. Co. v. Industrial Acc. Comm. (1925), 196 Cal. 593, 600, 238 P. 662; Los Angeles, etc., R. Co. v. Industrial Acc. Comm. (1935), 2 Cal.2d 685, 688, 43 P.2d 282; Cowell v. Industrial Acc. Comm. (1938), 11 Cal.2d 172, 179, 78 P.2d 1016; County of Los Angeles v. Industrial Acc. Comm. (1930), 109 Cal.App. 724, 726, 293 P. 820.) In any event, upon the record before us, the award must be upheld on its merits.

[9, 10] The contention that the award is beyond the jurisdiction of the commission because it grants compensation for permanent partial disability instead of compensation for the new temporary total disability which the employe alleged, is without merit. The phrase "new and further disability" was incorrectly used in the employe's petition, which is in substance a supplemental petition seeking amendment of previous awards, not an original claim. But this misnomer did not affect the jurisdiction of the commission nor did it prejudice petitioner. As stated above, at the hearing on the so-called "petition for new and further disability indemnity," the referee announced that the issues included "nature, extent and duration of disability." The evidence of both employe and employer was directed to, and the commission could properly consider, such issues, and was not limited to a consideration of whether the employe suffered the precise disability alleged in her petition. The commission's continuing jurisdiction, once acquired, is independent of any petition filed by a party; on notice and opportunity to be heard the commission could have reopened the proceeding of its own motion and considered the character, duration, and extent of disability. (Lab.Code, § 5803.) After the medical evidence was in, the referee gave notice to the parties that the case would be submitted on a recommended rat-

ing of 51¼ per cent permanent disability "unless good cause be shown to the contrary in writing." Petitioner thus had opportunity to contest the proposed finding of permanent partial disability.

[11] Petitioner next contends that the commission was without power to reopen its determination of November 30, 1943, that temporary disability had terminated and that the evidence then before the commission was insufficient to show permanent disability "at this time." Such determination, petitioner urges, became final without petition by the employe for rehearing and is now res judicata. This contention is, of course, directly contrary to petitioner's position as to the lack of finality of the original finding as to date of injury previously discussed. It is also contrary to the spirit and purpose of the workman's compensation law and to decided cases. (Bartlett Hayward Co. v. Industrial Acc. Comm. (1928), 203 Cal. 522, 535, 265 P. 195; Cowell v. Industrial Acc. Comm. (1938), supra, 11 Cal.2d 172, 178, 78 P.2d 1016; Employers' L. A. Corp. v. Industrial Acc. Comm. (1935), 7 Cal.App.2d 190, 193, 45 P.2d 371.) The order of November 30, 1943, contemplated, indeed invited, further proceedings directed to a determination of the existence and permanence of disability because of its wording: "The evidence is insufficient to show * * * that the condition, at the present time, is permanent. * * * It is accordingly ordered * * * that applicant take nothing by reason of her claim of permanent disability, at this time." The question of the permanence of disability, unlike the question of date of injury, was thereafter put in issue before the commission. The amendment of the prior orders, the finding that disability continued, and the award of compensation therefor, after notice, opportunity to be heard, and the taking of evidence addressed to the question, is a typical situation contemplated by the provisions of the Labor Code which give the commission continuing jurisdiction.

[12–16] What has been said disposes in large part of petitioner's contention that no good cause for amending the prior orders was shown. It is settled that "the continuing jurisdiction of the commission * * * is not limited to the consideration of changes in the physical condition of the workman, but is extended to the right to rescind, alter or amend the orders, decisions or awards upon good cause appearing therefor. What constitutes 'good cause' depends largely upon the circumstances of each case. The term is relative. It may be assumed that the determination of the commission as to what constitutes 'good cause,' while entitled to great weight, would not be conclusive." (Bartlett Hayward Co. v. Industrial Acc. Comm. (1928), supra, 203 Cal. 522, 532, 265 P. 195, 199.) This court has said that "the power of the commission to change its former orders or awards may not be predicated upon a mere change of opinion." (Merritt-Chapman & Scott Corp. v. Industrial Acc. Comm. (1936), 6 Cal.2d 314, 316, 57 P.2d 501, 502.) This statement must be considered in its context; it refers to the power of the commission to change a finding of fact and an award based thereon in the absence of any showing of any relevant circumstance which was not known to the commission when it made the original finding. (See Young v. Industrial Acc. Comm. (1944), 63 Cal.App.2d 286, 289, 146 P.2d 693.) The commission can amend its findings and the award based thereon where there exists some circumstance unknown to the commission at the time it made the original award, which renders such original award inequitable. (Merritt-Chapman & Scott Corp. v. Industrial Acc. Comm. (1936), supra; Ocean A. & G. Corp. v. Industrial Acc. Comm. (1938), 12 Cal.2d 116, 120, 82 P.2d 603; Clendaniel v. Industrial Acc. Comm. (1941), 17 Cal.2d 659, 663, 111 P.2d 314; Colonial, etc., Ins. Co. v. Industrial Acc. Comm. (1941), 47 Cal.App.2d 487, 490, 118 P.2d 361.) There appears here a circumstance which the commission did not and could not know at the time it found, on November 30, 1943, that temporary disability had terminated and that the evidence then before it did not show permanent disability. That circumstance is the showing that even the light work of sorting screws cumulated to cause continuing disability. In the circumstances the commission could properly determine that

the showing that the disability which was originally found to be temporary and thereafter was found to have terminated is in fact permanent, constitutes "good cause" for amending its orders.

Since the commission in this proceeding properly exercised its continuing jurisdiction under sections 5803 through 5805 of the Labor Code, contentions of the parties relating to proceedings under section 5410 of the same code to establish "new and further disability," need not be discussed.

For the reasons above stated the award is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concurred.




28 Cal.2d 340

**In re HULTIN'S ESTATE.**

**YOULIAN et al. v. WILLIAMS et al.**

**L. A. 19576.**

**Supreme Court of California, in Bank.**

**June 12, 1946.**

**1. Appeal and error ⇐571**

A petition for writ of mandate to compel trial court to settle and certify clerk's and reporter's transcripts on appeal would be considered as running to clerk and reporter, where there was no claim that transcripts were not correct. Rules on Appeal, rules 4(d), 5(d).

**2. Appeal and error ⇐629**

Appellant's petition for a writ of mandate to compel trial court to settle and certify clerk's and reporter's transcripts on appeal could be treated as a request for relief from default in preparation of the transcript. Rules on Appeal, rules 4(d), 5(d).

**3. Appeal and error ⇐628(1)**

In view that transcripts on appeal had been prepared and dispute between parties in court below with reference to timeliness of notice of intention to move for a new trial and its bearing on timeliness of the appeal, and the misconception that relief from default in preparation and filing of transcript should be secured in trial court rather than District Court of Appeal, and the policy of having a determination on the merits, appellants' application to be relieved from their default in failing to file the request and arranging for preparation of transcript on appeal would be granted. Rules on Appeal, rule 53(b).

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Proceeding in the matter of the estate of Helen La Monte Hultin, deceased, wherein Jack Youlian and others contested a witnessed will presented by Nadia Williams to probate and presented for probate an earlier holographic will of decedent which Nadia Williams and others contested. From adverse orders, Nadia Williams and others appeal. On applications for relief from default in preparation of transcript on appeal, for writ of supersedeas, and to dismiss appeal.

Application for relief from default granted, and other applications continued.

Nadia Williams, in pro. per., and Marion P. Betty, of Los Angeles, for petitioners.

Michael F. Brown and William A. Sherwin, both of Los Angeles, for respondents.

CARTER, Justice.

In this proceeding appellant Nadia Williams qualified as special administratix of the Hultin estate on July 14, 1944, furnishing a bond in the principal sum of $7,000. She presented to the court for probate a witnessed will of the decedent. Respondents contested the admission of that will to probate on the ground of fraud and undue influence and presented for probate an earlier holographic will of decedent which appellants contested. The two contests were heard and respondents were successful in having the holographic will admitted to probate and respondent Jack Youlian was appointed executor of the estate without bond pursuant to that will. The orders in the contest proceedings (hereinafter referred to as first order) and the order appointing Youlian executor (hereinafter referred

to as second order) were entered on June 5, 1945. Notice of entry was served and filed on June 18, 1945. A notice of intention to move for a new trial in the contest proceedings was filed and bears the clerk's filing date of June 29, 1945, apparently a day late. See Code Civ.Proc. § 659. That motion was heard on August 7, 1945, by Judge Beardsley, the trial judge. On August 14, 1945, Judge Blake, the presiding judge of the Superior Court in Los Angeles County, made ex parte, upon motion of appellants, an order reading in part as follows: "Upon reading and filing the affidavits of Nadia Williams, Marie Antoinette Griffith and Myrven F. Gift, and the evidence of the check dated June 28, 1945 being before the Court, and good cause appearing therefor, It Is Ordered And Declared that the fee of $9.00 for filing the Notice of Motion of Intention to move for a New Trial in the above entitled matter was filed within time and that therefore the Motion for the New Trial may be heard upon authority of Commercial Nat. Bank v. Schlitz, 6 Cal.App. 174, 91 P. 750." On August 16, 1945, the trial judge denied the motion for a new trial and in the order of denial also ordered (hereinafter referred to as third order) the vacation of Judge Blake's order of August 14, 1945. On November 5, 1945, the trial court ordered (hereinafter referred to as fourth order) appellant Williams as special administratrix of the estate to deliver the assets of the estate to respondent Youlian, executor. Purported appeals are taken from the first, second, third and fourth orders.

Appellants applied to this court in December, 1945, for a writ of supersedeas staying the execution of the fourth order pending appeal, and in January, 1946, an order to show cause in March, 1946, why the writ should not be granted, was issued by this court and all proceedings on the judgment and order appealed from were stayed pending final determination of the matter. Respondents answered the petition for a writ of supersedeas urges that the appeal was too late, the notice to prepare the transcript was not timely and the notice of appeal was not signed by the attorney of record. Respondents also noticed for hearing in March, 1946, a motion to dismiss the appeals on the grounds that as to the first order the notice of appeal and request for a transcript were late, and the transcript was not filed in the time required by law; that as to the second order the same was true, and in addition, that no request for a transcript was filed and the notice of appeal was not signed by the attorney of record (the issue of the timeliness of appeals for the first and second orders involves the question of whether the notice of intention to move for a new trial was filed in time thus extending the time in which to appeal and the effect on that question of the order of Judge Blake of August 14, 1945, and the third order vacating the order of August 14th); that as to the third order, it is not an appealable order; and that as to the fourth order, the matter will become moot on the dismissal of the other appeals.

[1-3] The petition for the writ of supersedeas and the motion to dismiss the appeals were heard in March, 1946, and submitted. Appellants filed a petition for a writ of mandate to compel the trial court to settle and certify the clerk's and reporter's transcripts on the appeal from the first order. An alternative writ was issued by this court returnable on June 10, 1946. It should be noted in connection with the petition for the last-mentioned writ that although it is directed to the trial judge it will be considered as running to the clerk and reporter of the court inasmuch as there is no claim that the transcript is not correct. In such case it is the reporter's and clerk's duties to certify the respective transcripts. Rules on Appeal, rules 4(d), 5(d). In any event the petition for a writ of mandate may be treated as a request for relief from default in the preparation of the transcripts. On the issue of their claimed default in the preparation of the transcripts, it appears that they have been prepared. In view of that fact and the dispute between the parties in the court below with reference to the timeliness of the notice of intention to move for a new trial and its bearing on the timeliness of the appeals, and the misconception that relief from default in the preparation and filing of the transcripts should be secured in the trial court, rather than this court (see Rules on Appeal, rule 53(b); Peebler v. Olds, 26 Cal.2d 656, 160

P.2d 545; Averill v. Lincoln, 24 Cal.2d 761, 151 P.2d 119), and the policy of having a determination on the merits, appellants are relieved from their default in failing to file the request and arranging for the preparation of the transcripts on appeal. We will therefore treat the mandamus proceeding as an application for such relief from default, and the clerk and reporter are hereby ordered to certify the respective transcripts and the former to transmit them to this court.

In regard to the motion to dismiss the appeals on the grounds of lateness of perfecting them, lack of the signature of the attorney of record, nonappealability of the third order, we deem it advisable to postpone a determination of that motion until the record in the court below is before us. Portions of the record are set forth in the pleadings of the parties here but before these matters can be intelligently determined the record should be available to the court, including what transpired with reference to the third order and the order of Judge Blake on August 14, 1945.

The petition for a writ of supersedeas need not be ruled on at this time inasmuch as a temporary stay was granted in the order to show cause and the petition may be heard on the merits along with the motion to dismiss the appeal.

In order that the expense and effort of filing briefs on the merits of the appeal may be avoided in the event the appeals are ultimately dismissed, it is suggested that after the filing of the record, and if the parties so desire, the motion to dismiss may be further briefed.

Therefore the motion to dismiss the appeal and the petition for a writ of supersedeas are continued until the record is before this court.

The clerk of the Superior Court of Los Angeles County is directed to certify and transmit the record on appeal to the clerk of this court.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

28 Cal.2d 329

## PACIFIC INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 19609.

Supreme Court of California, In Bank.

June 11, 1946.

**1. Workmen's compensation ⇐719**

Ordinarily injuries received by an employee while going to or coming from his place of work are not compensable.

**2. Workmen's compensation ⇐719**

The term "employment" within Workmen's Compensation Act includes not only the doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from place where the work is to be done.

See Words and Phrases, Permanent Edition, for all other definitions of "Employment".

**3. Workmen's compensation ⇐604, 730, 750**

If employment creates a special risk, an employee is entitled to compensation for injuries sustained within the field of that risk and an employee may be subject to such a risk as soon as he enters employer's premises or the necessary means of access thereto, even when the latter is not under the employer's control or management.

**4. Workmen's compensation ⇐706**

Employment includes reasonable interval of time for purpose of entry on and departure from employer's premises and what is a reasonable time depends on nature of employment, location and distance between different parts of employer's premises, the difficulty of access thereto and other significant factors.

**5. Workmen's compensation ⇐643**

The fact that accident happens on public road and danger is one to which general public is exposed, does not preclude existence of causal relationship between accident and employment if danger is one to which employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree.

**6. Workmen's compensation ⇐726**

Where employee driving his automobile into a parking lot adjacent to place of work and maintained by employer for ex-

clusive use of employees was struck by another automobile, the accident "arose out of and in course of employment", notwithstanding accident happened on public road some minutes before employee was to begin work and entrance used by employee was not exclusive means of access provided to parking lot.

See Words and Phrases, Permanent Edition, for all other definitions of "Arose Out of and In Course of Employment".

**7. Workmen's compensation ⇐1419**

The opinion of a qualified medical witness with reference to origin or cause of injury or death of employee is evidence which will support an award of workmen's compensation.

**8. Workmen's compensation ⇐1413, 1939**

All reasonable inferences must be indulged to support findings of Industrial Accident Commission and reasonable probability, not absolute certainty, is all that is required.

**9. Workmen's compensation ⇐1493**

Evidence sustained determination of Industrial Accident Commission that employee's death caused by rupture of aorta was result of injury sustained in automobile accident about 36 hours before his death.

**10. Workmen's compensation ⇐1820**

If Industrial Accident Commission follows recommendation of referee who heard evidence or read record, Commission need not review evidence, but if Commission makes a contrary determination, the Commission must make an independent examination of the record, but such rule applies only to a final award by the Commission and not to preliminary orders, such as the granting of a rehearing. Labor Code, §§ 5313, 5315.

**11. Workmen's compensation ⇐1935**

Even if Industrial Accident Commission disregarded the "true" findings of a referee, where Commission had before it, a transcript of evidence in proceedings two days before it requested referee to prepare findings and 18 days before award on rehearing was granted, Supreme Court must presume that decision was made after a consideration of the record. Labor Code, § 5315.

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Proceeding by the Pacific Indemnity Company against the Industrial Accident Commission and Hester P. Henslick and others to review a compensation award made by the Commission to Hester P. Henslick and others.

Award affirmed.

Herlihy & Herlihy, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, Edward A. Sarkisian, of Los Angeles, and R. C. McKellips, of San Francisco, for respondents.

EDMONDS, Justice.

The Industrial Accident Commission awarded a death benefit to the dependents of Charles A. Henslick, who died about thirty-six hours after a traffic accident which occurred as he was driving his automobile into a parking lot. By writ of review, the Pacific Indemnity Company, the insurance carrier of Consolidated Steel Corporation, Ltd., Henslick's employer, now challenges the commission's jurisdiction to make the award.

From the evidence presented to the commission, it appears that about 7:45 on a Saturday morning, as Henslick was entering a parking lot owned by the city of Long Beach but maintained by his employer, the vehicle which he was driving was struck by the automobile operated by William D. Johnson. The parking lot was adjacent to the Craig Shipyards, owned and operated by Henslick's employer. No one was permitted to park in the lot except Consolidated employees and this regulation was enforced by special guards employed by the company. The entrance used by Henslick was one of the means of access to the parking lot.

Two fellow employees were in Henslick's car at the time of the collision. One of them, William A. McClure, was riding in the back seat as the automobile entered the parking lot. He testified at the coroner's inquest that "the car hit our rear fender as we started into the parking lot. We were almost off the highway, that is, we were

going across the highway going into the parking lot." According to his description of the accident, they had a "pretty good jolt," and he was thrown against the other side of the automobile.

William D. Johnson, the driver of the on-coming automobile and a fellow employee of Henslick, told the coroner's jury that the accident "occurred on the highway"; that it happened "around the yard, but not on the grounds." He described it as a minor accident, saying that the impact was not severe but a glancing blow; "we didn't hit very hard; it was just very easy on us," and the other vehicle "continued on" into the parking lot. The estimate which he made as to the speed of his car was about 25 to 30 miles per hour. He said that he was so nervous immediately after the accident that he could not write, and Henslick wrote his name and address for him. At that time Henslick did not indicate in any way that he was injured.

Charles S. Marston, who occupied the front seat with Henslick, testified before the referee of the commission that Henslick made a left turn in front of a line of considerable on-coming traffic in order to reach the parking lot. On the important issue as to the point of impact, Marston stated that "when the accident occurred, half of the car was on the gravel, and a Ford car parked there kept us from being tipped over; we hit and then straightened." In response to the question of whether they "had * * * gotten off the paved portion" of the public highway, Marston said: "Half and half. The front end was in the gravel and the rear end out in the pavement." He explained that the parking lot was graveled and began right on the street line; that is, "the street stops and the lot starts." As he related the occurrence, the Henslick automobile came to rest after the collision "with the front part of the car on the gravel, the rear end still on the pavement."

Later in the hearing Marston said that the cars collided "in the street." He characterized the impact as "pretty heavy" and the speed of the automobile driven by Johnson as between 45 and 50 miles per hour. When asked if there was any formality in going through the gate into the parking lot, Marston replied: "If a person acts like a stranger and comes up from the other end—they have chains up there; we drove in from the rear and then use our 'id' cards and get admittance to get our time card."

The two vehicles collided with sufficient force to bend the fender of the Henslick car against the tire, and after the accident it was necessary for him and his passengers to lift the fender from the tire. Henslick's car, according to the testimony, was knocked against a parked automobile but bounced back again. The parked vehicle, according to Johnson, was "inside the lot" at the time of the impact. Marston testified that it was in "the entrance to the parking lot." After the accident the occupants of the Henslick vehicle drove about a block to park the car and then walked a distance of approximately two and one-half blocks to their stations.

Henslick, a plumber, worked as usual all of Saturday. McClure and Marston saw him two or three times during the day but he made no comment as to being ill nor did he show any sign of physical injury. During the trip home after work the accident was discussed but nothing was said about any one being hurt. Mrs. Henslick rode home with her husband, and although she was informed of the accident, he made no complaint to her about any injury nor did he say that he was either bruised or shaken up.

That evening, Henslick and his wife drove to Santa Ana, a distance of about 30 miles for the round trip, where they made some purchases. Although they usually went to some place of entertainment each Saturday night, that evening Henslick said that "he didn't feel like going any place." The only walking he did on the trip was "just across the street" and then he said: "I just don't feel quite right." After Henslick returned home he told his wife that he "felt sort of weak; he didn't feel quite right." According to her testimony, before the accident, except for sinus trouble, her husband "was in good health at all times." But he did not sleep well that night, and when they arose the next morning he said that he "had not enjoyed his rest" and "was just tired."

Henslick did not feel like digging in the garden, but he put in some time on odd jobs and sprayed the inside of two small chicken sheds. Following luncheon, he lay down to rest and slept until about 4:30, an unusual thing for him to do. After the nap, he went to the chicken house to see if it was dry. A few minutes later, in response to a call from a neighbor, Mrs. Henslick found her husband still on his feet leaning against the side of the chicken house. He fell forward into her arms and was dead when the doctor arrived about 45 minutes later.

The cause of death given by the autopsy surgeon at the inquest was: "heart tamponade, due to hemopericardium, as there was blood in the pericardian sac due to rupture of the aorta." He found no external bruises on the body except one on the clavicle, which he surmised was sustained at the time Henslick fell against the chicken house. The physician testified that, in his opinion, the ruptured aorta was the result of the jolt received in the automobile accident. Although a rupture of the aorta is usually followed by death quite soon thereafter, it was possible, he said, that death could result at a later time due to a slow seepage of blood. He explained that "in this particular case the rupture of the aorta was caused by some accidental means, some external injury, because the area of the aorta at that point where it was ruptured was normal." In his opinion, the jolt received in the collision was the only element in Henslick's history which could account for the death, and any strain during work as a plumber, or in straightening the fender, was not of the type of sudden tension which would be most likely to produce such a lesion.

At the hearing before the referee, the physician testified that, ordinarily, he would expect one whose aorta was ruptured to have shown distress of some kind, or some evidence of shock, such as cold sweat or pain in the chest, at the time of the injury. He admitted that it was possible that the lesion may have occurred at some later time, and that it might have been caused by some other accident. The physician was asked: "Then if we admit that there is no evidence of injury, if we eliminate guess work, is it not true that the cause of the lesion is unknown?" "Yes," was the reply. He agreed that a rupture of the aorta could happen spontaneously because of disease or weakened condition. It was also his opinion that persons "who suffer with a condition known as medical necrosis are subject to spontaneous rupture of the aorta," and to detect such a condition it would be necessary for a physician "to refer to microscopic study." No such examination was made in this case, he said. However, his final conclusion was that "the rupture of the aorta was the direct result of the jolt or shock which he [Henslick] got in the accident."

Before making a decision, the referee requested the assistant medical director of the commission to state whether he had "correctly evaluated the medical probabilities that there was no causal connection" between the accident and the death. The response to this inquiry was: "I have reviewed the record—I find that you have correctly evaluated medical probabilities." The referee then reported to the commission that the injury was not compensable under the "going and coming" rule; that the "deceased did not sustain injury arising out of and occurring in the course of his employment"; and that "death [was] caused by the collision of the automobiles." In accordance with this report, the commission found that Henslick died "as the result of an automobile collision"; but that his death "was not caused or hastened by injury arising out of and occurring in the course of his employment." The referee, upon the ground of clerical error, later changed his report to read "that death of the employee * * * was not the result of an automobile collision."

The applicants' petition for rehearing was considered by Referee McCredie, who recommended that a rehearing be granted. Upon the basis of his report, the commission granted the petition and thereafter ordered Referee Campbell to formulate findings of fact and an award in favor of the applicant. At the time the order for rehearing was made by the commission, the transcript of the testimony taken at the hearing before Referee Campbell had not been filed.

In accordance with the commission's directive, Referee Campbell prepared findings and an award but included in them his dissenting views. He also noted that the order for the rehearing had been made before either the commissioners or Referee McCredie had read the transcript of the evidence.

The petitioner contends that there is no evidence to support the finding that the employees sustained injury arising out of and occurring in the course of his employment. Under the facts presented, it is clear that the accident falls within the purview of the "going and coming" rule. Furthermore, it is said, there is no evidence that the accident was industrial. The collision occurred on a public highway before working hours and the employee was a long distance from the place where he performed his duties. Upon the second decisive issue of the case there is no substantial evidence, the insurer declares to support the finding that Henslick's death resulted from the automobile accident. The only medical opinion upon which that conclusion may be based rests upon erroneous assumptions drawn from conjecture and surmise. The autopsy surgeon's conclusion was nothing more nor less than a series of guesses and speculations as to the cause of the ruptured aorta, and such evidence is insufficient.

In conclusion, the petitioner urges that the commission acted without and in excess of its powers in directing the formulation of the decision after rehearing contrary to the findings and recommendations of the trial referee and without itself resorting to the record; moreover, the decision rests upon the recommendations of a referee who did not hear the evidence nor read the transcript. The petitioner argues that, under sections 5313 and 5315 of the Labor Code, if the commission abides by the recommendations and report of the referee who heard the evidence, there is no requirement for it to review the transcript, but a contrary award may be made only after an independent examination of the record.

In support of the award, the respondents urge that Henslick's injury arose out of and occurred in the course of his employment. There is sufficient evidence to support the finding to that effect because the employee was going to his place of work upon premises controlled by his employer. It is also asserted that the injury received during the accident was the proximate cause of Henslick's death. They rely upon the testimony of the autopsy surgeon and argue that the cause of death is a question exclusively for experts.

Finally, the respondents defend the commission's procedure on rehearing, which they say was in accordance with the law and constituted due process. They point out that, at the time of granting a rehearing, the commission had before it the full transcript of the coroner's inquest, which included testimony concerning the circumstances at the time of the collision and also the opinion of the autopsy surgeon. The granting of a rehearing is not a final order, and the rules applicable to the reversal of an award are not pertinent. The award of compensation is justified by them upon the ground that, at the time of the decision on rehearing, the transcript of testimony presented to the trial referee was before the commission.

[1-3] In compensation law the general rule is well established that injuries received by an employee while going to or coming from his place of work are not compensable. California Cas. Ind. Exch. v. Industrial Acc. Comm., 21 Cal.2d 751, 754, 135 P.2d 158; Freire v. Matson Navigation Co., 19 Cal.2d 8, 11, 118 P.2d 809; Smith v. Industrial Acc. Comm., 18 Cal.2d 843, 846, 118 P.2d 6; Enterprise Foundry Co. v. Industrial Acc. Comm., 206 Cal. 562, 565, 275 P. 432; California Casualty Indem. Exch. v. Industrial Acc. Comm., 190 Cal. 433, 435, 213 P. 257. However, in applying this general rule to borderline cases, the term "employment" has been held to include "not only the doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done." California Cas. Ind. Exch. v. Industrial Acc. Comm., supra, 21 Cal.2d at page 754, 135 P.2d at page 161; see, also, Fireman's Fund, etc., Co. v. Industrial Acc. Comm., 61 Cal.App.2d 335, 338, 143 P.2d 104; Bethlehem Steel Co. v. Industrial Acc. Comm., Cal.App., 161 P.2d 59. In further clarification of the general rule it

has been held that injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment. California Cas. Ind. Exch. v. Industrial Acc. Comm., supra, 21 Cal.2d at page 757, 135 P.2d 158; Smith v. Industrial Acc. Comm., supra, 18 Cal.2d at page 847, 118 P.2d 6, and cases cited therein. Also, it is well settled that if the employment creates a special risk, an employee is entitled to compensation for injuries sustained within the field of that risk. The employee may be subject to such a risk as soon as he enters the employer's premises, or the necessary means of access thereto, even when the latter is not under the employer's control or management. Freire v. Matson Navigation Co., supra, and cases cited therein.

In the case of California Cas. Ind. Exch. v. Industrial Acc. Comm., supra, an employee was returning from a personal errand and caught her heel in the hem of her skirt as she was alighting from her own automobile which was parked in a driveway provided by the employer for the use of customers' and employees' vehicles. The driveway was but a few feet from the main entrance to the place of work and an award of compensation was affirmed. Because the injury was sustained upon the premises of the employer while the employee was going to work, this court held, the evidence supported the commission's finding that the injury arose out of and occurred in the course of the employment.

More closely in point is Freire v. Matson Navigation Co., supra. A janitor had taken a taxicab to the pier where the ship upon which he worked was berthed. As he stepped from the cab he was struck by an auto driven by a fellow employee. This court held that, because the employment created a special risk which the employee encountered as he was traveling by a necessary means of access to the employer's premises, he could not maintain an action for damages.

The most liberal application of this rule was made in Smith v. Industrial Acc. Comm., supra. An employee at the Golden Gate International Exposition had "checked out" at the administration office and was proceeding homeward by way of the ferry terminal on a truck maintained by the employer but not provided for that purpose. The employee was riding upon the back of the truck without the driver's consent and, apparently, without his knowledge. The roads on the island, although used by the public, were under the control of the employer. On the way to the terminal, the employee jumped from the truck while it was in motion and sustained injury. Applying the rule that injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and occurred in the course of the employment, compensation was allowed.

In the present case the evidence shows a collision between the employee's automobile and another car while he was entering a parking lot adjacent to the place of work and maintained by the employer for the exclusive use of employees. The evidence shows that the Henslick vehicle was halfway into the lot when the impact occurred and was shoved against another automobile parked on the lot. Under such circumstances, it may reasonably be said that, at the time of the accident, the employee was on premises maintained by the employer.

Also there is evidence that the parking lot was a means of access to the place of work. It was necessary for an employee, approaching from the direction traveled by Henslick, to cross in front of a line of considerable on-coming traffic in order to reach the lot. According to the testimony, employees, after identification at the lot, parked their automobiles, obtained time cards and went on to their particular stations. The lot was adjacent to the shipyards, which evidently covered a considerable area, and was a part of its necessary activities. See Freire v. Matson Navigation Co., supra, 19 Cal.2d at page 12, 118 P.2d 809.

[4] Although the accident took place three and one-half blocks from Henslick's station, at the time when it occurred he was on the way to his place of duty on premises maintained by the employer as a means of

access to the plant. The fact that the accident happened some minutes before the employee was to begin work is immaterial. Freire v. Matson Navigation Co., supra, 19 Cal.2d at page 13, 118 P.2d 809. As stated in Cudahy Packing Co. of Nebraska v. Parramore, 263 U.S. 418, 426, 44 S.Ct. 153, 155, 68 L.Ed. 366, 30 A.L.R. 532 (quoted with approval in Freire v. Matson Navigation Co., supra, 19 Cal.2d at page 13, 118 P.2d 809): "The employment contemplated * * * entry upon and departure from the premises as much as it contemplated * * * working there, and must include a reasonable interval of time for that purpose." What is a reasonable time depends upon the nature of the employment, the location and distances between different parts of the employer's premises, the difficulty of access thereto, and other significant factors.

[5, 6] Furthermore, the fact that an accident happens upon a public road and the danger is one to which the general public is likewise exposed, does not preclude the existence of a causal relationship between the accident and the employment if the danger is one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree. Freire v. Matson Navigation Co., supra, 19 Cal.2d at page 12, 118 P.2d 809. Also it is of no particular significance that the entrance used by the employee is not the exclusive means of access provided. California Cas. Ind. Exch. v. Industrial Acc. Comm., supra, 21 Cal.2d at page 756, 135 P.2d 158. Applying these rules, the automobile collision arose out of and while Henslick was acting in the course of his employment.

[7] The cause of death, petitioner concedes, was a question for the determination of medical experts, but it contends that the opinion of the experts as to the cause of the ruptured aorta was based upon mere surmise and conjecture and not within the field of expert testimony. However, the opinion of a qualified medical witness with reference to the origin and cause of the injury or death is evidence which will support an award. Pacific Emp. Ins. Co. v. Industrial Acc. Comm., 19 Cal.2d 622, 629, 122 P.2d 570, 141 A.L.R. 798. The autopsy surgeon testified that, in his opinion, the rupture which caused Henslick's death was the result of the jolt received in the automobile accident. It was the only element in Henslick's history, he said, which would account for the death because of "this particular form of lesion of the aorta."

[8, 9] The physician's opinion was, in part, based upon the fact that the aorta was otherwise normal, the employee had been in good health, and he received a heavy jolt in the collision. The record shows some symptoms of illness on the evening of the accident. Henslick did not feel well, he spent a restless night, he complained of being tired the next morning, and he did not work in the garden that day as he had planned to do. All reasonable inferences must be indulged to support the findings of the commission; reasonable probability, not absolute certainty, is all that is required. Pacific Emp. Ins. Co. v. Industrial Acc. Comm., supra, 19 Cal.2d at page 629, 122 P.2d 570. This evidence, therefore, is a sufficient basis for the determination of the commission upon the issue of the cause of the lesion. Each case must be considered upon its own particular facts, and the decisions relied upon by petitioner are distinguishable upon that ground.

[10] Under section 5315 of the Labor Code, if the commissioners follow the recommendations of the referee who heard the evidence or read the record, they need not themselves review the evidence; however, if they make a contrary determination they are required to make an independent examination of the record. Bethlehem Steel Co. v. Industrial Acc. Comm., 42 Cal. App.2d 192, 194, 108 P.2d 698; Taylor v. Industrial Acc. Comm., 38 Cal.App.2d 75, 82, 100 P.2d 511. However, this rule applies only to a final award by the commission and not to preliminary orders, such as the granting of a rehearing.

[11] In the present case, it appears that the commission based its final decision on rehearing upon findings in favor of a death benefit prepared by Referee Campbell who, it is conceded, heard the evidence and read the transcript. If, as the petitioner contends, the commission disregarded the "true"

findings of Referee Campbell, it had the authority to do so upon a consideration of the record. Labor Code, §§ 5315. And as the return to the writ of review shows that the commission had before it the transcript of the evidence in the proceedings two days before it requested Referee Campbell to prepare findings and 18 days before the award upon rehearing was rendered, this court must presume that the decision was made after a consideration of the record. Pacific Emp. Ins. Co. v. Industrial Acc. Comm., supra, 19 Cal.2d at page 633, 122 P.2d 570.

The award is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.




75 Cal.App.2d 69

## HIGGINS v. COYNE.

Civ. 13062.

District Court of Appeal, First District, Division 1, California.

June 21, 1946.

Hearing Denied Aug. 19, 1946.

**1. Courts ⇐23**

Where a court is wanting in jurisdiction, it may not assume to exercise such jurisdiction, even though the parties consent thereto and actively participate in the trial.

**2. Forcible entry and detainer ⇐16(3)**

Where unlawful detainer action was properly within the jurisdiction of justice court, defendant's answer alleging that title to property rested in defendant and that trustee's deed under which plaintiff claimed was a nullity because deed of trust was not signed by any one owning or having an interest in the property, did not deprive justice court of jurisdiction. Civ.Code, § 2924; Code Civ.Proc. §§ 112, 1161a.

**3. Forcible entry and detainer ⇐6(2)**

Questions of title cannot generally be litigated in unlawful detainer actions.

**4. Forcible entry and detainer ⇐6(2)**

To limited extent of proving deraignment of title in manner expressly provided for in unlawful detainer statutes, question of title may be tried in an unlawful detainer action. Code Civ.Proc. §§ 112, subd. 1(b), 1161a; Civ.Code, § 2924.

**5. Justices of the peace ⇐36(7), 43(4)**

The phrase excepting from the grant of jurisdiction to justice's court of Class A, cases at law involving title or possession of real estate, refers to grant of jurisdiction of law actions in which demand or value of property in controversy is $1,000 or less, rather than to the grant of jurisdiction in forcible entry or forcible or unlawful detainer actions. Code Civ.Proc. § 112.

**6. Judgment ⇐747(6)**

A judgment in an action in unlawful detainer is not a bar to a subsequent action to determine the title to the real property involved.

**7. Courts ⇐472(7)**

Justice's court Class A has original and exclusive jurisdiction in proceedings in forcible entry or forcible or unlawful detainer where rental value is $100 or less per month and where whole amount of damages claimed is $1,000 or less. Code Civ.Proc. § 112, subd. 1 (b); Const. art. 6, § 5.

**8. Forcible entry and detainer ⇐6(2), 16(3)**

Where plaintiff in unlawful detainer action alleged that his title to property was deraigned and perfected through proceedings had under power of sale contained in a trust deed, defendant was entitled to challenge legality of those particular proceedings and have that limited issue tried and determined in justice's court, the action otherwise being within the jurisdiction thereof. Code Civ.Proc. §§ 112, subd. 1(b), 1161a; Civ.Code, § 2924.

**9. Forcible entry and detainer ⇐6(2)**

In an unlawful detainer action by purchaser at a trustee's sale, occupant of property, as defendant, could not go behind the sale proceedings and attack validity of deed itself upon ground that signature of trustor was a forgery, thereby opening the

broad question of title to the property. Code Civ.Proc. § 1161a.

**10. Forcible entry and detainer ⇐16(3)**

In unlawful detainer brought in Class A justice's court by purchaser at trustee's sale against occupant of property, inclusion of allegations in answer, attempting to raise broad question of title, did not oust justice's court of jurisdiction to determine issues raised by answer concerning legality of sale proceedings had under trust deed, since justice's court could restrict trial to legitimate issues of fact. Code Civ.Proc. §§ 112, 1161a; Civ.Code, § 2924.

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Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Unlawful detainer action by Barney Higgins against Lucille Coyne, originally commenced in a Class A justice's court and transferred to the superior court. From a judgment for plaintiff, defendant appeals.

Reversed with directions to retransfer to justice's court.

Jerome F. Macdonald, of Redwood City, for appellant.

Owen D. Richardson, of San Jose, for respondent.

KNIGHT, Justice.

This is an appeal by defendant from a judgment rendered in the superior court in an action in unlawful detainer. The action was brought in a "Class A" justice's court and by that court, of its own motion, transferred to the superior court upon the ground that the answer raised an issue involving the title to real property. The cause was then tried in the superior court on the merits, and judgment was rendered in favor of plaintiff.

[1] It is defendant's contention that the allegations of the answer did not have the effect of ousting the justice's court of jurisdiction; that it remained exclusively at all times within the justice's court, and that therefore the order of transfer and all subsequent proceedings had in the superior court, including the rendition of the judgment, are void. As pointed out by plaintiff, defendant made no objection to the superior court proceeding with the trial of the cause, but on the contrary actively participated therein by introducing evidence in support of the defense set up in the answer. The law is well settled, however, that if a court is wanting in jurisdiction to hear and determine an action it may not assume to exercise such jurisdiction, even though the parties consent thereto and actively participate in the trial. 7 Cal.Jur. 598.

The action was based on section 1161a of the Code of Civil Procedure, which is incorporated in Chapter 4, Title 3, Part 3, relating to actions in forcible entry and unlawful detainer. The pertinent provisions of the section read: "In either of the following cases, a person who holds over and continues in possession of real property, after a three-day written notice to quit the same, shall have been served upon him, or if there is a subtenant in actual occupation of the premises, also upon such subtenant, as prescribed in Section 1162 of the Code of Civil Procedure, may be removed therefrom as prescribed in this chapter. * * * 3. Where the property has been duly sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by him, or a person under whom he claims, and the title under the sale has been duly perfected. * * *" The actions authorized by the foregoing section may be brought either in the superior court or in the justice's court, according to the amount of the rental value of the property and the damages claimed. American Nat. Bank v. Johnson, 124 Cal.App.Supp. 783, 11 P.2d 916.

Section 112 of the Code of Civil Procedure declares: "Justices' courts shall have original jurisdiction of civil cases and proceedings as follows: 1. Justices' courts of Class A shall have original jurisdiction: (a) In all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to one thousand dollars ($1,000) or less, except cases at law which involve the title or possession of real estate or the legality of any tax, impost, assessment, toll or municipal fine; (b) In all proceedings in forcible entry or forcible or unlawful detainer where the rental value is one hundred dol-

lars ($100) or less per month, and where the whole amount of damages claimed is one thousand dollars ($1,000) or less, and in such proceedings any competent evidence may be given, and any question properly involved therein may be determined; * * *." The remaining subdivisions are not here involved.

In the present action plaintiff alleged that he was the owner and entitled to the possession of the real property described in the complaint; that he was the successor in interest of E. C. Ketcham; that the latter purchased the property at a trustee's sale held pursuant to a power of sale contained in a trust deed executed by H. J. Woody as trustor, and naming Ketcham as beneficiary; and that title to the property had been perfected by the execution and delivery of a trustee's deed which was filed for record in the recorder's office and recorded on September 7, 1943. It was further alleged that the statutory three day notice to quit had been given, and that the rental value of the property was $30 a month; that on account of defendant's holding over and continuing in possession plaintiff had suffered damages in the sum of $10, and will continue to suffer rental loss in the sum of $1 a day. The relief asked for was the restitution of the premises, $10 damages, $1 a day for the use of the premises, and that the damages be trebled.

Defendant's answer denied plaintiff's ownership and right of possession; and she alleged that she was the sole owner thereof. She admitted that there was a "purported" sale of the property in accordance with section 2924 of the Civil Code; but she denied that the deed of trust pursuant to which the sale was made was ever executed by Woody. The answer then goes on to allege "that the purported deed of trust * * * was never signed by the said H. J. Woody, or anyone owning or having an interest in said real property; that all proceedings for the sale of said real property pursuant to the terms of said purported deed of trust were, and are, invalid and void." The prayer of the answer was that plaintiff take nothing by his action and that defendant be dismissed with costs. In addition to the facts alleged in the pleadings it appears from the record on appeal that the trust deed was dated April 15, 1940; that it was recorded on April 18, 1940; that the trustee's sale took place on August 23, 1943; that Ketcham became the purchaser, and that on February 26, 1945, he conveyed the property by grant deed to plaintiff. It also appears that defendant's claim of title was based on the admitted fact that Woody conveyed the property to her in 1940, by deed, "subject to all liens"; and that the deed was recorded in 1942.

[2-4] Defendant's contention that the justice's court was not ousted of jurisdiction to hear and determine the action must be sustained. Hewitt v. Justice's Court, 131 Cal.App. 439, 21 P.2d 641; Cheney v. Trauzettel, 9 Cal.2d 158, 69 P.2d 832. As will be noted, the last clause of subdivision 1(b) of section 112 declares that "in such proceedings [in forcible entry or forcible or unlawful detainer] any competent evidence may be given, and any question properly involved therein may be determined"; and in the two cases last cited it was held that while under such a clause the broad question of title cannot be raised or litigated by cross-complaint or affirmative defense in an unlawful detainer proceeding, an issue of title may be tried to the limited extent stated in those two cases. In this regard the court in the Hewitt case said [131 Cal.App. 439, 21 P.2d 643]: "It is clear, of course, that questions of title cannot generally be litigated in an unlawful detainer action. But to the limited extent of proving deraignment of title in the manner expressly provided for in the unlawful detainer statutes themselves the question of title not only may, but must, be tried in such actions if the provisions of the statutes extending the remedy beyond the cases where the conventional relation of landlord and tenant exists are not to be judicially nullified." The decision in that case received the approval of the Supreme Court in Berkeley G. B. & L. Ass'n v. Cunningham, 218 Cal. 714, 24 P.2d 782. The Hewitt case involved the section 838 of the Code of Civil Procedure which was repealed in 1933. Nevertheless, the decision in that case is in point here for the reason that the particular language used in section 838, which the court there construed, is the

same as that embodied in the last clause of subdivision 1(b) of section 112.

In the second case, Cheney v. Trauzettel, supra [9 Cal.2d 158, 69 P.2d 833], the defendant sought to maintain a cross-complaint setting up his own title in opposition to the plaintiff's and the trial court struck out the cross-complaint. In affirming the trial court's ruling the Supreme Court said: "The trial court properly held that in the summary proceeding in unlawful detainer the right to possession alone was involved, and the broad question of title could not be raised and litigated by cross-complaint or affirmative defense. See Arnold v. Krigbaum, 169 Cal. 143, 146 P. 423, Ann.Cas. 1916D, 370; Bekins v. Trull, 69 Cal.App. 40, 230 P. 24. It is true that where the purchaser at a trustee's sale proceeds under section 1161a of the Code of Civil Procedure he must prove his acquisition of title by purchase at the sale; but it is only to this limited extent, as provided by the statute, that the title may be litigated in such a proceeding. Hewitt v. Justice's Court, 131 Cal.App. 439, 21 P.2d 641; Nineteenth Realty Co. v. Diggs, 134 Cal. App. 278, 25 P.2d 522; Berkeley Guarantee Building & Loan Ass'n v. Cunnyngham, 218 Cal. 714, 24 P.2d 782."

[5, 6] In support of the order of transfer plaintiff relies largely on the exception set out in the last clause of subdivision 1(a) of section 112. An examination of section 112 makes it clear, however, that subdivision 1(a) pertains only to "all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to one thousand dollars ($1,000) or less * * *"; whereas subdivision 1(b) of section 112 deals exclusively with "proceedings in forcible entry or forcible or unlawful detainer * * *." Therefore it would amount to a distortion of the language of both subdivisions to hold that the exception noted in subdivision 1(a) applied to the class of proceedings specified in subdivision 1(b). Furthermore it is evident that if it were held in accordance with plaintiff's contention that justice's courts, in unlawful detainer cases, are precluded from receiving any evidence whatever of title, such holding would be in direct conflict with the law as laid down in the Hewitt and Cheney cases, and to that extent would render the last clause of subdivision 1(b) of section 112 meaningless. It should be mentioned also that it has been repeatedly held that a judgment in an action in unlawful detainer is not a bar to an action to determine the title to the real property involved in the former action. Bekins v. Trull, 69 Cal. App. 40, 230 P. 24, cited in the Cheney case, supra.

[7] Plaintiff further contends that the jurisdiction conferred upon the justice's court by subdivision 1(b) of section 112 is an "original" jurisdiction only, and not "exclusive" jurisdiction, and that therefore by virtue of section 5 of Article VI of the Constitution the superior court is given concurrent jurisdiction with justice's courts in actions brought under section 1(b). There is no merit in the contention. Holm v. Davis, 8 Cal.App.2d 328, 47 P.2d 537. In the case just cited the court states: "It is settled that in such cases [falling within the provisions of subdivision 1(b) of section 112] the jurisdiction of such justice court would be original and exclusive. Shipp v. Superior Court, 209 Cal. 671, 289 P. 825; Larson v. Du Bain, 135 Cal.App. 433, 27 P.2d 393."

[8] In the present case, therefore, since plaintiff alleged that his title to the property was deraigned and perfected through proceedings had under a power of sale contained in a trust deed, the defendant, under the law laid down in the Hewitt and Cheney cases, was entitled to challenge the legality of those particular proceedings and to have that limited issue tried and determined in the justice's court.

[9, 10] It is true, as plaintiff argues, that defendant incorporated in her answer allegations indicating that she was attempting to go behind those proceedings and attack the validity of the deed itself upon the ground that the signature of the trustor attached thereto is a forgery, which obviously in the present action she is not permitted to do, for by so doing she would open up the broad question of the title to the property. But even so, the inclu-

sion of those objectionable allegations did not have the effect of ousting the justice's court of jurisdiction to hear and determine the issues raised by her answer concerning the legality of the sale proceedings had under the trust deed because very properly the justice's court could order the objectionable allegations of the answer stricken out (Cheney v. Trauzettel, supra) or exclude any evidence offered in support thereof (Subd. 1(b), Sec. 112, Code Civ. Proc.), and thereby restrict the trial to the legitimate issues of fact.

The judgment of the superior court is reversed, with directions to re-transfer the cause to the justice's court to be tried and determined in accordance with the law as laid down in the Hewitt and Cheney cases.

PETERS, P. J., and WARD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.




75 Cal.App.2d 189

**In re AUCLAIR'S ESTATE.**

**Civ. 13087.**

District Court of Appeal, First District, Division 1, California.

June 28, 1945.

**1. Descent and distribution ⇐14**

The word "issue" in statute providing that if decedent leaves neither spouse nor "issue", and estate or any portion thereof is separate property of previously deceased spouse, property goes in equal shares to children of deceased spouse and to their descendants by right of representation, refers to lineal descendants to any degree. Probate Code, § 229.

See Words and Phrases, Permanent Edition, for all other definitions of "Issue".

**2. Descent and distribution ⇐14**

Where father of two daughters on remarrying executed a joint tenancy deed of his separate property to himself and his second wife who had children by predeceased husbands, and father died so that his property vested in second wife, and second wife thereafter died intestate, two daughters had no right of heirship in estate of their father's second wife.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Proceeding in the matter of the estate of Annie T. Auclair, deceased. From an order denying heirship of Wanda A. Rose and Wilma Auclair, daughters of a predeceased husband of Annie T. Auclair, deceased, in the estate of Annie T. Auclair, they appeal.

Order affirmed.

Andrew P. Costelli and Girard N. Richardson, both of Oakland, for appellants.

Phillips, Munck & Niemand, of Oakland, for respondent.

WARD, Justice.

This is an appeal from an order denying the heirship of Wanda A. Rose and Wilma Auclair, daughters of a predeceased husband, in the estate of Annie T. Auclair who died intestate. From an agreed statement the following pertinent facts appear: George Auclair and Annie Petty (Auclair) were married on October 31, 1939; George Auclair died March 3, 1941; Annie Auclair died September 13, 1943. At the time of the marriage of George and Annie, George held title to certain real estate which was the separate property of George at the time of its acquisition. On November 29, 1940, George executed a joint tenancy deed to said property to himself and his wife Annie and at the same time filed a declaration of homestead on the premises described in the joint tenancy deed; the deed and declaration were duly filed and recorded. It is stipulated by the parties that the real property vested in Annie T. Auclair on the death of George Auclair; that "Administratrix Hazel Dean Elmer, Ida Belle Curtis and George Petty are issue of Annie T. Auclair and prior pre-deceased husbands. Contestants Wanda A. Rose and Wilma Auclair are issue of George Auclair and a prior pre-deceased wife. There was

no issue of the marriage between Annie T. Auclair and George Auclair."

[1] The sole question to be decided is the applicability of Probate Code sec. 229 to the facts. Sec. 229 reads: "If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead or in a joint tenancy between such spouse and the decedent, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, * * *." Annie Auclair left no spouse but three children survive, the issue of Annie and prior predeceased husbands. The word "issue" may be used with various meanings, depending upon the intent as used. 22 Words and Phrases, Perm.Ed., p. 713 et seq. As it appears in section 229 it definitely refers to lineal descendants to any degree. 2 Jarman on Wills, 109; Page on Wills, Lifetime Edition, Vol. 3, sec. 1027; 33 C.J., § 5, pp. 818, 819; Jackson v. Jackson, 153 Mass. 374, 26 N.E. 1112, 11 L.R.A. 305, 25 Am.St.Rep. 643; In re Estate of Cavarly, 119 Cal. 406, 51 P. 609; In re Estate of Carothers, 161 Cal. 588, 119 P. 926; In re Estate of Briggs, 186 Cal. 351, 199 P. 322; Musson v. Fuller, 57 Cal.App.2d 5, 133 P.2d 682.

It is appellants' position that the word "issue" in the above section must be read in conjunction with the purposes which are set forth in the majority opinion in Re Estate of Perkins, 21 Cal.2d 561, 134 P.2d 231. The Supreme Court of this state, after citing previous decisions, declared in Re Estate of Perkins, 21 Cal.2d at pages 569, 570, 134 P.2d at page 236: "By these sections [Probate Code, 228 and 229], the court has said, the Legislature intended that a lineal descendant of the predeceased spouse should succeed to all property of the surviving spouse in which the predeceased spouse owned an interest; if there were no lineal descendants of either spouse, the property should then be divided equally between the respective families of the two spouses by whose efforts it was accumulated. If, however, the property had originally come to the predeceased spouse by other means than his efforts during the existence of the marriage, such as acquisition before marriage, or by gift, devise, or bequest subsequent to the marriage, then the Legislature intended that such property should descend, upon the death of the survivor, entirely to the family of the predeceased spouse." Considerable argument is presented based upon the statement in Re Estate of Perkins that the property "should go to the family or families of the spouse or spouses through whose efforts the estate was accumulated." The sentence in which the above statement appears is qualified and limited therein to one who dies "intestate [and] without issue" as in Re Estate of Nielsen, 65 Cal.App.2d 60, 149 P.2d 737. Further in support of this position appellants rely on isolated statements in In re Estate of Putnam, 219 Cal. 608, 28 P.2d 27; In re Estate of Rattray, 13 Cal. 2d 702, 91 P.2d 1042; In re Estate of Perkins, supra; and In re Estate of Taitmeyer, 60 Cal.App.2d 699, 141 P.2d 504. In the Putnam case the contest was between the daughter of decedent's predeceased husband and the second or surviving husband and other heirs of the deceased. In the Rattray case a brother, sister and nieces and nephews of the decedent were placed in competition with brothers and a sister of the predeceased husband. In Re Perkins' Estate the decedent wife died intestate leaving as her sole survivors three sisters, the appellants, and the respondent, the son of her predeceased husband by a previous marriage. In Re Estate of Taitmeyer the contest was between decedent's sister and the daughter of the predeceased husband by a former marriage. In none of those cases did the *decedent* leave children by any predeceased spouse or by a subsequent marriage. Certain statements in the cited cases are the result of general comment and can not be considered as specific holdings on the point here involved as in none of the four cases was the attention of the court called to this problem—namely, that the surviving spouse upon death left issue by a marriage prior to that with the predeceased husband, who

placed his separate property in joint tenancy with decedent.

Note the language of the section. The deceased spouse is referred to as the *deceased spouse;* the last surviving spouse as the *decedent.* The section provides that when the last surviving spouse dies without "issue" the joint tenancy property goes in equal shares to the children of the deceased spouse (In re Estate of Taitmeyer, supra) and to their descendants by right of representation, etc. The facts in Re Estate of Marshall, 42 Cal.App. 683, 184 P. 43, are somewhat similar to those in the present case. Marshall died intestate leaving certain community property and certain separate property of his predeceased spouse which he had inherited. There was no issue of the bodies of the decedent, Marshall, and the predeceased spouse from whom he inherited the property, but Marshall had a stepdaughter, the child of the predeceased wife. The court held (42 Cal. App. at page 686, 184 P. at page 44) that under the provision of Civil Code sec. 1386, subd. 8, the basis for Probate Code sec. 229, "the title to the common property having passed absolutely to the present intestate, as well also such of the separate estate of his predeceased spouse, as was set out in the report of the inheritance tax appraiser, then whatever title would, by virtue of subdivision 8 of section 1386 of the Civil Code, pass to Marjorie O'Neill must go directly to her from the estate of Thomas E. Marshall. The source of his title is immaterial so far as the extent of his estate in such property is concerned; but the source of his title would be material in establishing the identity of his heirs under subdivision 8 of the section last referred to. The respondent's relationship to her deceased mother would be the determining factor in establishing her status as an heir of Thomas E. Marshall; but the title to the property she is entitled to receive by reason of that status would not relate back for its origin, to her mother. It would come directly to her from her stepfather. She would take as the heir of Marshall [In re] Estate of Watts [179 Cal. 20], 175 P. 415."

In Re Estate of Underhill, 190 Cal. 233, 211 P. 801, Elizabeth M. Underhill was married three times. By the first husband she had two children, Paul Macy and Grace Park. By the second husband, who was a widower, she had no children, but this husband had one son, Frank Bryson, by a former wife. Upon the distribution of the second husband's estate, the widow, the decedent in the Underhill case, and the son each received over $6,000, and some personal property was likewise distributed. After the death of her second husband she married J. C. Underhill, who survived her, without issue of the two. Mrs. Underhill died intestate. Underhill, the last husband, and administrator of her estate, filed a petition for distribution, alleging that he and the children of the decedent by her first marriage were the only heirs at law. Frank Bryson, the son of the second husband by a previous wife, contested the petition and requested partial distribution to himself, which was denied. The court said (190 Cal. at pages 234, 235, 211 P. at page 801): "In contending that he is an heir at law of Elizabeth M. Underhill, deceased, in that he is a son of John M. Bryson, the predeceased spouse of the decedent, and is therefore entitled to that portion of her estate that was received by her upon distribution of the estate of said Bryson, appellant relies upon section 1386, subd. 8, of the Civil Code, relating to succession and distribution of property of deceased persons who die without disposing thereof by will, which provides in part, so far as this case is concerned, that if the deceased is a widow and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse. If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse." "There is nothing in the subdivision or in the section which leads to the conclusion that the Legislature intended to provide that, if the decedent, a widow or widower, died without issue by her or his deceased spouse, the succession should be to the kindred of

such spouse. We do not feel impelled to write such a condition into the section, for the other provisions of the statute relating to descent and distribution do not require the adoption of such a construction. None of the California cases construing this provision of the code *involved the rights of children of the decedent* [emphasis added], but the court has, in a number of instances, assumed that its provisions applied only in the absence of a will and issue. [In re] Estate of Page, 181 Cal. 537, 539, 185 P. 383; [In re] Estate of Simonton, 183 Cal. 53, 55, 190 P. 442; [In re] Estate of Brady, 171 Cal. 1, 4, 151 P. 275."

The various "succession" sections tend to carry out the purposes of the Legislature. As applied to the facts of the present case it must be borne in mind that the predeceased spouse voluntarily executed a joint tenancy deed, covering in part his separate property, to himself and his wife, the decedent in this proceeding. He could have deeded or willed the same property to his two children by a prior predeceased wife. Upon the predeceased husband's death, his widow, the decedent herein, could have deeded or willed it to any relative or non-relative without interference from any source. In re Estate of McArthur, 210 Cal. 439, 292 P. 469, 72 A.L.R. 1318; In re Estate of Taitmeyer, supra. She did not will or deed the property away. She died intestate. The section provides: "If the decedent leaves neither spouse nor issue." The word "spouse," as used in the last quotation, has some significance. Sec. 229 since 1939 provides that succession to the heirs of a predeceased spouse does not take place if there is a surviving spouse. The insertion of the word "spouse" does not indicate that the statutory scheme of succession is based solely on the material objects of a predeceased spouse's bounty. The statutory scheme is a combination of two policies benefiting close relatives of the decedent, but if none, then the close direct relatives of the predeceased spouse first, and then his or her close collateral kindred. This disposition seems fair. On the equities of the situation it should be assumed that the predeceased spouse treated his children as he judged adequate.

[2] Sec. 229 is applicable only if there is no "issue," that is, no lineal descendants from the decedent and any spouse—one prior to the predeceased spouse, the predeceased spouse, or one subsequent to the predeceased spouse. The decedent in this case left issue and sec. 229 is not relevant to the determination of heirship in this case, which eliminates consideration of the two children, the issue of George Auclair and a prior predeceased wife as heirs in this case. See article by W. W. Ferrier, Jr., written prior to the 1939 amendments, 25 Cal.Law Review, 261.

The order of December 6, 1945 insofar as it decrees and adjudges that the petition of Wanda A. Rose and Wilma Auclair to determine heirship is denied and that said petitioners are not entitled to have distributed to them any part of said estate is affirmed.

PETERS, P. J., and SCHOTTKY, J., pro tem., concur.




75 Cal.App.2d 86

**SERWAY et al. v. GALENTINE.**

**Civ. 15265.**

District Court of Appeal, Second District, Division 2, California.

June 24, 1946.

**1. Bastards ⇐3**

The statutory presumption that all children born in wedlock are legitimate is disputable and may be overcome by evidence rebutting it. Civ.Code, §§ 193, 195.

**2. Bastards ⇐6**

Defendant's evidence that she had no sexual relations with her husband after birth of her first child more than one year prior to birth of infant plaintiff negated presumption of legitimacy of infant plain-

tiff, and further evidence of defendant's continued intimacy with adult plaintiff and absence of evidence that any other man had access to defendant established fact that adult plaintiff was father of infant plaintiff. Civ.Code, §§ 193, 195.

**3. Bastards ⇐8**

Under statute providing that presumption of legitimacy can be disputed only by husband or wife or the descendant of one or both of them, father of child by a married woman, not his wife, was not a proper party plaintiff in an action to establish his paternity of the child. Civ.Code, § 195.

**4. Bastards ⇐8**

Child born as the result of the illicit relations between a married woman and a man not her husband, being a descendant of such married woman, was within the class permitted by statute to maintain an action to dispute her legitimacy and establish her paternity. Civ.Code, § 195.

**5. Bastards ⇐8**

The fact that infant's guardian ad litem in action against her mother to dispute infant's legitimacy was her father, who was not the husband of mother, although mother was a married woman, did not bar the prosecution of the action by infant, since as guardian, father was not a party to the action. Civ.Code § 195.

**6. Infants ⇐73, 77**

The court is, in effect, the guardian of an infant litigant and the guardian ad litem is but an officer and representative of the court, and in such a case it is presumed that court will look to the best interests of infant and render a decree that will establish and preserve her rights.

**7. Bastards ⇐7**

The rule of the civil law that a person born in marriage cannot be permitted to repudiate his own legitimacy, in view of express authorization of the code to the contrary, does not apply in California. Civ.Code, §§ 195, 196a, 231.

**8. Bastards ⇐5**

Mother of child is competent to dispute the legitimacy of child by testifying that it was conceived by a man not her husband. Civ.Code, § 195.

**9. Bastards ⇐13**

Evidence establishing that infant plaintiff was illegitimate, that guardian ad litem representing her was her natural father, that he publicly acknowledged himself to be her father, that he received her into his family as his child, and that he otherwise treated her as his legitimate child sustained finding that father had adopted infant plaintiff, and that she was legitimated. Civ. Code, §§ 195, 230.

**10. Bastards ⇐13**

"Family," as used in requirement for legitimation of illegitimate child that father receive child into his family, may consist only of father, mother and child, or of father and child alone. Civ.Code, § 230.

**See Words and Phrases, Permanent Edition, for all other definitions of "Family".**

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Appeal from Superior Court, Santa Barbara County; Louis C. Drapeau, Judge.

Action by Karen June Serway, a minor, by Stanford S. Serway, her guardian ad litem, and by Stanford S. Serway on his own behalf against June Galentine to establish that the infant plaintiff is the legitimate child of adult plaintiff. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Alfred D. Haines and John A. Westwick, both of Santa Barbara, for appellant.

W. P. Butcher and Dickson Montgomery, both of Santa Barbara, for respondents.

WILSON, Justice.

The purpose of this action is to obtain a decree that plaintiff Karen June Serway, now three years of age, is the legitimate child of plaintiff Stanford S. Serway. Defendant, the mother of the child, contested the action but furnished the evidence that indubitably sustains the findings and judgment in favor of plaintiffs.

Defendant was married to one Thomas Galentine on May 2, 1939, and lived with him as his wife until July 6, 1942. She gave the following testimony: In March,

1942, plaintiff Stanford Serway began living at the Galentine home in Los Angeles and while residing there had sexual intercourse with defendant on several occasions; about July 1, 1942, she gave birth to a child of which her husband was the father; she went home from the hospital with her baby on July 4, 1942; her husband was absent at the time; he returned on July 6, and immediately left their home and thereafter never had sexual intercourse with her; a few days later defendant and Serway went to Santa Barbara where they continued their illicit relations; defendant became pregnant in October, 1942; plaintiff Stanford Serway is the father of plaintiff Karen, who was born on July 15, 1943; when Karen was born defendant had her name inserted in the birth certificate as "Karen June Serway" and named plaintiff Stanford Serway as the father; defendant filed an action for divorce against her husband and obtained an interlocutory decree of divorce in November, 1943.

Upon this evidence and that hereinafter referred to the court found and adjudged that plaintiff Stanford Serway is the father of plaintiff Karen, that he adopted her as his daughter under the provisions of section 230 of the Civil Code, and that she shall at all times hereafter be treated as and deemed to be the legitimate daughter of said plaintiff Stanford Serway.

[1, 2] 1. The presumption of legitimacy. Plaintiff Karen having been born prior to the entry of the interlocutory decree of divorce, appellant argues that she was born in wedlock and is therefore presumed to be legitimate. Section 193 of the Civil Code reads: "All children born in wedlock are presumed to be legitimate." But this is a disputable presumption and may be overcome by evidence rebutting it. Section 195 provides that illegitimacy may be proved like any other fact. Defendant's evidence that she had no sexual relations with her husband after the birth of her first child, more than one year prior to the birth of plaintiff Karen, negates the presumption of the legitimacy of the latter. Likewise her evidence of her continued intimacy with plaintiff Stanford Serway and the absence of evidence that any other man had access to her establish the fact that he is the father of Karen.

2. May the action be maintained by plaintiffs or either of them? Section 195 of the Civil Code provides: "The presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. * * *"

[3] Since plaintiff Stanford Serway is not within the classifications named in said section he cannot maintain the action and is not a proper party plaintiff.

[4-6] Plaintiff Karen is a descendant of defendant who was the wife of Thomas Galentine when Karen was born and is one of those permitted by said section to maintain such an action. By bringing the action she disputes her legitimacy. The fact that she is represented by Stanford Serway as her guardian ad litem does not militate against the prosecution of the action by her. As guardian he is not a party to the action. Ocean Acc. & Guar. Corp. v. Industrial Acc. Comm., 88 Cal.App. 369, 372, 263 P. 823; O'Shea v. Wilkinson, 95 Cal. 454, 456, 30 P. 588. The court is, in effect, the guardian of the minor and the guardian ad litem is but an officer and representative of the court. Cole v. Superior Court, 63 Cal. 86, 89, 49 Am.Rep. 78. In such a case it will be presumed that the court will look to the best interests of the child and will render a decree that will establish and preserve her rights.

[7] Defendant cites Eloi v. Mader, 1 Rob., La., 581, 38 Am.Dec. 192, holding that a person born in marriage cannot be permitted to repudiate his own legitimacy. This was once a principle of the civil law (1 Rob., La., at page 584, 38 Am.Dec. 192), but in view of the express authorization of this action by section 195 of our Civil Code, the Eloi case is not in point. In re Madalina, 174 Cal. 693, 164 P. 348, 1 A. L.R. 1629, and In re Estate of Lee, 200 Cal. 310, 253 P. 145, the legitimacy of the person involved was not attacked by either husband or wife or by a descendant of either. In the Madalina case legitimacy was assailed by the People of the State of California in a prosecution for nonsupport of the alleged illegitimate child, and in the Lee case the legitimacy of the alleged

daughter of the decedent was disputed by persons not within the classification specified in section 195.

There is express statutory authority for a denial by a child of its legitimacy: (1) The duty devolves upon the father of an illegitimate minor child to provide for its support and education and the child may maintain an action against the father to enforce that duty. Civil Code, sec. 196a; Kyne v. Kyne, 38 Cal.App. 2d 122, 100 P.2d 806; Carbone v. Superior Court, 18 Cal. 2d 768, 117 P.2d 872, 136 A.L.R. 1260; Berry v. Chaplin, 74 Cal.App.2d 669, 169 P.2d 453. (2) "An action may be brought for the purpose of having declared the existence or nonexistence between the parties of the relation of parent and child, by birth or adoption." Civil Code, sec. 231. An action to that end may be prosecuted by the child. Pasquale v. Pasquale, 219 Cal. 408, 409, 27 P.2d 76. Such is the purpose of the instant action on the part of plaintiff Karen.

[8] The mother of the child, who was the wife of Galentine when Karen was born, is a party defendant and under section 195 may dispute the legitimacy of her offspring. While she has made a defense in this action by filing an answer denying many of the allegations in the complaint, she has nevertheless attested Karen's illegitimacy by freely giving the testimony hereinabove outlined.

[9, 10] 3. Sufficiency of the evidence to sustain the finding of adoption. Section 230 of the Civil Code provides: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth." All of the five elements necessary to the establishment of Karen's claim of legitimation are sustained by the evidence: (1) That she is an illegitimate child; (2) that Stanford Serway is her natural father; (3) that he publicly acknowledged himself to be her father; (4) that he received her into his family (he was unmarried) as his child; (5) that he otherwise treated her as his legitimate child. In re Estate of Flood, 217 Cal. 763, 767, 21 P.2d 579; In re Estate of Baird, 193 Cal. 225, 274, 223 P. 974; In re Estate of Gird, 157 Cal. 534, 540 et seq., 108 P. 499, 137 Am.St.Rep. 131. The "family" referred to in section 230 may consist only of the father, the mother and the child (In re Estate of Gird, supra; In re Estate of McNamara, 181 Cal. 82, 98, 183 P. 552, 7 A.L.R. 313) or of the father and child alone. In re Estate of Jones, 166 Cal. 108, 115, 135 P. 288.

After Karen was born Stanford Serway and defendant lived together as husband and wife for several months and the child lived with them; Serway introduced defendant to other persons as his wife; he brought defendant as his wife to an auto court where they registered as Mr. and Mrs. Serway and lived for several months; she was known as Mrs. Serway and by no other name; he paid for rent, groceries and doctor's services; in a previous action between defendant and Serway a stipulation was entered into relating to the right of the latter to visit the child and his obligation to pay for her support; at the auto court he referred to Karen as his daughter, played with her when he came home in the evening, and showed paternal affection for her. This evidence and the evidence of paternity heretofore related establish all of the facts required by said section 230 and referred to in Re Estate of Baird, supra.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

74 Cal.App.2d 911

## MASSACHUSETTS BONDING & INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13077.

District Court of Appeal, First District, Division 2, California.
June 17, 1946.

1. Workmen's compensation ⇐1079

The Industrial Accident Commission under the constitutional provision authorizing its creation exercises a portion of the judicial powers of the state and is, in a legal sense, a "court". Const. art. 20, § 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Court".

2. Constitutional law ⇐301

Industrial Accident Commission, even if regarded as a purely administrative agency, in exercising adjudicatory functions is bound by due process to give parties before it a fair and open hearing. Const.Cal. art. 20, § 21; U.S.C.A.Const. Amend. 14.

3. Constitutional law ⇐301

The reasonable opportunity to meet and rebut evidence produced by an opponent and the right of cross-examination are essential to a "fair and open hearing" required in compensation cases under contemplation of due process of law. Const. Cal. art. 20, § 21; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Fair and Open Hearing".

4. Workmen's compensation ⇐1700

The code section providing that transcripts of all testimony taken without notice and copies of all reports and other matters added to record otherwise than during course of an open hearing must be served upon parties to proceeding and an opportunity given to produce testimony in explanation or rebuttal thereof before decision is rendered does not contemplate that when reports are admitted during an open hearing the opposing party may be denied rights of explanation and rebuttal. Labor Code, § 5704.

5. Constitutional law ⇐301

Legislature, in relaxing in compensation cases ordinary rule that no evidence may be considered which is not taken at a hearing of which the parties have notice and which they have an opportunity to attend, was required to provide for the giving to parties affected notice of evidence so introduced and an opportunity to explain or rebut it in order to meet constitutional requirement of due process. Labor Code, §§ 5701, 5703, 5704; U.S.C.A.Const. Amend. 14.

6. Workmen's compensation ⇐1396

Where one physician's report was served upon counsel for petitioner the day before hearing and the other report served on him at the hearing, counsel's oral request at the hearing, in compliance with Industrial Accident Commission's rule of procedure, for right to produce physicians for cross-examination was timely made. Labor Code, §§ 5701, 5703, 5704, § 5307, subd. (a).

7. Workmen's compensation ⇐1396

Referee's arbitrary denial of petitioner's timely request at hearing of compensation case to meet evidence, consisting of reports of two physicians, by cross-examination and rebuttal, in light of record disclosing that physicians had offices within the city and could readily have been produced for cross-examination, was error. Labor Code, §§ 5701, 5703, 5704, § 5307, subd. (a).

8. Workmen's compensation ⇐1396

Where physicians' written reports in compensation proceedings, unlike business entries, dying declarations, res gestae statements and other recognized exceptions to hearsay rule which derive their sanction of veracity from circumstance that they are not made or uttered with litigation in mind, are testimonial in character, being expressly made for use as evidence in compensation proceedings, at least when authors of such reports are available, adverse party is entitled to put accuracy of reports to test of cross-examination. Labor Code, §§ 5701, 5703, 5704, § 5307, subd. (a).

9. Workmen's compensation ⇐1396

Where attendance of authors of medical reports of Industrial Accident Commis-

sion may be easily procured adverse parties should be accorded right to produce them for cross-examination as a part of his rebuttal evidence as well as to test accuracy of their reports. Labor Code, §§ 5701, 5703, 5704, § 5307, subd. (a).

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Original proceeding on petition of Massachusetts Bonding & Insurance Company against Industrial Accident Commission of the State of California and Florence Irene Grant Himes for a writ of review directed to an order of the commission denying a petition to reduce permanent disability rating of respondent Himes.

Order annulled and proceeding remanded to commission.

W. N. Mullen, of San Francisco, for petitioner.

R. C. McKellips and Joseph Sheehan, Associate Counsel, both of San Francisco, for Commission.

Albert Picard, of San Francisco, for respondent Himes.

DOOLING, Justice.

Petitioner by writ of review attacks an order made by the Industrial Accident Commission denying its petition to reduce the permanent disability rating of respondent Himes. At the hearing of this petition before the referee on July 6, 1945, the reports of two physicians were introduced into evidence by respondent Himes. One of these reports, that of Dr. Haldeman, had been served on the petitioner in this proceeding on the day before the hearing. The other report, that of Dr. Kistler, had not previously been served. At the close of the hearing on July 6, 1945, counsel for respondent requested:

"That the Commission refer this case to independent examiners, orthopedic and neurological, to determine the apparent conflict between the reports filed by the applicant and the reports filed by the defendant. If that request be granted, I am agreeable that the case shall stand submitted upon the receipt and filing of such reports. That not being true, I would like the opportunity to cross-examine and offer further testimony in rebuttal of reports of Drs. Kistler and Haldeman."

After some discussion the following occurred:

"Referee: The case will be held open ten days at the end of which time it will stand submitted for decision. In this ten day period I will go over the file with the idea of your offer of independent medical examiners, and if we do not send her to the independent medical examiners, then I will give consideration to your petition to cross-examine these doctors.

"Mr. Mullen: In other words, open ten days to determine whether or not my request to cross-examine or offer testimony in rebuttal on these two reports will be granted or denied and if denied, it will stand submitted. If the case is sent to independent medical examiners, the defendant waives cross-examination of the two doctors."

The petitioner's requests for independent medical examination and the right to cross-examine Drs. Kistler and Haldeman and to produce evidence in rebuttal of that given in their reports, and his petition to reduce the permanent disability rating were all denied.

It is petitioner's claim that the denial of his requests for opportunity to produce rebuttal testimony and to cross-examine the two physicians amounted, under the facts of this case, to a denial of due process of law.

[1, 2] In considering these contentions it should be borne in mind that the Industrial Accident Commission under the constitutional provision authorizing its creation, art, 20, § 21, exercises a portion of the judicial powers of the state and "in legal sense is a 'court'." Bankers' Indemnity Ins. Co. v. Industrial Accident Comm., 4 Cal.2d 89, 97, 47 P.2d 719; Lyydikainen v. Industrial Accident Comm., 36 Cal.App. 2d 298, 304, 97 P.2d 993. Even if regarded as a purely administrative agency, however, in exercising adjudicatory functions the commission is bound by the due process clause of the fourteenth amendment to the United States Constitution to give the parties before it a fair and open hearing. "The right to such a hearing is one of 'the

rudiments of fair play' (citation) assured to every litigant by the Fourteenth Amendment as a minimal requirement." Ohio Bell Telephone Co. v. Public Utilities Comm., 301 U. S. 292, 57 S.Ct. 724, 730, 81 L.Ed. 1093, 1102; Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129, 1130, 1131.

[3] The reasonable opportunity to meet and rebut the evidence produced by his opponent is generally recognized as one of the essentials of these minimal requirements (Ohio Bell Telephone Co. v. Public Utilities Comm., supra; United States v. Abilene & S. R. Co., 265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016; Olive Proration, etc. Comm. v. Agricultural, etc., Comm., 17 Cal.2d 204, 210, 109 P.2d 918) and the right of cross-examination has frequently been referred to as another, Interstate Commerce Comm. v. Louisville & N. R. Co., 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431, 434; Olive Proration, etc., Comm. v. Agricultural, etc. Comm., supra; Carstens v. Pillsbury, 172 Cal. 572, 578, 158 P. 218; Walker Mining Co. v. Industrial Acc. Comm., 35 Cal.App.2d 257, 262, 95 P.2d 188; Holmes Eureka Lumber Co. v. Industrial Acc. Comm., 41 Cal.App.2d 150, 153, 106 P.2d 23; Young v. Industrial Acc. Comm., 38 Cal.App.2d 250, 257, 100 P.2d 1062; Pacific Employers Ins. Co. Industrial Acc. Comm., 47 Cal.App.2d 713, 118 P.2d 848.

The classic statement of the rule applicable to such proceedings is found in Interstate Commerce Comm. v. Louisville & N. R. Co., supra, 227 U.S. 88, 33 S.Ct. at page 187, 57 L.Ed. at page 434: "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

The reports of the two physicians were admitted pursuant to Labor Code, section 5703, subdivision (a):

"The commission may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing:

"(a) Reports of attending or examining physicians."

Section 5704 of the same code provides: "Transcripts of all testimony taken without notice and copies of all reports and other matters added to the record, otherwise than during the course of an open hearing, shall be served upon the parties to the proceeding, and an opportunity shall be given to produce testimony in explanation or rebuttal thereof before decision is rendered."

[4] Counsel for the commission call attention to the fact that sec. 5704 in terms gives the right of explanation and rebuttal only where reports and other matters are added to the record "otherwise than during the course of an open hearing", and seem to argue that when reports are admitted during an open hearing the opposing party may be denied the rights of explanation and rebuttal. We refuse to construe the language of this section as implying such a legislative intent.

[5] The legislature may reasonably be presumed to have expected that when evidence, oral or documentary, was introduced during an open hearing the parties would be accorded as of course a reasonable opportunity to meet it. But in relaxing in sections 5701 and 5703 of the Labor Code the ordinary rule that no evidence may be considered which is not taken at a hearing of which the parties have notice and which they have an opportunity to attend, it was necessary for the legislature to give the parties affected notice of evidence so introduced and the opportunity to explain or rebut it in order to meet the constitutional requirement of due process. 42 Am.Jur. 483, 484 and cases cited supra.

With respect to the right of cross-examination petitioner calls our attention to Rule XI, subd. 3 of the Industrial Accident Commission which reads: "If any person desires to cross-examine a physician whose report is so filed, he must forthwith by letter addressed to the Commission, or orally at the hearing, request opportunity to produce the physician, and the expense of so producing the physician for questioning must be borne by the party making the request."

[6, 7] The power to adopt rules of practice and procedure is expressly given to the commission by sec. 5307, subd. (a), Labor Code. Counsel for the petitioner complied with the rule by orally requesting at the hearing the right to produce the physicians for cross-examination and, in view of the fact that one report had only been served on him the day before and the other was first served on him at the hearing, his request must be held to have been timely made. From the face of the reports it appears that the offices of both physicians were in San Francisco and, granted the opportunity requested, petitioner might readily have produced them for cross-examination pursuant to the rule. We can find no justification for the referee's action in arbitrarily denying petitioner's timely request to meet this evidence by cross-examination and rebuttal.

[8] Counsel for the commission suggests that the reports are hearsay, that the chief objection to the use of hearsay is the deprivation of the right to cross-examine, and that therefore in making reports of physicians admissible the legislature has in effect indicated a legislative intention to deprive the adverse party of the right to cross-examine the authors of the reports. The reports, though hearsay, are testimonial in character. Unlike business entries, dying declarations, res gestae statements and other recognized exceptions to the hearsay rule, which derive their sanction of veracity from the circumstance that they are not made or uttered with litigation in mind or primarily for the purpose of being used as evidence, the reports of these physicians were expressly made for use as evidence in this proceeding. At least when the authors of such reports are available, pursuant to Rule XI, subd. 3 of the commission, above quoted, the adverse party is entitled to put the accuracy of their reports to the test of cross-examination.

[9] We may suggest that cross-examination, if successful, is the most effective method of rebuttal, and frequently does away with the necessity of producing other rebuttal evidence. At least where the attendance of the authors of reports may be easily procured the adverse party should be accorded the right to produce them for cross-examination as part of his rebuttal evidence.

What we have said sufficiently shows the applicability to this case of Walker Mining Co. v. Industrial Acc. Comm., 35 Cal.App.2d 257, 95 P.2d 188; Young v. Industrial Acc. Comm., 38 Cal.App.2d 250, 100 P.2d 1062; Holmes Eureka Lumber Co. v. Industrial Acc. Comm., 41 Cal.App. 2d 150, 106 P.2d 23; and Pacific Employers Ins. Co. v. Industrial Acc. Comm., 47 Cal.App.2d 713, 118 P.2d 848, all cited supra. In the first of those cases an award was annulled because the commission denied petitioner the rights to cross-examine the claimant in another state and to have a medical examination. In the latter three, awards were annulled where the commission had received and acted on reports filed after the hearing was closed, because the petitioners were thereby deprived of the rights of cross-examination and rebuttal. It would make a farce of the law to hold that if the report is filed at the hearing the adverse party may be denied the rights of cross-examination and rebuttal but that if it is filed after the hearing he must be accorded those rights. The deprival of due process lies not in the concealment of the evidence but in the lack of opportunity for cross-examination and rebuttal which results from the concealment. There is no magic in the mere disclosure of the evidence where the adverse party is denied all right to test or countervail it.

Walsh v. Industrial Acc. Comm., 1 Cal. 2d 747, 36 P.2d 1072, is heavily relied upon by the commission. The right of cross-examination was not involved or discussed in that case and, since neither the course nor the outcome of cross-examination can be foretold, that case is not controlling here.

The order herein attacked is annulled and the proceeding remanded to the commission for further hearing.

NOURSE, P. J., and GOODELL, J., concur.

75 Cal.App.2d 30

**SEVERO v. PACHECO et al.**

**Civ. 7255.**

District Court of Appeal, Third District, California.

June 19, 1946.

**1. Easements ⇐17(4)**

Where land was purchased by a deed which specifically referred to recorded map of tract, which map depicted roadway adjacent to purchaser's land, the purchaser acquired a private right of way and easement appurtenant to her land over the entire width of the roadway for a distance of at least 150 feet used by purchaser as access to her property.

**2. Easements ⇐30(2)**

A private easement to a roadway acquired by grant is not affected by a subsequent abandonment of the roadway by board of supervisors as a public thoroughfare and private easement may survive such an abandonment.

**3. Easements ⇐30(2), 61(7)**

Where land was purchased by deed which specifically referred to recorded map of tract, which map depicted roadway adjacent to purchaser's land, and purchaser continuously used 150 feet of roadway as access to her land, purchaser's private right of way and easement to roadway for distance of 150 feet survived the abandonment of roadway by board of supervisors as a public thoroughfare, and court properly quieted title in purchaser to her private use of the roadway for that distance, even though the board of supervisors was not a party to the suit. Streets and Highways Code, § 72.

**4. Boundaries ⇐20(5)**

Where deed conveyed title to each tract by reference only to designated lot by number and letter with specific reference to recorded map of tract of which lots were a part, upon which roadway was depicted, grantees took title to center of roadway on which their property abutted, subject only to public and private easement for use of roadway.

**5. Easements ⇐30(1)**

On abandonment of easement for use of roadway, title to fee reverts to owner of land.

**6. Highways ⇐81**

On vacation of highway, where state owns only an easement, title reverts to owner of land. Streets and Highways Code, § 837.

**7. Easements ⇐36(3)**

Where deed conveyed land by reference only to designated lots by number and letter with specific reference to recorded map showing roadway, evidence, in action to quiet title after board of supervisors had abandoned public easement, supported finding that parties had never used a portion of roadway.

**8. Highways ⇐81**

Where deed conveyed title by reference only to designated lot by number and letter with specific reference to recorded map which showed a roadway and grantees used only a part of roadway, on abandonment of public easement by board of supervisors, title to fee to center of roadway was properly quieted in abutting owners. Streets and Highways Code, § 837.

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Appeal from Superior Court, San Joaquin County; Raymond R. Dunne, Judge.

Action to quiet title and for injunction by Rose Severo, formerly Rose Enos, against M. S. Pacheco, Sr., and others, wherein the defendants filed a cross-complaint. From adverse portions of the judgment, the defendants appeal.

Affirmed.

George Wadsworth, of Tracy, for appellants.

J. Kingsley Chadeayne, of Tracy, for respondent.

THOMPSON, Justice.

The defendants have appealed from a portion of the judgment which was rendered against them quieting title in plaintiff to a private easement in 150 feet of a forty foot roadway along Middle Road, lying east of Fremont Road in San Joaquin

County, and to the fee in the southerly twenty feet of the remaining portion of that roadway, to the center thereof, adjacent to her land, from said point 150 feet east of Fremont Road to the easterly line of her property. The parties acquired title to their land by deeds with reference to a recorded map of the tract upon which the roadways in question were delineated. The plaintiff obtained her private easement for use of the roadway by grant as an appurtenance to her land. The roadway was used by the parties for many years for a distance of 150 feet easterly from Fremont Road, beyond which point, the court found, the roadway had never been used by anyone. The board of supervisors formally abandoned the entire roadway as a public highway. The trial court determined that, after the declaration of abandonment as a public thoroughfare, the fee to the center of Middle Road reverted to the respective adjacent owners of land, subject to plaintiff's private easement to the entire roadway for a distance of 150 feet east of Fremont Road, and enjoined the defendants from interfering with that private right.

The complaint alleges that plaintiff for ten years last past has been the owner of twenty acres of farm land in San Joaquin County, together with an easement in "Middle Road," a forty foot roadway intervening between her property and that of the defendants, M. S. Pacheco, Sr., and Mary S. Pacheco, his wife; that the plaintiff acquired title thereto by deed with reference to the map of the "Naglee Burk Tract," of which it was a part, which map is on file in the Recorder's Office of that county and depicts said roadway, together with "Fremont Road," running at a right angle therewith and bordering her land on the west; that during all of said time she has used said Middle Road as a right of way for access to her property; that on January 31, 1944, the board of supervisors of said county formally abandoned said Middle Road as a public highway, and the defendants thereafter constructed a fence along the center line of said roadway and excluded her from the use of her private easement in and to the twenty foot strip of said roadway adjoining defendants' respective properties.

Fremont Road extends north and south adjacent to the western lines of the lands of plaintiff and the defendants, Mr. and Mrs. M. S. Pacheco, Sr. Middle Road extends easterly from Fremont Road, at a right angle, between the lands of the last mentioned parties. The defendants, M. S. Pacheco, Jr., and his wife, Mary, own two twenty acre tracts, one of which adjoins plaintiff's land on the east and the other adjoins the land of the Senior Pachecos on the east. Middle Road intervenes between the two last mentioned twenty acre tracts, after passing the property of plaintiff. Each twenty acre tract extends along said roadway a distance of about one thousand feet.

The defendants answered the complaint, denying the material allegations thereof. They also filed a cross-complaint alleging title to their respective tracts of land, the formal abandonment by the board of supervisors of Middle Road as a public highway, and their titles to the twenty foot strips of abandoned roadway adjacent to their respective properties. They asked the court to quiet title in them to their one-half of said roadway, to the center thereof, acquired by said abandonment, and to enjoin the plaintiff from using any portion thereof or from interfering therewith.

The court adopted findings favorable to the plaintiff to the effect that she acquired title to a private right of way or easement, as appurtenant to her land, by means of her deed which referred specifically to the recorded map upon which said Middle Road was depicted, and that her personal right to the use of that roadway, as distinguished from its use as a public highway, survives its abandonment by the board of supervisors as a public thoroughfare. The court found that plaintiff had continuously used that roadway as access to her property during all of the time she had owned it, for a distance of one hundred and fifty feet easterly from Fremont Road, but that it had never been used by anyone for road purpose easterly of that point. Judgment was accordingly rendered quieting title in plaintiff to a right of way in and to the entire forty foot width of said Middle Road for a distance of one hundred and fifty feet easterly from Fremont Road, and enjoining

the defendants from interfering with that vested right. The decree also quiets title in plaintiff to the fee in the southerly twenty foot strip of said roadway adjacent to her property, easterly from said point one hundred and fifty feet east from Fremont Road, to her eastern boundary line. The judgment determines that the defendants also have a right of way in said roadway for a distance of one hundred and fifty feet east of Fremont Road, jointly with the plaintiff, and that the defendants own the fee in the twenty foot strips of said roadway adjacent to their respective properties, from said point one hundred and fifty feet east of Fremont Road to the eastern boundaries of their land.

The chief controversy on this appeal is the question as to whether a private right of way or easement acquired by a grantee of land with specific reference to a recorded map of a subdivided tract, upon which said road or highway is depicted, survives a formal subsequent abandonment by a board of supervisors of the roadway as a public thoroughfare. The respondent asserts that a private right of way, so acquired by deed with reference to a recorded map, is an appurtenance to her land distinct from the right of the general public, which easement may not be terminated by a subsequent abandonment of the roadway by the board of supervisors as a public thoroughfare. She suggests that she might have claimed an easement and right of way over Middle Road for the entire length of her property instead of for only one hundred and fifty feet thereof east of Fremont Road, but that she has "chosen to abide by the decision of the trial Court" in that regard. That problem was waived. It is not an issue on this appeal.

[1] The plaintiff acquired a private right of way and easement appurtenant to her land over the entire width of Middle Road for a distance of at least one hundred and fifty feet east of Fremont Road by virtue of her deed to "Lot Five B (5B) of Map of The Naglee Burk Tract, according to the official Map or Plat thereof filed for record March 7, 1911 in Vol. 5 of Maps and Plats, page 18, San Joaquin County Records," distinct from the right of the general public to the use of said highway as a public thoroughfare, for the reason that the land was purchased by a deed which specifically referred to the recorded map of the tract of which it was a part, which map depicted the roadway adjacent to plaintiff's land. Danielson v. Sykes, 157 Cal. 686, 689, 109 P. 87, 28 L.R.A.,N.S., 1024; Syers v. Dodd, 120 Cal. App. 444, 8 P.2d 157; Swift v. Board of Supervisors, 16 Cal.App. 72, 77, 116 P. 317; Moffatt v. Tight, 44 Cal.App.2d 643, 112 P.2d 910; Richardson v. O'Hanrahan, 83 Cal.App. 415, 423, 256 P. 1103; 150 A.L.R. 652, Note; 28 C.J.S., Easements, 39, p. 701.

[2] A private easement to a roadway acquired by grant is not affected by a subsequent abandonment of the highway by the board of supervisors as a public thoroughfare. It may survive such an abandonment. Swift v. Board of Supervisors, supra; 39 C.J.S., Highways, § 141, p. 1079; 150 A.L.R. 652, Note. In the Swift case it is said [16 Cal.App. 77, 116 P. 319]:

"The board of supervisors in making the order abandoning the road merely surrender the right which have been acquired by the public. If, by grant or otherwise, rights have been acquired by an abutting property owner, such rights are unaffected by the order (Leverone v. Weakley, 155 Cal. 395, 101 P. 304), but such owner may not insist that the public shall maintain a road for his private convenience and use."

In the caption to the elaborate note which is found in 150 A.L.R. at page 652, the author states the rule as follows:

"Where lots in a subdivision are sold by reference to a map or plat upon which ways are shown which are or become public streets or highways, the private easement which arises upon such a sale survives the vacation, abandonment, or closing of the street or highway by the public."

And at page 657 of the same volume it is further said:

"Where one is deemed to acquire a private easement in a public street or highway from the mere fact that his property abuts thereon, such easement continues notwithstanding the vacation, abandonment, or closing of the street or highway."

The preceding note is supported by numerous authorities from many jurisdictions, including several California cases.

The cases relied upon by the appellants, in support of their contention that the abandonment of Middle Road by the board of supervisors terminated the private easement of plaintiff to her use of that roadway for her personal benefit, are not in point. None of those cases involves a private right of way acquired by grant which refers to a recorded map upon which the streets or highways are depicted. The cases cited by appellant are distinguishable on that ground.

[3] We conclude from the foregoing authorities that the plaintiff's private right of way and easement to the use of Middle Road, a distance of one hundred and fifty feet easterly of Fremont Road, survived the abandonment of the highway by the board of supervisors as a public thoroughfare, and that the trial court properly quieted title in plaintiff to her private use of that roadway for that designated distance. It is immaterial that the board of supervisors was not made a party to this suit. The judgment does not affect the validity of the declaration of abandonment of the road by the board for public purposes. Streets and Highways Code, § 72.

[4-8] The court properly quieted title to the fee in the lands adjacent to the properties of the respective parties to the center of Middle Road easterly from a point one hundred and fifty feet east of Fremont Road. Since the deeds to the grantees conveyed title to each tract by reference only to the designated lots by numbers and letters with specific reference to the recorded map of the tract of which they were a part, upon which Middle Road was depicted, the grantees took title to the center of the roadway upon which their properties abut, subject only to public and private easements for use of the roadway. Anderson v. Citizens' Savings & Trust Co., 185 Cal. 386, 393, 197 P. 113; Moody v. Palmer, 50 Cal. 31; Civ.Code, § 1112; 47 A.L.R. 1277, Note; 4 Cal.Jur. p. 380, sec. 8; 8 Am.Jur. p. 778, sec. 42. That rule is conceded by the respective parties. On abandonment of an easement, title to the fee reverts to the owner of the land. On vacation of a highway, where the state owns only an easement, title likewise so reverts. Streets and Highways Code, § 837. The public easement was formally abandoned by the board of supervisors. The court found that none of the parties ever used any of those portions of the roadway. There is evidence to support that finding. The plaintiff never did abandon her private easement in the road for a distance of one hundred and fifty feet east of Fremont Road. Her easement in the last mentioned portion of the roadway, to be used jointly with the defendants, was properly quieted in plaintiff.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.




75 Cal.App.2d 54

## ESTRADA v. ORWITZ.

Civ. 13048.

District Court of Appeal, First District, Division 1. California.

June 21, 1946.

Hearing Denied Aug. 19, 1946.

**1. Action ⇐48(2)**

A cause of action for assault, based upon theory of an unauthorized operation, may be joined with a cause of action based upon theory that the same operation was negligently performed.

**2. Pleading ⇐406(8)**

Where patient joined cause of action for assault with cause of action for negligence without separately stating them, but dentist did not object by special demurrer or otherwise, joinder of the two causes in the same count was not fatal. Code Civ. Proc. §§ 430, 434.

**3. Negligence ⇐111(1)**

Negligence may be averred in general terms.

4. Physicians and surgeons ⇐18(4)

A complaint alleging that, after patient was rendered unconscious by an anesthetic, dentist carelessly and negligently removed certain teeth, and alleging in the same paragraph that such teeth were removed without the consent of patient, was sufficient in absence of demurrer, to charge negligence as well as assault. Code Civ.Proc. §§ 430, 434.

5. Physicians and surgeons ⇐18(5)

In action by patient against dentist for wrongful extraction of teeth, evidence of negligence was properly admitted under the pleadings. Code Civ.Proc. §§ 430, 434.

6. Physicians and surgeons ⇐18(10)

In action by patient against dentist for wrongful extraction of teeth, instructions on negligence were proper under the pleadings. Code Civ.Proc. §§ 430, 434.

7. Assault and battery ⇐42
Physicians and surgeons ⇐18(9)

In action against dentist for wrongful extraction of teeth, conflicting testimony of patient and dentist regarding condition of the teeth prior to extraction was for the jury.

8. Damages ⇐208(1)

Damages within realm of reason as to amount would not be held excessive as a matter of law.

9. Appeal and error ⇐1004(1)
Damages ⇐208(1)
New trial ⇐76(1)

The assessment of damages is first of all the province of the jury, and, secondly, that of the trial court when passing upon a motion for new trial, and therefore an appellate court will not disturb verdict unless it is so grossly excessive as to immediately suggest that it was the result of passion, prejudice, or corruption on part of the jury.

10. Damages ⇐127

Decreased purchasing power of dollar could properly be considered in determining whether damages were excessive.

11. Assault and battery ⇐40
Physicians and surgeons ⇐18(11)

$4,000 for wrongful extraction of five teeth while patient was under an anesthetic was not excessive.

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Action by Melvin Estrada against L. D. Orwitz for wrongful extraction of teeth. Judgment for plaintiff, and defendant appeals.

Affirmed.

Robert L. Lamb and A. Dal Thomson, both of San Francisco, for appellant.

James Sykes and Leander L. James, both of San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant is a dentist. Plaintiff was his patient. On May 25, 1944, defendant extracted six of plaintiff's teeth. Plaintiff brought this action for the wrongful, unauthorized, and improper extraction of five of these teeth. The jury brought in a verdict of $4,000 for plaintiff, and from the judgment entered on the verdict defendant appeals.

The defendant makes no claim that the evidence is insufficient to support the judgment, but he urges that certain evidence was erroneously admitted and certain instructions erroneously given for the asserted reason that the evidence and instructions dealt with matters outside the issues framed by the pleadings. The only other point urged is that the damages are excessive.

The complaint as amended at the time of trial alleges that defendant is a duly licensed dentist holding himself out to the public as possessing the skill and knowledge common to dental practitioners in this community; that on May 25, 1944, plaintiff visited the defendant's office for the purpose of having one designated tooth extracted; that plaintiff so notified an office attendant; that plaintiff was then placed in a dental operating chair and an anesthetic administered; that while plaintiff was unconscious the defendant "carelessly and negligently" removed five teeth from plaintiff's jaw in addition to the one he wanted extracted; that at no time did plaintiff consent to having any but one tooth removed; that as a result of such "carelessness and negligence" on the part of defendant, "and as a result of the malprac-

tice" of defendant, plaintiff has been damaged in the sum of $7,500.

The answer of the defendant denied generally all of the material allegations of the complaint and specifically denied that defendant "was careless and negligent, or careless, or negligent, in any manner whatsoever, or at all."

The evidence produced on behalf of plaintiff at the trial admittedly supports the allegations of the complaint. The evidence objected to came into the case under the following circumstances: The plaintiff was called as the first witness, but shortly after he started to testify, a Dr. Hendricks, a San Francisco dentist, whose qualifications are not questioned, was permitted to take the stand, by consent, out of order. Over defendant's objections he was permitted to testify that when a tooth shows signs of decay or has a hole in it, there are other remedies besides extraction, namely, the insertion or installation of fillings, crowns, or inlays; that it is customary practice in San Francisco to take an X-ray of teeth and of the root before extraction.

Based on this evidence, and the evidence of defendant contradicting it, the trial court, in addition to instructing on the elements of liability in an action based on the theory of an operation without consent, instructed on the issue of negligence. The defendant objects to all of these instructions, and particularly objects to the portion of one in which it was stated: "In this case there has been a conflict in the testimony of witnesses concerning the question as to whether or not it is the custom and practice of a dentist possessing that degree of learning and skill ordinarily possessed by a dentist of good standing practicing in the City and County of San Francisco, State of California, and using the care ordinarily exercised by reputable members of his profession practicing in the same locality to take X-ray pictures of a tooth which the patient requests the dentist to extract, and the area of the jaw bone in the vicinity of such tooth. You must resolve that conflict. To that end you must weigh one expert's opinion and one witness' opinion against that of another, the reasons given by one against those of the other, and the relative credibility and knowledge of the experts and witnesses who have so testified. Therefore, you shall find in favor of that expert's testimony which, in your opinion, is entitled to the greater weight." The court also instructed that "if you find the plaintiff consented to the extraction of the teeth removed, or if, upon learning that the teeth had been extracted, the plaintiff ratified and approved the doctor's action, then your verdict must be in favor of the defendant and against the plaintiff."

[1] It is the theory of defendant that the complaint charges that defendant removed five teeth without the consent of plaintiff and it is urged that such a complaint charges an assault; that negligence is no part of such a cause of action; that it was error therefore to admit evidence and to instruct on negligence. There can be no doubt that an action based on the theory that an operation is performed without consent of the patient charges an assault and battery, and that negligence has nothing to do with such an action. Valdez v. Percy, 35 Cal.App.2d 485, 491, 96 P.2d 142. It has been held that when a complaint charges both negligence and an assault, and no evidence is introduced on the issue of negligence, it is error to instruct on that issue, and that if a complaint charges only an assault it is error to admit evidence and to charge upon the issue of negligence. Markart v. Zeimer, 67 Cal. App. 363, 227 P. 683. But it is equally clear that a plaintiff may join a cause of action for an assault, based upon the theory of an unauthorized operation, with a cause of action based upon the theory that the same operation was negligently performed. Figlietti v. Frick, 203 Cal. 246, 263 P. 534. In such event evidence is, of course, admissible on that issue and the court may properly instruct upon it.

[2, 3] The real question in the instant case, therefore, is whether the complaint simply charges an assault, or whether it also charges negligence. A reading of paragraph V of the complaint shows that plaintiff has charged both an assault and negligence. It is there averred that after plaintiff was rendered unconscious by an anesthetic the defendant "carelessly and

negligently" removed certain teeth. In the same paragraph it is also alleged that such teeth were removed without the consent of plaintiff. What plaintiff has done is to join two causes of action, one for assault, and one for negligence, without separately stating them. Defendant did not object by special demurrer or otherwise. Thus the fact that the two causes of action were joined in the same count is immaterial. §§ 430, 434, Code of Civil Procedure. Negligence may be averred in general terms, so that the failure to allege the nature of the negligence in more specific terms is immaterial.

[4] A case directly in point is Abos v. Martyn, 31 Cal.App.2d 705, 88 P.2d 797. That was an action against a chiropractor based on the theory that he had negligently treated the child of plaintiffs. There, as here, the charge of negligence was made in the most general terms. There, as here, the defendant claimed that the charge was insufficient. At page 707 of 31 Cal.App.2d, at page 798 of 88 P.2d, the court stated:

"Appellant urges that the court erred in overruling his objection to the introduction of any evidence by plaintiff on the ground that the complaint does not state facts sufficient to constitute a cause of action, in that it sets forth no facts showing any negligent act or omission nor any facts showing a causal connection between any act or omission of defendant and the death of the patient. The general rule, as stated in Smith v. Buttner, 90 Cal. 95, 27 P. 29, is that 'negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence caused or contributed to the injury.'

"It sufficiently appears from this complaint that what was done by this defendant was the administration of chiropractic treatments, which treatments, it was alleged, were negligently administered. Having alleged what was done and that the same was negligently done, the complaint was sufficient in the absence of a demurrer. While the defendant might have insisted upon greater certainty and particularity, he waived such defects by failure to interpose a special demurrer. As against a general demurrer, which is what an objection to the introduction of any evidence amounts to, the complaint is sufficient."

Under the rule announced in the above case the complaint in the instant case, in the absence of a demurrer, was sufficient to charge negligence.

[5, 6] It should also be pointed out that after defendant had objected to the questions asked Dr. Hendricks the trial court indicated that it interpreted the complaint as charging negligence, so that defendant knew that negligence was an issue shortly after the opening of the trial. The defendant also introduced evidence on the issue. He testified that X-rays were unnecessary for two reasons; that in the first place, plaintiff did not want to pay for them, and, in the second place, the teeth in question were so badly diseased that it was obvious extractions were in order. Plaintiff testified that defendant made no suggestion that X-rays be taken. Defendant also testified that because of the condition of the teeth it would have been impossible to have filled or crowned them; that had they remained in plaintiff's mouth they would have impaired his health. Plaintiff testified that the five teeth in question were in good condition. It should also be pointed out that at the end of the trial plaintiff moved to amend to conform to the proof so as to allege specifically that it was the custom in this community to take X-rays before making an extraction. This motion was denied on the ground that the complaint generally alleged negligence, and that it was not necessary to set forth the evidentiary facts.

The principal case relied upon by defendant in support of his contentions is Markart v. Zeimer, 67 Cal.App. 363, 227 P. 683. An examination of that case shows that it supports plaintiff rather than defendant. There the complaint was in two counts. The first charged negligence in certain particulars in regard to a hernia operation, and the second, in addition to recharging those negligent acts, charged that

at a second operation, undertaken to relieve plaintiff of the effects of the first, defendant, without consent, removed plaintiff's right testicle. No charge was made that the second operation was negligently performed. No evidence was introduced on the first count. The trial court submitted to the jury the question as to whether the second operation had been properly performed. The appellate court properly held that this instruction was outside the issues framed by the complaint. At page 366 of 67 Cal.App., at page 684 of 227 P., it is stated: "By instruction 'D' the question of the degree of skill and care exercised by defendants in removing plaintiff's testicle was submitted to the jury. This was without the issues. The complaint charged the defendants with a trespass in removing the testicle without his consent and against his expressed direction. No charge was made that the work of removing it was carelessly or unskillfully done. To submit this question to the jury was error." Unlike that case, in the instant case, as already pointed out, the complaint not only charges that the extractions were made without consent, but also that they were negligently and carelessly made. The necessary implication of the Markart case is that if negligence is charged and evidence is introduced on the issue, it is proper to give instructions on the standard and degree of care required of a medical man. That is the instant case.

[7] The only other point urged by defendant (without citation of authority) is that the damages are excessive. The judgment is for $4,000. There is a conflict in the evidence as to the condition of the five teeth improperly extracted. The plaintiff testified that they were all good teeth. The defendant testified that they were all badly diseased, three of them being no more than roots. The plaintiff testified that he was 31 years old, and that he had never visited a dentist before in his life. These conflicts were, of course, for the jury.

[8-11] We cannot hold, as a matter of law, that the judgment is excessive. The judgment is within the realm of reason. The rule applicable to such a situation was aptly stated in Stanhope v. Los Angeles College of Chiropractic, 54 Cal.App.2d 141, at page 148, 128 P.2d 705, at page 708, as follows: "The assessment of damages is first of all the province of the jury, and secondly, that of the trial court when passing upon a motion for a new trial, therefore, an appellate court will not disturb the verdict unless it is so grossly excessive as to immediately suggest that it was the result of passion, prejudice or corruption on the part of the jury. [Citing two cases.] Moreover, the jury's award of damages cannot be set aside on appeal where there is nothing to suggest that the jury acted through passion, prejudice or corruption." See, also, Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 785, 117 P.2d 850; Koyer v. McComber, 12 Cal. 2d 175, 182, 82 P.2d 941; Johnson v. McRee, 66 Cal.App.2d 524, 529, 152 P.2d 526. We cannot say, as a matter of law, that the jury acted through passion, prejudice or corruption. It must be remembered that the purchasing power of the dollar is much less than it was a few years ago, so that a verdict that might have been considered very high or even excessive then, would, today, be within the realm of reason. That this is a proper factor to consider on this question was recently held in Butler v. Allen, 73 Cal.App.2d 866, 167 P.2d 488, 490 (hearing denied in Supreme Court), where it was stated: "The facts warranted a verdict in a substantial amount and we cannot say that it would have been excessive in normal times. Considering the economic conditions of the period through which we are now passing, the jury cannot be criticized as having been too liberal in either element of damages. The courts will take judicial notice that the purchasing power of the dollar is sixty cents or less compared with ten years ago. Salaries and wages are higher and the cost of living is greater. The value of the sum awarded is to be measured not by the number of dollars named in the verdict but in their comparative ability to furnish the necessaries of life. O'Meara v. Haiden, 204 Cal. 354, 367, 268 P. 334, 60 A.L.R. 1381, and cases cited."

The judgment appealed from is affirmed.

WARD, J., and SCHOTTKY, Justice pro tem., concur.

74 Cal.App.2d 919

## JOHNSON v. BOARD OF POLICE AND FIRE PENSION COM'RS OF CITY OF LONG BEACH et al.

Civ. 14902.

District Court of Appeal, Second District, Division 1, California.

June 17, 1946.

Workmen's compensation ⇐2179

Provision in city charter of Long Beach that pensions therein provided for were intended to be in lieu of workmen's compensation, and that any person who would be entitled to a pension and who applied therefor should be deemed to have waived all provisions of Workmen's Compensation Act, did not bar policeman from right to pension who had received an award from the Industrial Commission because of a service-connected disability. St.1917, p. 831, as amended.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Petition by John W. Johnson against Board of Police and Fire Pension Commissioners of the City of Long Beach, Robert Swanson, George E. Merrill, and Frank Garrety, as members thereof, for a peremptory writ of mandate directing defendant to grant petitioner a pension. From a judgment for plaintiff, defendants appeal.

Judgment affirmed.

Irving M. Smith, City Atty., Nowland M. Reid, Asst. City Atty., and Clifford E. Hayes, Deputy City Atty., all of Long Beach, for appellant.

Fred M. Riedman, of Long Beach, for respondent.

WHITE, Justice.

Defendants appeal from a judgment ordering the issuance of a peremptory writ of mandate directing them to grant petitioner a pension.

The undisputed facts are that petitioner was a policeman employed by the City of Long Beach from the 1st day of August, 1928, and served continuously in such capacity until January 16, 1942, at which time his employment was terminated because of a service-connected disability which he sustained on the 27th day of March, 1937, said injury occurring in the course of and arising out of his employment as such police officer. The salary of petitioner was $200 per month, and at the time of the filing of his petition herein there was $500 due on his pension.

Petitioner bases his right to a pension on the provisions of section 187 of the Charter of the City of Long Beach, subdivision 3 of which reads as follows: "Whenever a member of the police or fire department shall become physically disabled, or by reason of bodily injury received in or by reason of sickness, while in the discharge of duties of such person in such department, as to render necessary his retirement from active service, the commission shall order and direct that such person be retired from further service from such department, and thereafter such person so retired shall, during his lifetime, be paid from the pension fund, a yearly pension equal to one-half of the amount of the salary attached to the rank of the position held by him in such department at the date of such retirement order."

The petitioner received an award from the Industrial Accident Commission of the State of California against the City of Long Beach for compensation, and thereafter, on the 3d day of February, 1942, he filed his application for pension with defendant board, and the same was denied.

The only question presented on this appeal is whether section 188 of the Charter of the City of Long Beach deprives petitioner of his right to receive a pension. The pertinent section reads as follows: "This provision is intended to be in lieu of and take the place, in so far as it applies, of the Workmen's Compensation, Insurance and Safety Act of 1917, of the State of California [St. 1917, p. 831], and amendments heretofore or hereafter to be adopted, and any person who would be entitled to a pension under the provisions of this amendment and who applies for a pension hereunder shall be deemed to have waived all provisions under the Workmen's Compensation, Insurance and Safety Act of 1917; but should it be decided by the Su-

preme Court of the State of California that the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917 cannot be waived, payments that may have been made hereunder shall be credited on the amounts allowed under said Act, and all pensions granted hereunder for causes included within the purview of said Workmen's Compensation, Insurance and Safety Act shall become null and void except as to such an amount as will, when added to the amount allowable under said Workmen's Compensation, Insurance and Safety Act, equal the total monthly pension herein provided for."

It is the contention of defendant board that because of the provisions of this section plaintiff has deprived himself of the right to receive the benefits of the pension provisions of the charter for the reason that he applied for and accepted the benefits awarded him by the Industrial Accident Commission, and which benefits are commonly referred to as "workmen's compensation." Appellants in their brief readily concede that if respondent had not applied for and received the benefits of workmen's compensation, he would be entitled to a pension, but they earnestly urge that having sought and obtained the maximum benefits provided by the Workmen's Compensation Law, respondent thereby voluntarily placed himself outside of the class for whom the pensions provided by section 187 of the charter were intended, and therefore appellant board correctly denied his application for a pension.

It is conceded that the issues raised on this appeal are identical with those presented in the case of Larson v. Board of Police etc. Commissioners, 71 Cal.App.2d 60, 162 P.2d 33 (hearing denied by the Supreme Court), in which the same claims here urged were decided contrary to the contentions of appellants. We are in accord with the holding of the court and the reasoning supporting the same in the case just cited. Upon the authority of and for the reasons stated in the case of Larson v. Board of Police etc. Commissioners, supra, the judgment from which this appeal was taken is affirmed.

YORK, P. J., and DORAN, J., concur.



75 Cal.App.2d 75

## COOPER et al. v. LOS ANGELES COUNTY et al.

Civ. 15068.

District Court of Appeal, Second District, Division 1, California.

June 21, 1946.

Rehearing Denied July 11, 1946.

Hearing Denied Aug. 19, 1946.

1. Injunction ⇐89

An action to enjoin county from erecting buildings for penal institution on leased property in violation of residential zoning restrictions was not improper as a faulty analogy to a stay pending appeal from order of city board of zoning appeals, affirming zoning administrator's order granting property owners' application for variance, because plaintiffs did not seek to restrain either such administrator's or board's acts which were completed.

2. Injunction ⇐89

An action to enjoin county from erecting buildings for penal institution on leased property in violation of residential zoning restrictions was not improper because other remedies might have been available to plaintiffs.

3. Injunction ⇐38

The superior court not only had right, but owed duty, to maintain status quo of property leased to county by granting owners of nearby property an injunction against erection of buildings for penal institution on leased property until settlement of issues raised in owners' pending action in such court to review order of city board of zoning appeals affirming zoning administrator's order granting owners of leased property a variance from residential zoning restrictions.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Alfred Cooper and others against the County of Los Angeles and others to enjoin erection of permanent buildings for a penal institution on property leased to defendant county. Judgment for defendants, and plaintiffs appeal.

Reversed.

P. Talbot Hannigan and A. Becker, both of Los Angeles, for appellants.

Jones & Hoyt and Lewis Sherman Jones, all of Los Angeles, for respondent Charleston Dow.

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, both of Los Angeles, for respondent Los Angeles County and others.

DORAN, Justice.

The trial court sustained defendants' demurrer without leave to amend and this is an appeal by plaintiffs from the judgment that followed.

The record reveals that some time before the filing of the within action, plaintiffs had filed another and different action in the Superior Court, which action is still pending, for a review of the action of the Board of Zoning Appeals of the City of Los Angeles. That action did not include, as defendants, the County of Los Angeles or any of the other defendants in the within action. It sought to enjoin the City of Los Angeles and the Board of Zoning Appeals from committing what was alleged to be a violation of the zoning ordinances of the City of Los Angeles. The property involved in that action has been leased to the County of Los Angeles, and it is alleged in the within action that said County of Los Angeles, unless restrained, will commit acts that amount to a violation of valid and existing restrictions affecting said property. It is argued in substance that the County of Los Angeles was not a proper party to the former action, hence the within action is necessary to preserve the status quo of the property involved until the issues raised by the pleadings in the fromer action are settled. It is pointed out that, unless restrained, the County of Los Angeles will proceed to improve the property with permanent buildings in violation of the restrictions and then devote said buildings and property to uses and purposes that also constitute a violation of the restrictions; that such conduct on the part of the County of Los Angeles will defeat the rights of the plaintiffs in the former action; that in such circumstances a judgment, if recovered, will be to no purpose for by that time the remedy relied on in the within action, unless sought now, will be lost by laches.

It is alleged in the within action that the plaintiffs in the former action and, "many hundreds of property owners in the surrounding contiguous territory, duly prosecuted their appeal from the order of the Zoning Administrator, and said order was in due course affirmed and approved by the Board of Zoning Appeals of said City of Los Angeles, and said plaintiffs having exhausted their remedies before the administrative authorities of said City," brought the former action. It is also alleged in the within action that the "administrative authorities", referred to above, granted the owners' application for a variance for a five year period, which, it is further alleged, said administrative authorities were without power to do. The property, it is alleged, is in territory zoned as R-1 and restricted to residential purposes. The ordinance is set forth defining zone R-1 and it is further alleged that the zoning administration and the Board of Zoning Appeals are powerless to approve a "variance from zone R-1"; that such a "variance" may only be effected by city ordinance. It is also alleged that the city ordinance relating to "variance", the procedure therefor, when variances may be granted, and the powers and duties of the Zoning Administrator with regard thereto, contains no provision authorizing or permitting any penal institution or "Probation Camp for Boys". Other pertinent provisions of the zoning ordinance are particularly set forth. It is also alleged that the granting of the variance was and is in violation of the express provisions of the ordinance, which provisions are specifically set forth. It is also alleged that the proposed change in the restriction is detrimental to surrounding property, the reasons therefor being specifically set forth; other damaging results and violations of the law are also alleged. Allegations disputing the validity of the finding of the Zoning Administrator are detailed and specific. It is also alleged that unless restrained, the County of Los Angeles threatens to and will, "expend some $27,000.00 of the moneys of the taxpayers of said County for improvements on said ten acres which,

if plaintiffs are successful in the former action, will be a total loss to the taxpayers".

Although not a complete summary of the allegations of the complaint, the foregoing is sufficient to show the character of the within action which in turn suggests the issues in the former action.

[1] Respondent contends, under a heading, "Analogy to Stay on Appeal", that "Appellants' analogy to a stay pending appeal is faulty because they do not seek to restrain the action of either the Zoning Administrator or the Board of Zoning Appeals". There is no merit to the argument; the acts of the two administrative authorities mentioned above were completed acts; there was nothing to restrain.

[2] Respondent also argues that other remedies should have been followed by appellants. The cases cited in support of both arguments are not analogous; they afford no support to respondents' contentions. Although other remedies may have been available, it does not follow that the remedy sought here is not a proper one.

It is also urged by respondents that, "while the demurrer to the second amended complaint was special as well as general, we submit that the demurrer was properly sustained on the ground that the second amended complaint showed that the appellants were not entitled to an injunction, * * * we submit that the second amended complaint alleges no facts showing any need for an injunction pending the outcome of the Mandamus-Certiorari action. * * * To grant an injunction in the case would be, in practical effect to set aside the order of the Zoning Administrator before a trial on the merits in the action filed for that specific purpose". The foregoing contentions are merely partisan opinions and prove nothing; as arguments, they clearly are untenable; in effect, they merely dispute appellants' claim to have the issues determined by trial and not by demurrer.

Respondents' brief contains the following, "Clearly, there must have been some arrangements either by lease or otherwise, between the County and Mr. Charleston Dow whereby the County was granted possession of the property which was the subject of the variance. The interest of the County will be affected by any judgment rendered in the mandamus action, and it should have been joined." No such assumption may be indulged. On the contrary, it must be assumed that appellants had no knowledge of any such threat on the part of the county or the county might in fact have been joined in the former action, thus avoiding the necessity of the present action. If the owner of the property, the County of Los Angeles and the zoning authorities of the City of Los Angeles were collaborating in connection with the plan to rezone the property in question, it does not appear from the record that appellants had knowledge of it.

As pointed out by appellant, "There is no conflict in the purposes of the two actions, and the decision in one case does not act in contradiction to the decision in the other."

[3] "The Superior Court has the right to maintain the status quo by injunctive relief, and plaintiffs are entitled to a trial upon the merits and an injunction if they prove their allegations. To hold otherwise, denies to plaintiffs constitutional rights ancillary to trial and appeal in litigation." In that regard, the Superior Court not only has "the right to maintain the status quo" of the property involved but, in the circumstances, it is the Court's plain duty to do so. Appellants merely seek to prevent the County of Los Angeles from establishing what is alleged to be a penal institution in a district long established as exclusively residential, and dispute the authority of certain city officials to permit such an act under the procedure followed by them in connection therewith. Fundamental doctrines of law and equity guarantee this right to plaintiffs. Neither public officials nor political subdivisions possess rights or privileges superior to the individual in the administration of the law.

The judgment is reversed.

YORK, P. J., and WHITE, J., concur.

75 Cal.App.2d 156

**PRATO et al. v. MOORE et al.**

**Civ. 3429.**

District Court of Appeal, Fourth District, California.

June 26, 1946.

Hearing Denied Aug. 22, 1946.

**1. Mines and minerals ⇐109**

In action to cancel a lease or contract for development of mining property, on ground that defendants had failed to comply with terms of contract for development of the property, evidence sustained finding that required amount of work was not done by defendants, and that contract was breached in that respect.

**2. Mines and minerals ⇐109**

Notice was sufficient under lease or contract for development of mining property giving plaintiffs right to terminate the contract if defendants failed to comply with requirement for employment of laborers on the property within 30 days after receipt of written notice, though notice stated that contract was terminated in accordance with contract and did not inform defendants that they had 30 days in which to remedy any deficiencies.

**3. Mines and minerals ⇐109**

In action to cancel a lease or contract for development of mining property, on ground that defendants had failed to comply with terms of contract for development, evidence was insufficient to support a finding that defendants were prevented from performing the contract because of the war and laws and regulations made in connection therewith.

**4. Mines and minerals ⇐109**

In action to cancel a lease or contract for development of mining property, on ground that defendants had failed to comply with terms of contract for development, evidence sustained finding that performance on part of defendants was not prevented by interference of plaintiffs.

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Appeal from Superior Court, San Bernardino County; Ben R. Ragain, Judge.

Action by John Prato and Sylvia Prato against Charles E. Moore and John Moore to cancel a lease or contract for development of certain mining property. From an adverse judgment, the defendants appeal.

Judgment affirmed.

Harry H. Parsons, of San Bernardino, for appellants.

Jerome Lyman Richardson, of Riverside, for respondents.

BARNARD, Presiding Justice.

This is an action to cancel a lease or contract for the development of certain mining property.

The plaintiffs were the owners of two sets of mining claims, one supposed to contain talc and the other lead and silver. On April 17, 1940, they entered into a contract with the defendants for the purpose of developing these properties and producing ore. So far as material here this agreement provided that the defendants would furnish, at their own expense, all labor, equipment and supplies necessary for developing these mining properties and extracting ore therefrom; that they would employ in this connection an average of at least three men for at least six months during each year, commencing with the year 1940; and that the proceeds from all ore produced and sold should be divided equally between them and the plaintiffs. It was also provided that if the mining properties were sold during the life of the agreement the proceeds should be equally divided but that no such sale could be made without the mutual written consent of all parties. It was further provided that the defendants should have the right to withdraw and terminate the agreement at any time, and that in the event they should fail to employ an average of three men a day for at least six months a year, in accordance with the contract, the plaintiffs "shall have the right to terminate this agreement if said second parties shall fail to comply with said requirement within thirty (30) days after receipt of written notice from first parties to that effect."

On December 29, 1942, a written notice was served on the defendants that the

plaintiffs "hereby elect to terminate and cancel that certain agreement", which is then particularly described, upon the ground that the defendants had failed to comply with its terms in that they had failed to employ, in connection with the development of the properties, an average of three or more men for at least six months during each year. On receipt of this notice the defendants put two or three men to work on the property for a short time, but failed to make up the deficiency.

This action was brought on February 5, 1943, and the complaint was later amended. The complaint alleged the execution of the contract and the failure of the defendants to comply with its terms, in the respects described in the notice. It also alleged forfeiture and abandonment. In their answer the defendants admitted service of the notice upon them, but denied its sufficiency under the terms of the contract. As special defenses, it was alleged that the defendants had been frustrated and prevented from performing the contract by federal and state laws, rules and regulations adopted in connection with carrying on World War II, and that the plaintiffs had interfered with the defendants "in the operation or endeavored sale of said property" in that they had interfered with the sales of these mining claims "which these defendants were able and willing to make", and had interfered with the installation of machinery and with operation of the properties.

At the trial there was evidence that in 1940 the defendants had employed only three men for a period of about three months; that in 1941 they had employed two men for a period of two months; that in 1942, no work was done on the properties; that very little machinery was ever placed on the property and that little was removed sometime in 1941; that no lead or silver ore was taken out except a few samples for assaying; and that no talc was produced or sold. The defendant Charles E. Moore testified that "We was up there" three times in 1940; that they took up three parties who were "interested in buying the property"; that they did no actual digging on the lead and silver claims; that they "didn't find nothing so we didn't go in"; and that he could not tell how much talc they took out "because it wasn't much good and we dumped it over the dump." The court found in all respects in favor of the plaintiffs and the defendants have appealed from the judgment which followed.

[1, 2] It appears beyond question that the court's findings, to the effect that the required amount of work was not done and that the contract was breached in this respect, are amply sustained by the evidence. The appellants practically admit this and make no contention to the contrary. In view of this situation only a few of the points they raise are material to this appeal. The first of these is that the notice given by the respondents was not sufficient, under the terms of the agreement. It is argued that the notice, as given, was a "pronunciento" to the effect that the agreement was absolutely terminated and can canceled as of that date, that it gave them no alternative at all, and that it should have informed them that they had thirty days thereafter in which to remedy any deficiencies. This contention is without merit. The contract provided that, in the event of the failure indicated in the notice, the respondents should have the right to terminate the agreement if the appellants failed to comply with that requirement within thirty days after written notice from the respondents to that effect. This gave the respondents, in the event of such a default, the right to give notice of their election to terminate the contract. The appellants could then avoid and prevent the termination by curing the defect within thirty days. The notice given on December 29, 1942, did not state that the contract was arbitrarily terminated or that it was terminated as of that date. In effect, it stated that the respondents intended to avail themselves of that provision of the contract and to exercise their right of termination in accordance with the terms of the agreement. Under the contract itself which was specifically referred to in the notice, and as the appellants well knew, they then had thirty days in which to remedy their default. Not only is this a reasonable interpretation of the contract and of the notice, but it fully appears that the appellants so understood it. They immediately put some men to work in an endeavor to comply with the notice and contract, but failed to do so and

soon abandoned the attempt. The court's holding in this regard must be sustained.

[3] With respect to the defense of frustration it is urged that the court erred in failing to find that the appellants were prevented from performing this contract by the existing war and the laws and regulations made in connection therewith. There is no evidence to support such a finding had it been made. There was a serious failure of performance during two calendar years before war was declared. During that time little machinery was installed and even that little was removed by some one in 1941 and not replaced. Not only does it appear that no serious effort was at any time made to carry on mining operations but the evidence given by the appellants themselves strongly indicates that they were much more interested in trying to sell these mining properties than in attempting to carry on mining operations and producing ore. The only specific evidence in the record bearing on the claim of frustration is with respect to some difficulty experienced by the appellants in obtaining a permit to procure and use dynamite. However, it appears that they did secure such a permit and that they then procured a quantity of dynamite. But it does not appear that they used the dynamite they procured, that they could not have procured more under the permit, or that they needed or would have used any additional amount. The authorities cited on the issue of frustration are entirely inapplicable under the facts here appearing.

[4] With respect to the contention that performance on the part of the appellants was prevented by interference on the part of the respondents, little need be said. Most of the contentions in this regard relate to the refusal of the respondents to consent to the sale of these properties to purchasers whom the appellants claim to have produced. Aside from any other consideration, the respondents were under no obligation to sell these properties, and had a right to refuse to do so. Some contention is made that the respondents also interfered by refusing to sign written contracts for the sale of products from the mines, which contracts had allegedly been negotiated by the appellants. Not only was nothing ever produced which could be sold but the appellants had the right, under the agreement, to sell anything which might be produced and neither the consent nor signatures of the respondents were required. No interference appears in this regard which could possibly affect or excuse the breach of the contract here in question. The other matters relied on in this connection were not only minor in nature, but at best constitute no more than a conflict in the evidence. The evidence, as a whole, fully supports the contrary findings made by the court on the issues of interference and obstruction on the part of the respondents.

There are many claims of error in connection with the admission or rejection of evidence. Most, if not all, of these rulings were correct and in no instance could the ruling be held prejudicial in view of the circumstances shown in connection with the controlling issues.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.




75 Cal.App.2d 35

**BYBEE v. FAIRCHILD et al.**

**Civ. 13041.**

District Court of Appeal, First District, Division 1, California.

June 20, 1946.

Hearing Denied Aug. 15, 1946.

**1. Venue ⇨4**

Whether a cause of action is transitory or local for venue purposes must be determined from the allegations of the complaint on file at the time the motion was made and from the nature of the judgment which might be rendered thereon, assuming the truth of the allegations.

**2. Venue ⇨21**

The normal right of defendant is to have the action tried in the county of his residence.

3. Venue ⇐24

A cause of action is triable elsewhere than in the county of the defendant's residence, if the plaintiff brings himself clearly within the terms of some statutory exception.

4. Venue ⇐72

In determining whether plaintiff has brought himself clearly within the terms of some statutory exception to the rule that action shall be tried in the county of defendant's residence, all ambiguities will be construed against the pleader to the end that defendant shall not be deprived of his fundamental rights to have case tried in the county of his residence.

5. Venue ⇐8

An action for fraud or for money damages is personal and transitory and triable in the county of defendant's residence.

6. Venue ⇐16½

Where a transitory action in personam is joined with a local action, the defendant is entitled to a change of venue, although had the local action been sued upon alone, no such right to a change would exist.

7. Venue ⇐5(3, 5)

A complaint alleging that defendants agreed to compromise a judgment, that thereafter defendants filed and recorded an abstract of the judgment, and that such judgment and abstract constituted a cloud on plaintiff's title, and that defendants wrongfully, fraudulently, and maliciously refused to satisfy the judgment and remove the cloud upon the title, and praying that plaintiff's title be declared good as against defendants' claim and that defendants be enjoined from asserting any claim to the land based on the judgment, stated a cause of action to quiet title, a cause to remove a cloud on the title, and a cause of action for slander of title within the statute placing the venue of actions involving real property in county where realty is situated. Code Civ.Proc. § 392.

8. Venue ⇐5(3, 5)

An action to quiet title or to remove a cloud from title or for slander of title is local and triable in the county where the realty is located. Code Civ.Proc. § 392.

9. Venue ⇐5(5)

Where allegations of fraud are merely incidental to slander of title action, the action is triable in county in which the land is located. Code Civ.Proc. § 392.

10. Venue ⇐4, 16½

A complaint alleging fraud which injured real property of plaintiff, and which also injured plaintiff in the operation of his business as a real estate broker, stated a cause of action for money damages not growing out of injury to real property, and such cause of action was transitory and not merely incidental to local actions to quiet title and to remove a cloud on title and for slander of title, and hence defendants were entitled to change of venue from county in which land was located to county of defendants' residence. Code Civ.Proc. § 392.

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Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action to quiet title, to remove a cloud on title, and for slander of title, and for damages for injuries to plaintiff's business by Lester E. Bybee against Ida Fairchild and others. From an order denying the defendants' motion for a change of venue, the defendants appeal.

Order reversed.

Hardin Barry and Arthur J. Anderson, both of Susanville, and Philip C. Wilkins, of Sacramento, for appellants.

John J. Taheny, of San Francisco, for respondent.

PETERS, Presiding Justice.

Defendants appeal from an order denying their motion for a change of venue.

The action was commenced in San Mateo County against the five named defendants. Demurrers were filed, and at the same time defendants filed notices of motions for a change of venue supported by proper affidavits of merit. The notices and affidavits disclose that all of the defendants at the time of the commencement of the action were residents of Lassen County. This is not disputed. It is contended that the complaint joins a local

and transitory cause of action, namely, a purported action to quiet title to real property in San Mateo County, and a cause of action to recover $12,500 for alleged fraudulent representations and conduct on the part of defendants, and, it is urged, that when local and transitory causes of action are joined in one complaint the defendants are entitled to a change of venue to the county of their residence.

[1] Before directly referring to the allegations of the complaint, brief reference should be made to certain general rules applicable to such a proceeding that are not seriously questioned by either party. It is settled law that the question as to whether a cause of action is transitory or local "must be determined from the allegations of the complaint on file at the time the motion was made and from the nature of the judgment which might be rendered thereon, assuming the truth of the allegations." Neet v. Holmes, 19 Cal.2d 605, 607, 122 P.2d 557, 558, citing Sheeley v. Jones, 192 Cal. 256, 219 P. 744, and Eckstrand v. Wilshusen, 217 Cal. 380, 18 P.2d 931.

[2-5] It is also well settled that the normal right of the defendant is to have the action tried in the county of his residence. For the cause to be triable elsewhere the plaintiff must bring himself clearly within the terms of some statutory exception, and in this connection all ambiguities will be construed against the pleader to the end that a defendant shall not be deprived improperly of his fundamental right to have the cause tried in the county of his residence. Ah Fong v. Sternes, 79 Cal. 30, 21 P. 381; Lyons v. Brunswick-Balke etc. Co., 20 Cal.2d 579, 127 P.2d 924, 141 A.L.R. 1173; see cases collected 25 Cal.Jur. p. 866, § 13. An action for fraud or for money damages is, of course, personal and transitory and triable in the county of the defendant's residence. See cases collected 25 Cal.Jur. p. 869, § 15.

[6] It is also well settled that when a transitory action in personam is joined with a local action, the defendant is entitled to a change of venue, although had the local action been sued upon alone, no such right to a change would exist. This had been the rule at least since 1891 when Smith v. Smith, 88 Cal. 572, 26 P. 356 was decided and has been reaffirmed many times. See Bardwell v. Turner, 219 Cal. 228, 25 P.2d 978; Turlock Theatre Co. v. Laws, 12 Cal.2d 573, 86 P.2d 345, 120 A.L.R. 786; Howe v. Tucker, 219 Cal. 193, 25 P.2d 832; Hays v. Cowles, 60 Cal.App. 2d 514, 141 P.2d 26; Neet v. Holmes, 19 Cal.2d 605, 122 P.2d 557; see, also, Abbott v. Peoples Nat. Fire Ins. Co., 132 Cal.App. 357, 22 P.2d 544; Ah Fong v. Sternes, 79 Cal. 30, 21 P. 381.

How do these rules apply to the facts of this case? The complaint contains twenty-six paragraphs, and is quite lengthy. It purports to state but one cause of action. The first nineteen paragraphs charge the defendants with fraud. The gist of these allegations is that on September 25, 1943, plaintiff, while hunting, accidentally shot and killed his guide by name Fairchild; that Fairchild's heirs (three of the defendants, the other two being the lawyers for the heirs) sued the plaintiff in Lassen County for wrongful death; that on November 24, 1944, the Fairchild heirs recovered judgment against plaintiff in the sum of $15,313.50; that notice of entry of such judgment was served on plaintiff's counsel on November 27, 1944; that plaintiff moved for a new trial, the motion being denied by operation of law on January 26, 1945; that the time for appeal expired February 25, 1945; that prior to this last date, and on December 29, 1944, the Fairchild heirs, through their attorneys who are made defendants in this action, offered in writing (the writing being set forth in haec verba) to compromise the judgment for $2,500; that on January 11, 1945, plaintiff accepted the offer to compromise and the heirs agreed to satisfy said judgment in consideration of plaintiff refraining from taking an appeal from the judgment; that pursuant to this agreement checks for the full amount of the compromise were delivered to the heirs' attorneys by February 1, 1945; that the said attorneys, defendants herein, were authorized to act for the heirs in consummating the compromise; that the checks were cashed about February 27, 1945, by the said attorneys

with the full knowledge and consent of the heirs, and the $2,500 is held by the attorneys with the consent and approval of the heirs; that the checks were presented and accepted on the understanding that the judgment would be fully satisfied; that on February 26, 1945, after the time for appeal had expired, the plaintiff's attorney received from the heirs' attorneys a letter stating that the heirs would not accept the payment and the money was being held in defendant attorneys' trustee account; that the heirs consented and approved the holding of the money for them but have refused to repudiate the compromise; that the plaintiff at all times disputed the judgment and threatened to appeal unless a compromise was entered into; that plaintiff at all times believed he had good grounds for reversal on appeal; that plaintiff refrained from appealing solely because of the representations and promises made to this plaintiff by the defendants.

Through paragraph XIX of the complaint the theory is obviously that plaintiff was fraudulently prevented by defendants from taking the appeal. Starting with paragraph XX an entirely new factor is brought into the case. That paragraph alleges in substance that plaintiff is, and at all times herein mentioned has been, the owner of an undivided one-half interest in certain real property situated in Brisbane, San Mateo County. Paragraph XXI alleges that defendants caused an abstract of their judgment to be filed and recorded in the official records of San Mateo County; that the judgment and abstract constitute a cloud upon plaintiff's title and interest in the said property; that plaintiff has demanded of the defendants that they fulfill the compromise terms, and that they cause the judgment to be satisfied and the abstract and cloud to be satisfied and removed; that the defendants wrongfully, fraudulently and maliciously refuse and neglect to satisfy the judgment and remove the cloud upon the title; that defendants' claim of interest in and to the property is inequitable, fraudulent and without right; that the plaintiff is a real estate broker; that the false and fraudulent representations and conduct of the defendants and wrongful and malicious maintaining of said abstract and cloud have prevented the plaintiff from disposing of the property and interfered with his ability and opportunity to buy and sell real property and to carry on his business of a real estate broker to his general damage in the sum of $12,500.

Paragraph XXII alleges that the aforesaid promises, agreements and representations of defendants were and are false and fraudulent and were made to plaintiff falsely and fraudulently and without any intention on the part of defendants to perform and fulfill the same and with the fraudulent intention and purpose to prevent plaintiff from appealing; that the said cloud results from the said fraud of defendants.

Paragraph XXIII alleges defendant attorneys have a contingent interest in the judgment and in any amount recovered thereon. Paragraph XXIV alleges defendants threaten to harass and damage plaintiff by further wrongful use of the judgment, and by the further filing and recording of abstracts against the plaintiff's interest in and to real property in San Mateo County

Paragraph XXV asks for attorney's fees incurred in the action, while paragraph XXVI alleges that plaintiff has no plain speedy or adequate remedy at law.

The prayer is (1) that defendants be required to set forth their adverse claims to the property; (2) that it be decreed that defendants have no rightful claim to the property and that plaintiff's title as to an undivided one-half interest therein is good and valid against defendants; (3) that defendants be enjoined from asserting any claim to the described property, and (4) be enjoined from asserting any claim based on the judgment or abstract in any other land now or hereafter owned by plaintiff; (5) that plaintiff be awarded compensatory damages of $12,500, plus attorney's fees; (6) that plaintiff be awarded punitive damages in the sum of $12,500; (7) that plaintiff have such other and further relief as may be proper, and (8) his costs.

[7] The trial court denied the motion for a change of venue to Lassen County. There can be no doubt that the above com-

plaint pleads a cause of action to quiet title, a cause to remove a cloud on the title, and a cause of action for slander of title, without separately stating them. As to such actions, § 392 provides in part:

"Venue for actions involving real property. Proper Court. (1) Subject to the power of the court to transfer actions and proceedings as provided in this title, the county in which the real property, which is the subject of the action, or some part thereof, is situated, is the proper county for the trial of the following actions:

"(a) For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property."

[8] There is no doubt that an action to quiet title or to remove a cloud from the title is local, and triable in the county where the real property is located. It is now settled as well that an action for slander of title is also local in nature. The leading case on this subject is Coley v. Hecker, 206 Cal. 22, 272 P. 1045. In that case a judgment secured by appellants against respondent had been stayed by the giving of an undertaking on appeal. The appellants thereafter filed an abstract of the judgment in San Joaquin County. The respondent alleged that (206 Cal. at page 25, 272 P. at page 1046) "appellants, acting maliciously, and with the evil purpose of vexing and annoying respondent, and slandering the title to all lands owned by him in the county of San Joaquin, and clouding the title thereto, recorded * * * an abstract of judgment * * * well knowing that said abstract of judgment was inoperative, and of no legal effect, by reason of the filing of said undertaking * * * and that said appellants well knew said abstract of judgment, when filed by them, would be a cloud upon, and a slander against, all the lands owned * * * by respondent * * * that the recordation of said abstract of judgment decreased the value of said real property and rendered it unmarketable to the damage of respondent in the sum of $26,000." As additional damages, respondent alleged that appellants in recording the abstract were moved by malice and a desire to oppress him, and as a penalty therefore he prayed for punitive damages in the sum of $25,000. The prayer of the complaint is very similar to the one in the present case.

The court, after holding that slander of title was an injury to real property within the meaning of § 392 of the Code of Civil Procedure, stated (206 Cal. at page 27, 272 P. at page 1047) that: "Damages for injury to the real property are but an incident to the action to remove the cloud wrongfully cast upon respondent's real property by the filing of said abstract of judgment. It is the proximate result of an alleged wrongful act. The fact that damages are demanded for maliciously doing an act from which an injury is the necessary consequence does not split the action into two separate causes of action merely because dual relief may be properly or improperly sought."

Another more recent case establishing the same general rule is Strosnider v. Pomin, 32 Cal.App.2d 103, 89 P.2d 179. In that case there were two causes of action set forth in the complaint. The first one was to quiet title to real property. The second cause of action was one for damages arising out of fraudulent representations which induced that plaintiff to dismiss a prior quiet title action. The defendants there contended that since the second cause of action was personal and transitory they were entitled to have the case transferred to the county of their residence. The trial court sustained this argument and granted defendants' motion for a change of venue. The appellate court reversed the order, and held that the action was purely local in nature, because in the second cause of action it was necessary for plaintiff to prove ownership of his real property and of the easement in question before he could prove damages. It therefore appeared that the question of an estate and interest in real property as well as a matter of injury thereto would have to be determined within the meaning of § 392 of the Code of Civil Procedure. The court stated (32 Cal.App. 2d at page 108, 89 P.2d at page 182):

"In the case before us, the cause of action is unquestionably based upon a tort—damages arising out of fraudulent repre-

sentations made in respect to the dismissal of the prior quiet title action. The real question is: Damages to what? According to the allegations of the complaint, damages to the real property of plaintiff which would be affected by the obstruction of the right of way of defendants and which resulted from the dismissal of the prior action through the fraud of defendants. Thus it is clearly alleged that the fraudulent act injured the real property of plaintiff—a consequential injury which the court in the Hecker case held to be covered by the term 'injury to real property.'

"The complaint also brings the action under that portion of section 392 of the Code of Civil Procedure which requires the action to be brought in the county where the real property is situated, where it is 'for the recovery of real property, or an estate or interest therein, or for the determination *in any form,* of such right or interest.' It is quite clear, from a reading of the second cause of action, that plaintiff would have to prove ownership of his own real property, and of the easement in question, before he could establish any right to damages. In our opinion this would call for the determination, in some form, of an estate and interest in real property.

"* * * It is true, as respondents state, that the second cause of action is for the recovery of damages based upon fraud and deceit, but those facts do not fix the character of the action as transitory, if the further fact appears, from the allegations of the complaint, that plaintiff, in order to make out a case under his pleading, must prove ownership of an interest in real property, and if the further fact appears that the damages, if any, must necessarily be predicated upon an immediate or consequential injury to the real property of plaintiff.

"The admitted fact that plaintiff seeks to recover a money judgment does not necessarily stamp the action as transitory, if, according to the allegations of the complaint, such judgment is predicated upon damages to real property."

[9] Plaintiff here argues that all of the allegations of fraud in the complaint are incidental to the main cause of action, which he conceives to be a cause of action for slander of title. The defendants argue that the main action is for fraud, and the several local actions merely incidental thereto. We have no doubt at all that, if the damages alleged were merely the damages to plaintiff's real property, under the rules referred to in the two cases quoted from above, the allegations of fraud are incidental to the slander of title action, and the case would therefore be triable in San Mateo County. The allegations of damage so far considered all relate to plaintiff's real property caused by the filing of the abstract of judgment, which resulted from plaintiff's failure to appeal induced by the fraudulent representations of defendants. This clearly falls within the rule stated in the Pomin case, supra, where the court stated (32 Cal.App.2d at page 108, 89 P.2d at page 182): "Thus it is clearly alleged that the fraudulent act injured the real property of plaintiff—a consequential injury which the court in the Hecker case held to be covered by the term 'injury to real property.'" It was undoubtedly on this theory that the trial court held the action to be local and denied the motion for a change of venue.

[10] The difficulty with this solution in the instant case is that it entirely overlooks another cause of action pleaded but not separately stated. After setting forth in the first nineteen paragraphs the fraud upon which he relies, the plaintiff undertakes in the succeeding paragraphs to charge how that fraud injured him. After alleging that the fraud injured the real property as above described, in Paragraph XXI it is alleged that the fraud also injured him as follows: "that the plaintiff is and at all times herein mentioned was a duly licensed real estate broker and that the false and fraudulent representations and conduct of the defendants and the wrongful and malicious maintaining of said abstract and said cloud * * * have interfered with this plaintiff's ability and opportunity to buy and sell real property and to carry on his said business of a real estate broker, to his general damage in the sum of $12,500.00." From this allegation we find that the alleged fraud not only injured plaintiff's real property, but also injured him in the opera-

tion of his business. This is a separate cause of action, although not separately and somewhat incompletely stated. This is a cause of action for money damages not growing out of injury to real property. It is transitory in nature. It is not merely incidental to the local actions above discussed because it is not dependent upon the success of the plaintiff as to those causes of action. Brown Materials Co., Ltd., v. Angus, 20 Cal.App.2d 32, 66 P.2d 470. It is quite clear that if plaintiff herein, at the trial, is able to prove the fraud charged, but is unable to prove ownership of the interest in real property in San Mateo, he could still recover, under the quoted allegation, upon proper proof, for any general damages to his business caused by the wrongful filing of the abstract. As to such a cause of action, the damages would not be predicated upon any injury to plaintiff's real property. Thus, what we have here is a local action or actions joined with a transitory action in no way connected with injury to real property. In such a case, under the rule of the cases already cited, the defendants are entitled to a change of venue. See, particularly, Turlock Theatre Co. v. Laws, 12 Cal. 2d 573, 86 P.2d 345, 120 A.L.R. 786, and Neet v. Holmes, 19 Cal.2d 605, 122 P.2d 557.

In most of the cases cited, supra, where it was held that the defendants were entitled to a change of venue where transitory and local actions had been joined, the several causes of action were interrelated. In the instant case they are distinct causes of action in no way dependent upon one another. In the instant case, as already pointed out, the determination of whether the plaintiff is entitled to damages for injury to his business is in no way dependent upon or related to the determination of whether plaintiff owns any real property in San Mateo County, or whether, if he does, his title thereto has been slandered. This being so there would seem to be no doubt but that defendants are entitled to have the action tried in the county of their residence.

The order denying the motion for a change of venue is reversed.

WARD, J., and SCHOTTKY, Justice pro tem., concur.

Hearing denied; SHENK, J., dissenting.

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## DE CAMPOS et al. v. STATE COMPENSATION INS. FUND et al.

Civ. 7206.

District Court of Appeal, Third District, California.

June 19, 1946.

**1. Workmen's compensation ⇐1048**

The constitutional provision providing that a corporation or association may be sued in the county where the contract is made or is to be performed, etc., does not apply to the State Compensation Insurance Fund which is not a "corporation" within such provision. Const. art. 12, § 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Corporation".

**2. Venue ⇐29**

As respects venue of actions against the State Compensation Insurance Fund, the residence of the Fund is the same as its principal place of business. Code Civ. Proc. §§ 392 et seq., 395.

**3. Venue ⇐46**

In action against State Compensation Insurance Fund for breach of insurance policy, where plaintiffs did not allege that the defendant's residence was unknown and proof showed that the principal place of business of the Fund was in San Francisco and that it was a resident of such city and county, and the insurance policy did not designate the county in which the obligations thereunder were to be performed but showed on its face that it was countersigned at San Francisco, the Fund was entitled to change of venue to county of its residence. Code Civ.Proc. §§ 392 et seq., 395.

Appeal from Superior Court, Placer County; Lowell L. Sparks, Judge.

Action by Victor James De Campos and others, copartners doing business under the firm name and style of Mary Len Mine, against State Compensation Insurance Fund, a political subdivision of the State of California, for breach of workmen's compensation insurance policy. From an

order denying defendant's motion for change of venue, the defendant appeals.

Order reversed.

Donald Gallagher and Royle A. Carter, both of San Francisco, for appellant.

George C. Faulkner and A. Dal. Thomson, both of San Francisco, for respondents.

ADAMS, Presiding Justice.

This is an appeal by defendant from an order denying its motion for a change of venue from Placer County to the City and County of San Francisco. Plaintiffs' complaint alleges as follows: Plaintiffs are engaged in mining in Placer County. Defendant is "a political subdivision of the State of California" carrying on a workmen's compensation insurance business, insuring employers against liability under the Workmen's Compensation and Safety Act. Labor Code, § 3201 et seq. About December 26, 1940, defendant issued to plaintiffs a workmen's compensation insurance policy, copy of which is made a part of the complaint. On or about July 15, 1941, and while said policy was in effect, one William Ralph Payne, an employee of plaintiffs, who was covered by the aforesaid policy, sustained injuries arising out of and in the course of his employment, which caused his death. Payne left surviving him a wife and four minor children, in whose behalf a proceeding was commenced before the Industrial Accident Commission for collection of a death benefit. Defendant, though given due notice, refused to defend on behalf of plaintiffs, whereupon plaintiffs employed counsel to defend them. Subsequently an award in favor of the Payne widow and children was made by the Industrial Accident Commission, but it held that the policy issued by the Fund excluded coverage with respect to Payne, and dismissed the Fund from liability. Thereafter the decision of the Commission was reviewed on appeal and the portion of said decision dismissing the Fund was reversed and the cause was remanded with orders to enter an award in accordance with the decision of the court. Thereafter petitions for rehearing and for hearing in the Supreme Court were denied, and eventually the Commission amended its findings in conformity with the appellate court's decision. Said policy provided that the Fund would defend in behalf of plaintiffs any claims or suits against them, such as was the Payne proceeding, and pay all costs of such defense, but failed to do so. Plaintiffs further alleged that by reason of defendant's refusal and failure to represent them in said matter they had been compelled to pay for attorney's fees, costs and other expenses the amount sued for, for which they demanded judgment against defendant Fund; that the contractual obligation of defendant to plaintiffs "arose at and in the county of Placer," and was "agreed to be performed" in said county; that "the breach of said contractual obligation" occurred in Placer County, and that said county was the proper place for trial of the action.

Defendant filed a demurrer to said complaint and at the same time filed notice of motion for change of venue, alleging therein and in an affidavit of merits and of residence in support thereof, that both the Industrial Accident Commission and the defendant Fund were, during the period involved, residents of and had their principal places of business in the City and County of San Francisco; that the insurance policy issued to plaintiffs was made and entered into in San Francisco; that the obligation upon which plaintiffs' complaint was based was incurred in and was to be performed there and that the breach, if any, likewise occurred there. The affidavit further alleged that defendant did not contract to perform the obligation alleged in plaintiffs' complaint in any county other than the City and County of San Francisco; that the last act in consummation of the contract, to wit, the payment of the total initial premium to defendant, was performed at its office in San Francisco and that the signing and issuance of the contract occurred in San Francisco, and that there never had been any special contract in writing between the parties changing the county in which said contract was to be performed from San Francisco; that neither the obligation of the contract nor its breach, if any, occurred in Placer County.

In opposition to defendant's motion, plaintiff De Campos filed an affidavit in

which he merely alleged that he attended to the procurement, execution and delivery of the policy in question, that he received the policy in the mail about January 2, 1941, and that prior thereto and on or about December 24, 1940, he mailed a check for the full amount of the premium, addressed to defendant, and subsequently received the canceled check; but he did not allege where he received the policy or where he mailed the check. He also averred that the policy showed that the principal place where the work described in said policy is conducted is in Placer County. There was no denial of the allegations of the affidavit in support of the motion for change of venue.

The trial court, after submission of points and authorities by the respective parties, filed a written opinion and denied the motion. The grounds for its decision, as summarized in its opinion, are: "* * * that no statutory venue has been fixed by legislative enactment or decision in actions against the State Compensation Insurance Fund, that defendant should not be considered in the same category as a natural person for the purposes of Section 395, C.C.P., and that even if it were so held, that under the provisions of Section 395, C.C.P., it still could be sued in any county in this State as its residence is unfixed and unknown; that if its residence be deemed to be the situs of its principal place of business then it should also be held to be in the county of any alleged breach of its policy of insurance. Although an instrumentality of the State it should be for the purposes of venue placed in the same category as private carriers engaged in the same type of business and suable not only in the principal place of business of its business, but also in any other county in the State as provided in said provision of the Constitution, Article XII, Paragraph 16."

Appellant's argument in support of its appeal is that it is, in effect, admitted by respondent that the allegations of its affidavit that the contract was entered into and the obligations thereunder, if any, incurred in San Francisco, and that San Francisco is the residence of the Fund; and that there is no single ground for retaining the cause in Placer County. Respondents, in reply, assert that the Fund is a "corporation," that the provisions of Article XII, section 16, of the Constitution apply, and that, under these provisions, the venue is in Placer County because the contract was to be performed there, the liability arose there and the breach occurred there.

While respondents concede that the Fund is "an arm of the state government," thereby admitting that it is not a private corporation, they argue that it is a corporation within the meaning of that term as used in the Constitution because it is authorized to transact the business of workmen's compensation insurance to the same extent as any other insurer is legally authorized to do, that it may enter into contracts and sue and be sued, that it is by statute "given the important and all-controlling attributes of any corporation," and that it is unimportant that it has not all of the attributes of private corporations. On the assumption, then, that the Fund is a corporation, respondents base their defense of the order of the trial court on Article XII, section 16, of the Constitution of this state, which provides: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

It is apparent that if respondent is not a corporation or association, within the meaning of the aforesaid constitutional provision, the basis of respondents' argument vanishes.

In Rauschan v. State Compensation Insurance Fund, 80 Cal.App. 754, 253 P. 173, 175, it was contended that the Fund was a corporation and, as such, liable for damages claimed to have been sustained by plaintiff by reason of certain alleged slanderous statements made by one of its alleged agents. The court said that the Fund constituted "a governmental mandatory or agency to which the Legislature committed the administration of certain of

the state's sovereign powers"; that it is "an agency of the state and was established for the purpose of administering certain portions of the sovereignty of the state"; that the provision of the statute permitting it to sue or be sued for wrongs committed by it applied, not to torts but to breaches of contractual obligations only. Also see Commissioners of State Insurance Fund v. Lapidus, 182 Misc. 368, 50 N.Y.S.2d 589; In re Opinion of Justices, 309 Mass. 571, 34 N.E.2d 527, 535; Gilmore v. State Compensation Insurance Fund, 23 Cal.App.2d 325, 329, 73 P.2d 640.

Respondents cite no decision in this state holding the Fund to be a corporation, but argue that because it has certain attributes of a corporation it must be considered as such and that the provisions of section 395 of the Code of Civil Procedure are not applicable. It relies particularly upon Utah State Building Commission v. Great American Indemnity Co., 105 Utah 11, 140 P.2d 763, 766, which held that the Utah State Building Commission was a "body corporate" within the meaning of a statute which provided that when a contract was made "with a state, or with a state institution, board or commission which is not a body politic or corporate, the state shall be named as obligee in such bond"; and the question was whether the State Building Commission was a "body politic or corporate" within the intention of the legislature. It was held that it was; but it does not follow therefrom that the California State Compensation Insurance Fund is a "corporation" within the meaning of the provisions of Article XII, section 16, of the California Constitution, particularly in view of the fact that the Fund does not possess all the powers and duties which the Utah commission had, as, for instance, the power to buy, lease and acquire property of any kind, and to sell, exchange or lease any and all property, and other powers not specifically mentioned. No such powers repose in the State Compensation Insurance Fund.

Respondents also contend that section 395, supra, does not apply to corporations, either public or private, but applies only to natural persons. They cite Cook v. W. S. Ray Manufacturing Co., 159 Cal. 694, 115 P. 318; McDuffie v. California Tehama Land Corp., 138 Cal.App. 245, 32 P.2d 385; Kaupke v. Lemoore Canal and Irrigation Co., 7 Cal.App.2d 362, 46 P.2d 204; Konig v. Associated Almond Growers, 37 Cal. App.2d 360, 99 P.2d 678; Pacific Freight Lines v. Pioneer Express Co., 39 Cal.App. 2d 609, 103 P.2d 1056; Swartz v. California Olive Growers', etc., Corp., 56 Cal.App. 2d 168, 169, 133 P.2d 20, as holding that section 395, supra, applies only to natural persons. These cases were also relied upon by the trial court in its opinion, but we think that too much emphasis has been put upon certain language therein contained. Cook v. W. S. Ray Manufacturing Co., the only Supreme Court case cited, did not hold that section 395 applies only to natural persons, but did hold that it did not apply to transitory actions against private corporations, such actions being governed by the constitutional provision, and that the provision did not constitute a discrimination against corporations and in favor of natural persons which was violative of the 14th Amendment. The decisions in McDuffie v. California Tehama Land Corporation; Konig v. Associated Almond Growers; Kaupke v. Lemoore Canal & Irrigation Co.; and Pacific Freight Lines v. Pioneer Express Company, go no further. In Swartz v. California Olive Growers', etc., Corporation the court did say, 56 Cal.App. 2d at page 172, 133 P.2d at page 22, that section 395, supra, does not apply to domestic corporations *"but is applicable only to actions against natural persons."* However, the phrase quoted is dictum, and its use was probably inadvertent since it was not necessary to the decision in the case, the defendant in the action being a private corporation.

As opposed to respondents' views we have Bohn v. Better Biscuits, Inc., 26 Cal. App.2d 61, 78 P.2d 1177, 80 P.2d 484, in which the question whether Article XII, section 16, of the Constitution applied to foreign as well as domestic corporations was before the court. The court there said, at page 65 of 26 Cal.App.2d and at page 1179 of 78 P.2d that "under a reasonable interpretation of the provisions of sec-

tion 395 of the Code of Civil Procedure, as amended, it might be held that, by reason of the enactment of section 405 et seq. of the Civil Code * * *, said section 395 of the Code of Civil Procedure, as amended, applies to persons both natural and artificial and whether the corporation is a domestic or a foreign corporation. Section 395, Code of Civil Procedure, as amended, does not use the word 'corporation,' but it has never been held that its provisions did not apply to corporations. No reason appears why they should be so limited. There is no more reason for a state-wide venue when the action is against a corporation than when against a natural person, nor when it is against a foreign corporation than when against a domestic corporation." Hearing in the Supreme Court was denied

In Buck v. City of Eureka, 97 Cal. 135, 138, 31 P. 845, the contention was made that the city of Eureka, being a municipal corporation, was not entitled to have the action removed from the City and County of San Francisco to Humboldt County, reliance being placed upon Article XII, section 16, of the Constitution. But the court said that Article XII relates exclusively to private corporations and consequently section 16 thereof has no application to a suit against a public corporation; and the residence provisions of section 395 of the Code of Civil Procedure were applied. Also in Gallup v. Sacramento and San Joaquin Drainage District, 171 Cal. 71, 151 P. 1142, the court held that defendant drainage district was not such a corporation as was comprehended within the meaning of the word corporation as used in Article XII, section 16, of the Constitution; that said section relates exclusively to private corporations, citing Buck v. City of Eureka, supra.

[1] We conclude, in conformity with the foregoing decisions, that Article XII, section 16, of the Constitution is not applicable in this action.

Respondents, in their brief, make no contention that if the provisions of Article XII, section 16, are inapplicable, appellant is not entitled to the change of venue to the City and County of San Francisco, saying: "It is unnecessary to discuss the authorities cited in appellant's opening brief. All of them deal with Code of Civil Procedure, section 395, which, as the trial court properly held, applies only to natural persons." From the foregoing we take it that respondents do not contend that if the constitutional provision does not apply, appellant is not entitled to the change of venue as prayed. However, in view of certain statements in the opinion of the trial court and the arguments of appellants, some consideration of that section in its application to the case may not be inappropriate.

Title IV of Part 2 of the Code of Civil Procedure provides for the place of trial of civil actions, and section 395 thereof provides that "In all other cases" (other than those provided for in the preceding sections of said title) "the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action." After making special provision for certain kinds of actions, of which this is not one, the section provides that *"When a defendant has contracted to perform an obligation in a particular county, either* the county where such obligation is to be performed, *or* in which the contract in fact was entered into, *or* the county in which the defendant * * * resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, *and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."* (Italics added).

The foregoing language is susceptible of the construction that a right to trial in a county where an obligation is to be performed or the county in which the contract was in fact entered into, arises only in the case of a contract in which the defendant has contracted to perform an obligation in a particular county. However, in construing the section the court said in Armstrong v. Smith, 49 Cal.App.2d 528, 532, 122 P.2d 115, 117: "No great consequence is to be attached to the general limitation of the section that 'When a defendant has contracted to perform an obligation in a particular county,' the other provisions are to

apply. Obviously, an existing obligation is performable at some place. If it is of such character that it is to be, or may be, performed in different counties no different situation is created than if it is to be performed at a particular place. The express condition of the statute is that unless there is a special contract in writing to the contrary the county in which the obligation is incurred is the venue of an action arising out of it. What the legislature has in substance said is that all actions arising on contract shall be tried in the county in which the defendant resides, or in which the contract was made, unless the defendant has contracted specially and in writing as to the county in which his obligation is to be performed, in which event such county is also a proper county for the trial of the action."

It also said, at pages 533, 534 of 49 Cal. App.2d, and at pages 118 of 122 P.2d: "The obligation of a contract is incident to its making. It is incurred at the time the contract is made and follows it until the contract is extinguished. The obligation arises as soon as the contract takes breath and may be breached at any time while it has life. While it is the law, in conjunction with the contract, which casts the obligation, the law does not wait until it is breached to cast it. This is done when the contract is made. So with the contract before us, all obligations arising under it were incurred at the time and in the county in which it was made." Also see Campbell v. Clifford, 52 Cal.App.2d 615, 618, 619, 126 P.2d 887.

In the case before us there is no provision in the policy of insurance designating the county in which obligations thereunder are to be performed. While, as above stated, respondents have not made any argument regarding the proper construction to be given section 395, they do assert that the contract was to be performed in Placer County, and that "the liability arose" there —which might be construed as an allegation that the obligation was incurred there. Appellant meets both of these statements by pointing out that this contract was in fact entered into in the City and County of San Francisco, and that its obligations were to be performed in San Francisco. The policy has a provision which reads: "As a condition precedent, this Policy is null and void unless the total initial premium stated herein is paid to the State Compensation Insurance Fund at its office in San Francisco on or before January 5, 1941, at noon, standard time."

In Limited Mutual Compensation Insurance Co. v. Curtis, 45 Cal.App.2d 507, 114 P.2d 404, where the insurance company sued Curtis for payment of premiums under a policy which contained a like provision, and made the payment of initial payments to the insurance company at its office in San Francisco a condition precedent to the going into effect of the policy, the court said that by the terms of the contract the parties themselves fixed the time when and the place where the condition precedent should be performed to make the contract binding and operative; and that it followed that the place where they became binding and operative was the place where the obligations thereunder were incurred. To be sure that was an action for premiums which it was agreed were to be paid in San Francisco, but the obligations imposed upon the insurance company came into being only when those imposed upon the insured were met, and came into being at that time and place.

The policy also contains a provision that it should not be binding upon the Fund unless countersigned by a duly authorized officer or representative of the Fund; and it shows upon its face that it was "countersigned at San Francisco December 30, 1940" by L. M. Johnson, "Authorized Representative." In Di Giorgio Fruit Corp. v. Zachary, 60 Cal.App.2d 560, 141 P.2d 8, a contract contained the provision that it was subject to the approval and acceptance of the office of Earl Fruit Co., at San Francisco. Acceptance was evidenced by a letter from Earl Fruit Company mailed at San Francisco; and it was held that the contract was entered into at that place.

It is said in 5 Cal.Jur. 454: "The place at which a contract bears date is prima facie the place where it is made. So it is a fair deduction that a contract is to be entirely performed at the place where it was made and where it expressly provides that part of the performance (payments, for instance) shall be made." Also see Hammond v.

Ocean Shore Development Company, 22 Cal.App. 167, 170, 133 P. 978; Fitzhugh v. University Realty Co., 46 Cal.App. 198, 188 P. 1023.

[2] The trial court, in its opinion, stated that if section 395 were applied, plaintiffs were nevertheless authorized to sue in Placer County, if the residence of defendant was not definitely established or if it was unknown to the plaintiff, since it provides that if none of the defendants reside in the state, or, if residing in the state, and the county in which they reside is unknown to the plaintiff, the action may be tried in any county which the plaintiff may designate in his complaint. But plaintiffs did not allege that defendant's residence was unknown, and its place of residence was established, as the affidavit in support of the motion for change of venue alleged that the principal place of business of the Fund is in San Francisco and that it is a resident of that city and county. These allegations are not denied by the affidavit of plaintiffs in opposition to the motion, and there is no allegation in the complaint to the contrary. Furthermore, several endorsements attached to the policy show the address of the Fund to be San Francisco, and that city as the location of its executive offices. And, as held in Gallup v. Sacramento and San Joaquin Drainage Dist., supra, at page 74 of 171 Cal., 151 P. 1142, its residence is the same as its principal place of business. Also see Barber v. Galloway, 195 Cal. 1, 14, 231 P. 34; Bohn v. Better Biscuits, Inc., supra, 26 Cal.App.2d at page 64, 78 P.2d 1177, 80 P.2d 484; Cohn v. Central Pac. R. R. Co., 71 Cal. 488, 12 P. 498; Winterburn v. Sheriff, 61 Cal.App. 531, 534, 215 P. 406; Trezevant v. Strong Co., 102 Cal. 47, 36 P. 395; Krogh v. Pac. Gateway etc. Co., 11 Cal.App. 237, 104 P. 698.

The trial court also stated that the complaint alleged that the breach occurred in Placer County, and that in certain cited cases it had been held that under various types of insurance policies the liability or breach occurred where the injury or death took place. But those were all cases in which the defendant was a private corporation, and Article XII, section 16, of the Constitution applied. They do not purport to construe or apply section 395.

In Lyons v. Brunswick-Balke-Collender Co., 20 Cal.2d 579, 582, 127 P.2d 924, 141 A.L.R. 1173, the court said that a statutory provision permitting a defendant to have certain actions tried in the county where he resides is remedial in nature and should be liberally construed to the end that a defendant may not be unjustly deprived of that right; that the right of a defendant to have certain actions brought against him tried in the county of his residence is an ancient and valuable right which has always been safeguarded by statute and is supported by a long line of judicial decisions; that the right of a plaintiff to have an action tried in a county other than that of the defendant's residence is exceptional; and that if a plaintiff would claim such right he must bring himself within the exception. Also see Kaluzok v. Brisson, Cal.Sup., 167 P.2d 481.

[3] We conclude that in the instant case plaintiffs failed to show a right to have this action tried in Placer County, and the order denying defendant's motion for change of venue is accordingly reversed.

PEEK and THOMPSON, JJ., concur.

74 Cal.App.2d 946

## FRIEDMAN v. PACIFIC OUTDOOR ADVERTISING CO. et al.

Civ. 15145.

District Court of Appeal, Second District, Division 2, California.

June 18, 1946.

Hearing Denied Aug. 15, 1946.

**1. Appeal and error ⇐770(1)**

Where judgment in favor of corporate and individual defendant was appealed and only brief in behalf of the defense was that of the corporate defendant, reviewing court would assume that individual defendant chose not to follow the appeal.

**2. Negligence ⇐120, 122(1)**

Defendants, to establish that plaintiff was precluded, under the doctrine of contributory negligence or of volenti non fit injuria, from recovery for the destruction of his goods by fire used to burn defendant's rubbish and which spread to plaintiff's property were required to prove that plaintiff consented to performance of the acts which occasioned his loss. Civ.Code, § 3515.

**3. Negligence ⇐122(1)**

Where a nuisance is established by proof of negligent acts of defendants in burning rubbish in a manner violative of city ordinance, in order to preclude plaintiff from recovery for destruction of his goods by fire, defendants must show that plaintiff had done some act willfully or negligently which actually and proximately contributed to cause the destruction of his property, and not merely that he omitted to assume that defendants would violate the city's ordinance enacted for public welfare.

**4. Negligence ⇐48**

Owner of property is under no duty to assume that property is exposed to a danger which can arise only from a violation of law by another.

**5. Negligence ⇐82, 105**

The fact that plaintiff on two prior occasions had added his waste paper to illegal bonfire maintained by defendants on a vacant lot adjacent to building in which plaintiff stored his goods could not be construed as consent to or contributory to third fire started by defendants on lot which, when left unattended, spread to building and destroyed plaintiff's goods, in light of fact that plaintiff had no notice of defendants' intention to burn rubbish on third occasion or of manner of igniting it or of plan to leave it unguarded.

**6. Negligence ⇐82**

In order for violation of a city ordinance to constitute contributory negligence it must contribute directly and proximately to the injury alleged.

**7. Negligence ⇐82**

Before negligent act or omission of a plaintiff can be said to have contributed to the cause of his injuries, it must appear that his negligence combined with that of defendant to produce the result and that together they were the proximate cause.

**8. Negligence ⇐135**

Proof of careless conduct or of mere negligence is insufficient to establish contributory negligence as a defense.

**9. Negligence ⇐105**

Where municipal code made the storing of combustible litter on a vacant lot a misdemeanor, owner of property stored in building on adjacent lot was incapable of consenting to a violation of such provision of the code.

**10. Master and servant ⇐323**

One cannot delegate to another an act which he is by law forbidden himself to do.

**11. Negligence ⇐65**

Occupant of building owed no duty either to public or to defendant to remove rubbish stored on the defendants' premises, or to prevent defendants from burning it in violation of city ordinance.

**12. Negligence ⇐105**

Plaintiff, as occupant of a building, did not assume any risk in defendants' use of vacant lot adjoining building to burn their rubbish even though maintenance of nuisance in violation of city ordinance endangered plaintiff's property, since plaintiff, in occupying the building, assumed only such perils as were naturally incident to his position and not those which might result from the negligence of defendants.

13. Negligence ⇐105
Nuisance ⇐25(1)

The doctrine of volenti non fit injuria does not apply where injury arises from a violation of an ordinance and does not apply to the maintenance of a nuisance unless the aggrieved party contributed to such maintenance.

14. Negligence ⇐105

Even though a person may waive benefit of a law enacted for his own benefit, an ordinance enacted for the public good cannot be contravened by private agreement. Civ.Code, § 3513.

15. Negligence ⇐105

The doctrine of volenti non fit injuria did not preclude plaintiff from recovering for the destruction of his goods by fire when defendants, who were burning waste which had been stored on vacant lot in violation of city ordinance, left fire unguarded, also in violation of ordinance, with result that fire spread to building which plaintiff occupied, merely because plaintiff had previous knowledge of defendant's violation of ordinance and on two prior occasions when defendants were burning rubbish with the fire properly guarded, plaintiff added some of his waste to the fire.

16. Nuisance ⇐25(1)

A person does not waive his right of action against one who maintains a nuisance per se merely because he knows of its existence.

17. Contracts ⇐108(2)
Estoppel ⇐52

Public policy requires that duties imposed by statute be discharged and that those who are affected cannot suspend operation of law either by waiver or by express contract.

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Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Percy Friedman, doing business of Canvas Specialty Manufacturing Company, and another against the Pacific Outdoor Advertising Company and T. G. Evans to recover for loss occasioned by destruction by fire of building occupied by named plaintiff, which fire was allegedly caused by the negligence of defendants. From so much as the judgment as denied named plaintiff recovery, he appeals.

Reversed and remanded with directions.

Hindman & Davis and Isadore I. Smuckler, all of Los Angeles, and Huntington P. Bledsoe, of San Diego, for appellant.

Reginald I. Bauder, of Los Angeles, for respondent Pacific Outdoor Advertising Co.

Edward W. Tuttle, of Los Angeles, for respondent T. G. Evans.

MOORE, Presiding Justice.

The question for decision is whether the former occupant of a building which was destroyed by fire caused by the flames of an unlawful burning of rubbish on an adjacent vacant lot is barred from recovery by reason of the fact that on one or more occasions prior to the date of the fire he had cast his own waste matter into a bonfire which had been made by the occupants of such lot.

From a judgment in favor of defendants denying recovery to plaintiff on account of losses suffered by the burning of his personal property located in a building which was destroyed by fire whose origin was on the lot adjacent to such building Friedman appeals. His coplaintiff, Los Angeles Canvas and Supply Company, owner of the building in question, recovered the value of its losses, which judgment was presumptively settled.[1] The grounds of his appeal are: (1) the evidence is insufficient to support the conclusion that appellant is barred by reason of his contributory negligence; (2) knowledge by appellant that respondents had on prior occasions violated city ordinances and committed negligent acts does not bar him from recovery.

[1] Appellant conducted his manufacturing business and kept machines and other personal property of the value of $5,052.77 stored in the rear portion of the building of the Los Angeles Canvas and Supply Company at 1013 North Mission Road in the

[1] No satisfaction of the judgment appears in the record and there is no mention of any disposition thereof in the briefs.

city of Los Angeles, herein referred to as the corporation's building. Adjacent and contiguous to the building was a vacant lot used by respondent Pacific Outdoor Advertising Company, hereinafter referred to as respondent, for the purpose of dumping and maintaining thereon waste paper, shrubbery cuttings and other combustible waste material collected from its various properties in the city. The defendant Evans was an independent contractor engaged for the purpose of tending and keeping clean the various properties of respondent throughout the city of Los Angeles used by it for advertising purposes, and made such collections and deposits.[2] He burned such accumulated waste material every three or four weeks without the use of incinerator and in an open bonfire and closer than 25 feet to the corporation's building, in violation of ordinances of the city of Los Angeles. The municipal code inhibits the burning of brush, waste material, dry grass and weeds on any lot not set aside for such purposes by public authority, without having first obtained a permit from the chief engineer of the fire department so to do and forbids any person in charge of a parcel of land to store or allow to exist thereon any dry grass, paper, litter, waste or any combustible material which constitutes a fire hazard. An exception to the foregoing rule provides that outside of any fire or mountain district all such burning of waste and rubbish shall be done in an approved incinerator, or at a distance of more than 25 feet from any building, "with a competent person in constant attendance until all fire is extinguished." The violation of any of such code provisions is declared to be a misdemeanor and the conditions caused by the deposit of such rubbish and waste material on a vacant lot in violation of such ordinance is deemed a public nuisance. Municipal Code, City of Los Angeles, sections 57.00; 57.04; 57.24; 57.43; 11.00; Ordinance 77,000 of the City of Los Angeles.

On June 27, 1943, while such rubbish and waste material lay in a pile upon the vacant lot, defendant Evans with the consent of respondent set fire thereto and thereafter left the fire before it had been extinguished and without leaving a competent person in charge, and negligently permitted the fire to spread to the dry grasses and other inflammable materials upon the lot and to ignite the corporation's building, resulting in the destruction of its contents including the personal property of appellant. Such illegal act of defendants directly caused the destruction of appellant's movables, the value of which was found to be $5,052.77.

In addition to the foregoing facts the court also determined that the damage suffered by appellant was concurrently caused and contributed to by his own negligence; that the conduct of Evans in the burning of the rubbish was open and obvious to appellant; that the latter had knowledge prior to June 27, 1943, of the uses to which defendants put the vacant lot in storing and maintaining combustible materials.

From the facts so found the court concluded that appellant was not entitled to recover the value of his destroyed property and that he should take nothing by his action.

The evidence as to whether appellant was contributorily negligent in causing the burning of his movables is as follows: (1) The testimony of defendant Evans was that he had been engaged by respondent as an independent contractor to collect weekly the waste, cuttings and debris from respondent's several properties used in the conduct of its advertising business. He deposited such rubbish on the vacant lot and approximately every three weeks made a bonfire thereof. The bonfire of June 27, 1943, was 21 feet from the corporation's building. At no time did Evans use an incinerator in which to burn the waste and debris. (2) The testimony of appellant was that he had leased the rear portion of the corporation's building on April 17, 1943, and continued his occupancy to June 27 when his belongings were destroyed. He was absent from the building on the latter date and knew nothing of the burning of

[2] Inasmuch as the only brief filed on behalf of the defense appears to be on behalf of the defendant company it is assumed that defendant Evans chose not to follow the appeal.

the rubbish or that it had been ignited, or that a fire had been left unguarded. Prior thereto he had observed trash being burned on the vacant lot on one or more occasions and in about the same place each time. He kept no incinerator there for his own use nor made objection to respondent's piling or burning the rubbish. On probably two Sundays prior to June 27, 1943, he had put some paper and other waste on a fire which had been set by Evans with the consent of the latter with whom appellant discussed the matter at the time. But when the conflagration attacked the corporation's building appellant was at the office of the United Tent and Awning Company, about two miles west of the fire. When he arrived 15 minutes later the destruction of his part of the corporation's building was practically complete and the firemen were playing water upon it.

No Contributory Negligence

[2-4] From such evidence respondent contends that appellant was precluded from recovery under the doctrines of (a) contributory negligence, and (b) volenti non fit injuria. In order to establish appellant's liability under either of these doctrines it was essential that defendants prove that appellant consented to the performance of the acts which occasioned his loss (Broom's Legal Maxims, p. 265; Civil Code, sec. 3515); or, if a nuisance was established by proof of the negligent acts of defendants, it must be shown that appellant had done some act willfully or negligently which actually and proximately contributed to cause the destruction of his property, Bosqui v. Sutro Railroad Co., 131 Cal. 390, 397, 63 P. 682, and not merely that he omitted to assume that defendants would violate the city's ordinances enacted for the public welfare. Collins v. Hodgson, 5 Cal. App.2d 366, 371, 42 P.2d 700; Moreno v. Los Angeles Transfer Co., 44 Cal.App. 551, 556, 186 P. 800. Appellant was under no duty to assume that his property was exposed to a danger which could arise only from a violation of law by another. Robbiano v. Bovet, 218 Cal. 589, 597, 24 P.2d 466. At the time of the fire appellant was far from its environs and had no knowledge of defendants' intention to ignite the rubbish on the vacant lot. The only proof from which it might be inferred that appellant consented to the burning of the debris on June 27 was his own testimony that on a prior occasion he had thrown waste matter into a bonfire on the lot. He had operated his business in the building only nine weeks and had observed the trash burning on Sundays only. In view of Evans' practice to destroy his collections "every three or four weeks" the occasions of such observations could hardly have exceeded two in number. At both times, however, the fire was guarded by the keeper until it had been extinguished.

[5] Appellant kept no dump of his own scrap or wastage on the lot. While he had on the days mentioned participated in burning the rubbish by casting his own paper into the flames, yet so far as the bonfire on June 27 is concerned appellant neither expressed his consent nor did any act, wilful or negligent, that could be construed as having contributed to the building of the bonfire or the destruction of his property. In fact the court found that appellant did not on that day throw upon or leave on the vacant lot any material or consent to the fire's being left unguarded. Nothing done by appellant in the entire course of Evans' burning of the wastage could have had a causal connection with the fire. The rubbish which appellant had burned on each of the former occasions was ashes only on June 27.

[6-8] Such former burnings by appellant were too remote from the events of June 27 to be considered contributory causes of the fire. He had no notice of Evans' intention to burn rubbish on that day or of the manner of igniting it or of his plan to leave it unguarded. In order for the violation of an ordinance to constitute contributory negligence it must contribute directly and proximately to the injury alleged. Hurtel v. Albert Cohn, Inc., 5 Cal. 2d 145, 147, 52 P.2d 922; Muir v. Cheney Bros., Inc., 64 Cal.App.2d 55, 62, 148 P.2d 138. Before the negligent acts or omissions of a plaintiff can be said to have contributed to the cause of his injuries it must appear that his negligence combined with that of the defendant to produce the result and that together they were the proximate cause. Jones v. Kansas City Public

Service Co., 158 Kan. 367, 147 P.2d 723, 725. It follows that the acts of appellant on the two previous occasions in placing his wastage in respondent's bonfires were remote from the negligence of defendants on June 27 and therefore had no causal connection with the origin or spread of the flames. Proof of careless conduct or of mere negligence is insufficient to establish contributory negligence as a defense. Monroe v. San Joaquin Light and Power Corporation, 42 Cal.App.2d 641, 651, 109 P. 2d 720.

Volenti Non Fit Injuria

[9-12] All that is said above as to the failure of appellant's act to be a contributing cause of the burning of his property applies with equal force in appraising the finding that appellant had knowledge of defendants' maintenance of a nuisance on the vacant lot prior to June 27, 1943. Storing combustible litter on a vacant lot was a violation of the municipal code to which appellant could not consent. One cannot delegate to another an act which he is by law forbidden himself to do. Snow v. Marian Realty Co., 212 Cal. 622, 299 P. 720; Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 143 P.2d 929. Appellant owed no duty either to the public or to respondent to remove the rubbish stored on the latter's premises or to prevent defendants from burning it. Appellant did not assume any risk in defendants' use of the vacant lot to burn their rubbish even though the maintenance of the nuisance endangered his property. Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L.R.A. 718, 48 Am.St.Rep. 146. In occupying the building adjacent to the vacant lot appellant assumed only such perils as were naturally incident to his position and not those which might result from the negligence of defendants. 19 Cal.Jur. 589; Weaver v. Shell Oil Co., 34 Cal.App.2d 713, 94 P.2d 364.

[13-17] The doctrine of volenti non fit injuria is not applicable where the injury arises from a violation of an ordinance. Neither does it apply to the maintenance of a nuisance unless the aggrieved party contributed to such maintenance. Even though a person may waive the benefit of a law enacted for his own benefit an ordinance enacted for the public good cannot be contravened by private agreement. Civil Code, sec. 3513; Moore v. Dresden Investment Co., 162 Wash. 289, 298 P. 465, 77 A.L.R. 1258; L'Heureux v. Hurley, 117 Conn. 347, 168 A. 8. Appellant neither took part in storing the wastage of respondent on the lot nor deposited any of his own to await a day of burning. On the contrary respondent made it a constant practice to maintain the nuisance with accumulated cuttings, debris and waste from its properties. Because appellant had knowledge of such practice he was not for that reason obliged either to remove it or to prevent defendants from burning it. Moreover, a person does not waive his right of action against one who maintains a nuisance per se merely because he knows of its existence. Neither may he be authorized by him who maintains the nuisance to violate the ordinance forbidding the outlawed acts. Rauch v. Southern California Gas Co., 96 Cal.App. 250, 258, 273 P. 1111; Martello v. Beletich, 59 Cal.App. 533, 211 P. 20. In the Rauch case, although the defendant was obliged to file with the city clerk a map showing the location of the gas service pipes in the streets, the defendant did not escape its own liability for a gas explosion caused by gas from a broken main by its contention that the city had acquiesced in the nonfiling of the map. In the Martello case the landlord did not avoid liability to his roomer in a tenement on account of the burning of the house by pleading that plaintiff knew during his occupancy that defendant kept an automobile under the same roof which covered plaintiff, in defiance of a city ordinance. Public policy requires that duties imposed by statute be discharged and that those who are affected cannot suspend the operation of the law either by waiver or by express contract. Adams v. Cumberland Inn Co., 117 Tenn. 470, 101 S. W. 428; Martello v. Beletich, supra.

It follows that appellant cannot be denied recovery by reason of his two acts occurring some weeks prior to June 27 when he cast some wastage into defendants' fire. When he did so the fire was so guarded as to prevent its spread. Such

acts did not modify the practice of defendants and therefore could not have proximately contributed to the destruction of appellant's property. They were too remote to be a proximately contributing cause. Elm v. Bennett, 99 Cal.App. 573, 575, 278 P. 906.

The judgment is reversed with instructions to enter judgment in favor of appellant against the defendants for the sum of $5,052.77.

McCOMB and WILSON, JJ., concur.




74 Cal.App.2d 885

## ROONEY v. MUTUAL BEN. HEALTH & ACCIDENT ASS'N.

Civ. 15049.

District Court of Appeal, Second District, Division 1, California.

June 13, 1946.

**1. Insurance ⇐646(6)**

In action on accident policy, burden was on plaintiff to prove that death of insured was result of injury sustained through purely accidental means.

**2. Insurance ⇐455**

Where policy does not insure against accidental death or accidental injury, but against death or injuries caused by accidental means, it is not sufficient that the death or injury should be unexpected, but in the means through which the injury was sustained, or the death produced, there must be something of an unexpected or unforeseen character.

**3. Insurance ⇐455**

Where insured voluntarily engaged in fistfight and, while attempting to strike his opponent, was struck and in falling insured's head came in contact with concrete sidewalk and sustained injuries which resulted in insured's death, the fatal result was through purely "accidental means" within accident clause of health and accident policy.

See Words and Phrases, Permanent Edition, for all other definitions of "Accidental Means".

**4. Insurance ⇐455**

In action on accident policy, each case must stand upon its own facts, and the legal principles as to what constitutes accidental means, as distinguished from accidental result, must be applied to such facts as appear in the particular case.

**5. Insurance ⇐455**

Mere fact that one invites a fistic encounter and sustains an injury or death therefrom does not prevent recovery on accident clause of policy insuring against loss of life resulting directly and independently of all other causes from bodily injury sustained through purely accidental means, but to prevent recovery it must appear that in utilizing the means to which the insured resorted the insured knew or should have known that he would probably sustain the injury which resulted as a consequence thereof.

**6. Trial ⇐139(1)**

Where there was no evidence of sufficient substantiality to support a verdict in favor of defendant if one should be given, plaintiff's motion for directed verdict was properly granted.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Edith E. Rooney against Mutual Benefit Health and Accident Association on two health and accident insurance policies issued by defendant to plaintiff's husband, subsequently deceased. From a judgment for plaintiff upon directed verdict, defendant appeals.

Judgment affirmed.

J. Edward Haley, of Los Angeles, for appellant.

Arthur Garrett, of Los Angeles, for respondent.

WHITE, Justice.

This action was instituted by plaintiff to recover the principal amount of two poli-

cies of health and accident insurance issued by defendant to Preston E. Rooney, plaintiff's husband, by reason of the death of her husband.

By her complaint plaintiff alleged that the death of her husband resulted from injuries sustained within the meaning of the insuring clause of each policy of insurance. The wording of the insuring clause in each policy was identical.

By its answer defendant denied that the insured's death resulted from injuries sustained within the meaning of the insuring clause of the policies issued to the insured.

The cause was tried before a jury, and at the conclusion of the trial the court directed the jury to return a verdict for plaintiff. From the judgment entered upon such verdict defendant prosecutes this appeal.

The facts are not in dispute and may be thus epitomized: On the evening of May 26, 1944, the deceased, Preston E. Rooney, was at George's Chili Parlor, a small restaurant serving meals and beer, located in the 1400 block on West Seventh Street in the City of Los Angeles. During the period of time the deceased was in the restaurant he became involved in an argument with a stranger. In the course of the argument the deceased invited the stranger to come outside the restaurant, saying to him, in effect, "come on outside, we will settle it out there." The deceased proceeded out to the sidewalk, followed by the stranger. The deceased attempted to strike the stranger, and the latter struck a blow at the deceased, causing him to fall, striking his head upon the concrete or paved portion of the sidewalk, whereby he sustained injuries described by the Chief Autopsy Surgeon for the Coroner's Department of Los Angeles County as "contusion of the brain and subdural hemorrhage due to basal fracture of the skull," and from the effects of which injuries decedent died that evening.

The insuring clause contained in each of the policies of insurance issued to the insured reads as follows:

"Mutual Benefit Health and Accident Association of Omaha (herein called Association) hereby insures Preston E. Rooney (herein called the Insured) of City of Los Angeles, State of California, against loss of life, limb, sight or time, sustained or commencing while this policy is in force, resulting directly and independently of all other causes, from bodily injuries sustained during the term of this policy or renewal thereof, through purely Accidental Means (Suicide, sane or insane, is not covered), and against loss of time beginning while this policy is in force and caused by disease contracted during the term of this policy or renewal thereof, respectively, subject, however, to all the provisions and limitations hereinafter contained."

The accident indemnity clause, so far as it is applicable to the payment of the principal sum provided for by said policies of insurance, reads as follows:

"If the Insured shall sustain bodily injuries, as described in the Insuring Clause, which injuries shall, independently of disease and all other causes, continuously and wholly disable the Insured from the date of the accident and result in any of the following specified losses within thirteen weeks, the Association will pay:

* * * * * *

"For Loss of Life.....$1,250.00."

The principal question and the only one that need here be considered is whether the evidence, in which there is no conflict, justified the trial court in concluding that any verdict other than that the death of the insured occurred "through purely accidental means" would be so lacking in evidentiary support as to require it to be set aside as a matter of law on motion for a new trial or upon appeal.

[1] The burden rested upon the plaintiff to prove that the death of the insured was the result of "injuries sustained * * * through purely accidental means." Rock v. Travelers Insurance Co., 172 Cal. 462, 464, 156 P. 1029, L.R.A. 1916E, 1196; Dark v. Prudential Ins. Co., 4 Cal.App.2d 338, 342, 40 P.2d 906.

Appellant in the instant case attacks the verdict upon the ground that the injury here claimed to have been sustained by the insured, resulting in his death, was not shown to have been effected "through purely accidental means."

[2] Where, as here, the policy does not insure against accidental death or accidental injuries, but against death or injuries caused by accidental means, it is not sufficient that the death or injury should be unexpected, but in the means through which the injury was sustained or the death produced there must be something of an unexpected or unforeseen character. Dark v. Prudential Ins. Co., supra, 4 Cal. App.2d at page 342, 40 P.2d 906. In other words, there is a distinction in law between "accidental death" and "death by accidental means." If the encounter with which we are here concerned had been one with deadly weapons and the deceased himself had invited and brought on such conflict, the ensuing fatal result could not be characterized as accidental, because while it is possible that death might not result from such an encounter, nevertheless death is the result which would naturally be expected. Price v. Occidental Life Ins. Co., 169 Cal. 800, 802, 147 P. 1175. In Richards v. Travelers Ins. Co., 89 Cal. 170, 26 P. 762, 763, 23 Am.St.Rep. 455, the term "accident" is defined as "a casualty, something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured."

[3] The theory of appellant in the case at bar is that Rooney, the insured, by inviting his antagonist to a fistic encounter, voluntarily assumed the risk of death. We are persuaded that it cannot be said from the evidence in the instant case that the deceased had any cause or reason to believe that a fistic encounter would result in his death. The fatal result was therefore accidental. Here the means which produced death was the fistic encounter, and this cannot be characterized as a voluntary act upon the part of the deceased the natural and usual and to-be-expected result of which would be fatal to him. In Horton v. Travelers Ins. Co., 45 Cal.App. 462, 466, 187 P. 1070, the court approves the definition of accidental means as given in Western Com. Travelers Ass'n v. Smith, 8 Cir., 85 F. 401, 405, 40 L.R.A. 653, a leading case, as descriptive of "means which produce effects which are not their natural and probable consequences."

While it is true under the terms of the policies herein that a mere accidental result would not suffice for recovery, we are convinced that it cannot reasonably be said that the "means" which produced the fatal result were of such a character that death was the usual, natural and probable result to be expected from voluntary resort to such "means." While in the case at bar the insured voluntarily engaged in a fist fight with another, he was not killed by a blow from the fist of his antagonist. His death resulted from falling and striking his head on the sidewalk. In Davilla v. Liberty Life Ins. Co., 114 Cal.App. 308, 315, 299 P. 831, 834, the court said: "If the injury to an insured person results in some greater or less degree from his own acts, and the evidence be such that the jury may fairly find that such result is one which he did not and could not have reasonably anticipated, and did not intend to produce, it is an accident, and is caused by accidental means. (Citing cases.) * * *."

We experience no difficulty in determining that the evidence in the case now before us was sufficient as a matter of law to show death from accidental means as distinguished from an accidental death, and therefore supports the verdict directed by the court. In the case of Losleben v. California State Life Ins. Co., 133 Cal. App. 550, 24 P.2d 825, the insured died from peritonitis caused by a twisting of the small intestine when he voluntarily jumped from a work bench, about three feet to the floor. Judgment was for the plaintiff and defendant appealed. In affirming the judgment the court said (133 Cal.App. at page 556, 24 P.2d at page 827):

"The mere fact that an act of jumping was voluntarily done does not conclusively show that an ensuing injury was not the result of accidental means. Such an act may be, and frequently is, accompanied or followed by other acts not intentionally done, such as slipping, falling, alighting upon an object not seen, an involuntary movement caused by unexpected developments or any one of a number of things that could be named. While an injury to an insured person may result in greater or less degree from an original voluntary

act upon his part, if there is some evidence which justifies the inference that the means which produced the injury contained something of an unexpected or unforeseen character involving other acts not intentionally done, the resulting injury may be said to have been caused by accidental means."

[4, 5] Appellant asserts that when one provokes an assault, as the result of which injuries are received from which death ensues, there can be no recovery upon a policy of the kind here involved. In support of this claim cases from other jurisdictions are cited, including Harrison v. Prudential Ins. Co., of America, 54 Ohio App. 279, 6 N.E.2d 991; Hutton v. States Accident Ins. Co., 267 Ill. 267, 108 N.E. 296, L.R.A.1915E, 127, Ann.Cas.1916C, 577; Fidelity & Casualty Co. v. Stacey's Exc'rs, 4 Cir., 143 F. 271, 5 L.R.A.,N.S., 657, 6 Ann.Cas. 955; Maryland Casualty Co. v. Spitz, 3 Cir., 246 F. 817, L.R.A. 1918C, 1191. While these cases would seem to support appellant's contention, we are convinced that, if so, the holdings therein are not supported by the weight of authority in this state. The rule in California is that each case must stand upon its own facts and that the legal principles enunciated as to what constitutes "accidental means" as distinguished from "accidental result" must be applied to such facts as appear in the particular case. These principles, applied to the facts of this case, do not support appellant's claim that when one invites a fistic encounter and sustains injury or death therefrom recovery cannot in any case be had upon policies of the character here involved. To prevent a recovery upon such a policy, it must be made to appear that in utilizing the means to which he resorted the insured knew or should have known that he would probably sustain the injury which resulted as a consequence thereof.

We are cited by appellant to the case of Gray v. Western States Life Ins. Co., 214 Cal. 695, 8 P.2d 126, 127, but in that case the policy provided that there could be no recovery thereon if the death of the insured resulted, among other causes, "from any violation of law by the deceased * * * ." The judgment in favor of defendant insurer was affirmed because the evidence showed and the trial court found that the insured met his death while making an assault upon another. This conduct upon the part of the insured was a violation of law which brought the case squarely within one of the exceptions contained in the policy. No such provision is found in the policy here presented and the cited case is not helpful.

[6] There being in the record before us no evidence of sufficient substantiality to support a verdict in favor of defendant if one were given, plaintiff's motion for a directed verdict was properly granted. Katoaka v. May Dept. Stores Co., 60 Cal. App.2d 177, 181, 140 P.2d 467; Anthony v. Hobbie, 25 Cal.2d 814, 155 P.2d 826.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.




74 Cal.App.2d 922

**MARTIN et al. v. RAY et al.**

**Civ. 15162.**

District Court of Appeal, Second District, Division 3, California.

June 17, 1946.

**1. Judgment ⇐303, 304**

A trial court has power to correct a mistake in its order or judgment, where the mistake is not the result of the exercise of judgment; but where the mistake is judicial, rather than clerical or inadvertent, the court has no power to amend its decision.

**2. Judgment ⇐23**

Trial judge was not required to make his formal judgment in accordance with memorandum which he had previously filed.

**3. Appeal and error ⇐717**

On an appeal from a judgment, trial judge's memorandum of opinion may not be used to impeach the judgment.

**4. Appeal and error ⇐717**

On appeal from an order amending a judgment, trial judge's memorandum of opinion is significant in determining whether amendment in formal judgment was a correction of a judicial or a clerical error.

**5. Judgment ⇐303**

A court has the power to correct its judgment to make it speak the court's true and intended decision, even though the misprision in the original judgment was that of the court.

**6. Judgment ⇐306**

Where trial judge's memorandum of opinion stated that plaintiffs were to have judgment against individual defendants for $1,000, but against corporate defendant only for $10, and plaintiffs thereafter presented to judge for signature a formal judgment stating that plaintiffs should recover $1,000 from "defendants", judge's action in correcting judgment to provide for recovery from corporate defendant for only $10 was a proper amendment of a "clerical error".

See Words and Phrases, Permanent Edition, for all other definitions of "Clerical Error".

**7. Appeal and error ⇐1074(1)**

On appeal by plaintiffs from an order amending a judgment nunc pro tunc, on ground that trial judge did not have power to amend, because mistake was allegedly a judicial mistake, plaintiffs were not entitled to have order set aside on ground that the judgment, as originally entered, was the only proper judgment that could have been made on the merits, since, irrespective of whether original judgment was right or wrong, trial judge had right to correct it so that it would reflect his true decision.

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Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Hugh B. Martin and Mary Frances Martin against Frederick Ray, Mary Louise Ray, and the Garden Land Company, Limited, a corporation, for relief against the individual defendants for the alleged violation by them of certain restrictions affecting realty, and for relief against the corporate defendant because of the alleged breach by it of its warranty to enforce the restrictions. From trial court's order amending a judgment nunc pro tunc, the plaintiffs appeal.

Judgment affirmed.

Chas. L. Nichols, of Los Angeles, for appellants.

Richard J. O. Culver and Felix H. McGinnis, both of Los Angeles, for respondent.

WOOD, Justice.

This is an appeal by plaintiffs from an order amending a judgment nunc pro tunc. Appellants contend that the amendment was a correction of a judicial error, and therefore the court did not have power to so amend the judgment. Respondent Garden Land Company, Ltd., asserts that it was a correction of a clerical error, and therefore the court had power to make the amendment.

Plaintiffs sought relief against defendants Frederick Ray and Mary Louise Ray by reason of the alleged violation by said defendants of certain restrictions affecting real property. In the same complaint they also sought relief against defendant Garden Land Company, Ltd., by reason of the alleged breach of its warranty that it would enforce said restrictions.

After three days of trial, the action was submitted for decision on July 31, 1944. On September 1, 1944, the judge signed and filed his memorandum of opinion, the last paragraph of which was as follows: "Judgment for the plaintiffs against the defendants Ray in the sum of $1,000.00, and that a mandatory injunction issue commanding defendants to remove said obstruction by November 1st, 1944, and Judgment against the defendant Garden Land Company Ltd. in the sum of $10.00." Immediately preceding that paragraph the opinion recited that the "damages as against the Land Company should be nominal and set at $10.00."

The findings of fact, conclusions of law, and judgment were prepared by counsel for the plaintiffs (appellants herein), and they were signed and filed by the judge on October 17, 1944. The judgment so prepared and signed contained the usual preliminary recitals as to when the case was

tried, the name of the judge, the names of counsel, that the cause was submitted, and that findings of fact and conclusions of law had been filed. It then read as follows:

"Wherefore, by reason of the law and the findings of fact as aforesaid, it is ordered, adjudged and decreed, as follows:

"1. Defendants Mary Louise Ray and Frederick Ray are hereby commanded forthwith to remove from that certain real property in the City and County of Los Angeles, California described herein as parcel C, the building or structure heretofore constructed by them on said parcel, or so much of said building or structure as now remains upon said structure.

"2. Defendants Mary Louise Ray and Frederick Ray are hereby commanded forthwith to remove from that certain real property in the City and County of Los Angeles, California described herein as Parcel A, the building or structure, known as the Gate House, heretofore constructed by them on said parcel, and now standing constructed thereon.

"3. That plaintiffs have and recover of and from defendants herein, and each of them, the sum of one thousand dollars ($1,000.00) with interest thereon at the rate of seven per cent (7%) per annum from the date hereof until paid together with plaintiffs' costs and disbursements incurred herein amounting to the sum of $15.25."

It will be observed that the judgment prepared for the signature of the judge did not specifically mention the name of defendant Garden Land Company, Ltd., in the body of the judgment, but the names of defendants Frederick Ray and Mary Louise Ray were specifically mentioned in two places therein. The name of the defendant Garden Land Company, Ltd., appeared only in the title of the cause at the heading of the judgment. It is to be noted also that in the 3rd paragraph of the judgment wherein the amount to be recovered was stated, which paragraph immediately followed specific references to defendants Frederick Ray and Mary Louise Ray, the names of the defendants were not stated, but only a general reference was made therein to the "defendants."

The attorneys for defendant Garden Land Company, Ltd., respondent herein, were attorneys for all the defendants at the trial, namely, Frederick Ray, Mary Louise Ray, and Garden Land Company, Ltd. On November 3, 1944, said attorneys made a motion for a new trial solely on behalf of the defendants Ray. After that motion was denied, said attorneys appealed from the judgment solely on behalf of the defendants Ray.

On May 10, 1945, the said defendant Garden Land Company, Ltd., filed a notice of motion for a nunc pro tunc order amending said judgment by inserting in the last paragraph thereof, after the word "from" and preceding the words "defendants herein," the words "Frederick Ray and Mary Louise Ray," so that it would recite that plaintiffs recover from Frederick Ray and Mary Louise Ray, defendants herein, and each of them, the sum of $1,000.

According to the affidavit of Mr. McGinnis, one of the attorneys for respondent, in support of the motion to amend the judgment, he understood that said judgment, in referring to the "defendants herein" in the last paragraph thereof, referred only to the defendants hereinbefore named in the body of the judgment, namely, Frederick Ray and Mary Louise Ray. He also stated therein that his said understanding was based upon the judgment and the unequivocal decision of the trial judge as set forth in his memorandum of opinion; that by reason of such understanding, the Garden Land Company, Ltd., acquiesced in that portion of the opinion providing for judgment in favor of plaintiffs against the Garden Land Company, Ltd., for $10; that he believed that said plaintiffs and their attorney waived their right to include the same in the judgment so prepared and submitted to the judge for his signature; that he was advised for the first time on May 1, 1945, that plaintiffs, through their attorney Mr. Nichols, contended that said judgment was intended to provide and did provide that it should run against said Garden Land Company, Ltd., as well as against de-

fendants Frederick Ray and Mary Louise Ray for the sum of $1,000.

The affidavit of Mr. Nichols, attorney for appellants, was in substance that he was not responsible for the neglect of counsel for defendants in failing to comprehend the language of the judgment; that at the time of the settlement of the findings of fact he predicated his word and act upon the propriety of the judgment being rendered against Garden Land Company, Ltd., in the sum of $1,000, and he did not indulge in any word or act calculated to create the impression that such judgment was not being actively sought or properly awarded by the court in the premises.

On June 11, 1945, after a hearing upon the motion to amend the judgment, at which hearing the attorneys for all the parties were present, the court amended the 3rd or last paragraph of the judgment nunc pro tunc to read as follows:

"3. That plaintiffs have and recover of and from Frederick Ray and Mary Louise Ray, defendants herein, and each of them, the sum of One Thousand Dollars ($1,000.00) with interest thereon at the rate of seven per cent (7%) per annum from the date hereof until paid, and of and from Garden Land Company, Ltd., defendant herein, the sum of Ten Dollars ($10.00) with interest thereon at the rate of seven per cent (7%) per anum from date hereof until paid, together with plaintiffs' costs and disbursements incurred herein amounting to the sum of $——."

[1, 2] A trial court has power to correct a mistake in its order or judgment where the mistake is not the result of the exercise of judgment, but where the mistake is judicial rather than clerical or inadvertent the court has no power to amend its decision. In re Estate of Burnett, 11 Cal.2d 259, 262, 79 P.2d 89.

Appellants assert that the nunc pro tunc order "involved the very essence of judicial action" because the original judgment "explicitly" awarded judgment against the Garden Land Company, Ltd., in the sum of $1,000, and the trial judge attempted by the nunc pro tunc order to limit the award of $1,000 to the two individual defendants and to award damages against the corporate defendant in the sum of $10 only. The assertion that the judgment "explicitly" awarded a judgment of $1,000 against the Garden Land Company, Ltd., was based apparently upon the fact that general word "defendants" was used to designate those against whom a judgment of $1,000 was rendered. Irrespective of whether the form of the judgment was such that the judgment might be characterized properly as one "explicitly" awarding a $1,000 judgment against respondent, the circumstances establish that such form of judgment did not recite the judgment which the trial judge had rendered and intended to record as his judgment. In the memorandum of opinion, signed and filed by the judge prior to signing the judgment, he first discussed at length the rights of plaintiffs as against the defendants Ray and said that those defendants, Frederick Ray and Mary Louise Ray, should pay to plaintiff $1,000 as damages. He then discussed at length the rights of plaintiffs as against the defendant Garden Land Company, Ltd., and said, "We cannot say * * * that the plaintiff Martin suffered appreciable damages because of the mere non-performance of duty of the defendant Land Company, and as * * * these damages are not measurable from the evidence adduced, we are of the opinion that these damages as against the Land Company should be nominal and set at $10.00." At the end of said memorandum, after having discussed separately the liability of the individual defendants and the liability of the corporate defendant, the judge stated specifically, as shown by the above quotation, that the judgment should be for $1,000 against the defendants Ray, and for $10 against the defendant Garden Land Company, Ltd.

[2-4] The form of judgment prepared by counsel for the prevailing parties, and signed by the judge, did not include the provision, expressly stated in said memorandum, that the judgment against the Garden Land Company, Ltd., should be for $10, but on the contrary it stated that plaintiffs should recover $1,000 from the "defendants." It is true, as appellants contend, that the judge was not required to

make his formal judgment in accordance with the memorandum which he had filed. He had the power to make a formal judgment different from the proposed judgment announced in his memorandum of opinion. There is nothing in the record, however, other than the fact that the judge signed the formal judgment submitted to him, to indicate that the judge had changed his decision from that stated in his memorandum. Counsel for appellants asserts in his brief that, at the time of signing the judgment, the judge "was clear and oriented concerning the provisions thereof." That statement implies that the judge, in the exercise of judgment, changed his decision from that stated in his memorandum, but it is not asserted as a fact that the judge made any statement to the effect that he had changed his decision or that he recognized that the proposed formal judgment was different from his memorandum. It is true that, on an appeal from a judgment, a memorandum of opinion may not be used to impeach the judgment. Lord v. Katz, 54 Cal.App.2d 363, 367, 128 P.2d 907. The appeal here, however, is not from the judgment, which provided that plaintiffs recover $1,000 from "defendants," but is from an order amending the judgment so that it would recite the alleged true decision of the judge. Although, as above stated, the memorandum was not binding as to what the formal judgment should be, and it could not have been used on an appeal from the judgment to impeach the judgment, it is of significance, on appeal from the order amending the judgment, in determining whether the change made in the formal judgment was the correction of a judicial or a clerical error.

[5, 6] The amendment of the judgment was made upon notice of motion to amend and after a hearing at which counsel for appellants opposed the motion. The trial judge amended the judgment to conform with the provisions of his memorandum of opinion. In so amending the judgment he found that his true and intended judgment, which had been announced in his written opinion, had not been clearly or accurately expressed in the formal judgment. The comprehensive memorandum of opinion, which had been signed and filed prior to the signing of the formal judgment, indicates that the amendment was not an afterthought or an attempt to correct a judicial error. A court has the power to correct its judgment to make it speak the court's true and intended decision, even though the misprision in the original judgment was that of the court. Kohlstedt v. Hauseur, 24 Cal.App.2d 60, 61, 62, 74 P.2d 314. The amendment herein was a correction of a clerical error, and said amendment was made properly.

[7] Appellants contend further that the amendment should not have been made, because the judgment as entered, according to appellants, was righteous and the only proper judgment that could have been made, and therefore there was no error, judicial or clerical, to be corrected. Their argument is that in such an action the amount of damages should have been the same as to all defendants. The effect of said contention is that if a judgment, entered through clerical error or misprision, should happen to be the proper judgment under the evidence and the law, the trial judge should not be permitted to amend it even though it does not speak the truth as to his intended decision. Irrespective of whether the original judgment herein was the right or wrong one under the evidence and the law, the trial judge had the right to correct it so that it would reflect his true decision. The appeal here is not from the judgment, but is one which questions the right of the trial judge to make the order amending the judgment.

The order is affirmed.

DESMOND, P. J., and SHINN, J., concur.

75 Cal.App.2d 1

## PEOPLE v. SILVER.

Cr. 2400.

District Court of Appeal, First District, Division 2, California.

June 19, 1946.

Hearing Denied July 18, 1946.

1. Statutes ⇐225

The statute prohibiting bribery and providing punishment therefor, and statute defining "bribe", must be construed together. Pen.Code, § 7, subd. 6; § 68.

2. Bribery ⇐6(1)

An indictment, charging that acting investigator of State Board of Architectural Examiners asked and received a bribe "upon an agreement and understanding and with the corrupt intent" that investigator's action "should be unlawfully influenced thereby" for purpose of revealing questions and problems to be asked of license applicant, did not fail to state an offense because of lack of allegation that accused had duty to keep examination questions secret. Pen.Code, § 7, subd. 6; §§ 68, 952.

3. Bribery ⇐3

In prosecution against acting investigator of State Board of Architectural Examiners for asking and receiving a bribe for purpose of revealing examination questions and problems to license applicant, proof of practice permitting disclosure of questions in advance of examination would be a defense to the charge. Pen.Code, § 7, subd. 6; §§ 68, 952.

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Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Benjamin G. Silver was charged in an indictment with a felony of asking and receiving a bribe, and, from an order dismissing the indictment, the People of California appeal.

Reversed.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Charles S. Peery, Asst. Dist. Atty., both of San Francisco, for appellant.

Leo R. Friedman, of San Francisco, for respondent.

DOOLING, Justice.

The people appeal from an order of the superior court dismissing an indictment. The indictment charged the defendant with the felony of asking and receiving a bribe. It alleged that:

"The said Benjamin G. Silver * * * was * * * the duly appointed, qualified and acting investigator of the California State Board of Architectural Examiners * * * and that while * * * acting as such, the said Benjamin G. Silver, on or about the 16th day of June A. D. 1944 * * * did then and there ask and receive from one Robert Anshen a bribe, towit: Two Hundred and No/100 Dollars ($200.00) * * * upon an agreement and understanding and with the corrupt intent * * * that the action of said Benjamin G. Silver, upon a matter then pending and which might be brought before the said Benjamin G. Silver, in his official capacity, as aforesaid, should be unlawfully influenced thereby, in the manner following, towit: that the said Benjamin G. Silver * * * was required to assist in the handling and assembling of the examination questions and problems chosen by the California State Board of Architectural Examiners * * * to be asked of applicants for licenses to practice archecture (sic) * * * at the examination * * * to be held in the month of June A.D. 1944 * * * that the said Benjamin G. Silver * * * agreed to and with the said Robert Anshen * * * for the said bribe * * * to disclose and reveal to said Robert Anshen that (sic) said examination questions and problems to be asked of applicants for licenses to practice architecture within the State of California, at said duly scheduled examination * * * that said Robert Anshen * * * had qualified and intended to take said examination for the purpose of procuring a license to practice architecture within the State of California; that said Benjamin G. Silver * * * knew that said Robert Anshen

intended to take said examination * * * (and) knew, agreed and intended * * * to deliver said examination questions and problems to said Robert Anshen in advance of said examination for the purpose of enabling and assisting the said Robert Anshen to pass said examination and to procure a license to practice architecture within the State of California."

The sole ground urged by respondent in support of the order appealed from is that the indictment fails to state a public offense because (quoting from respondent's brief): "There is no allegation in the indictment that it was part of the duties of Silver, as such employee, to keep the examination questions secret. From all that appears from reading the indictment any applicant for the examination had a perfect right to be furnished with a set of questions in advance of the examination. The indictment being susceptible of such construction it fails to state a violation of Section 68 of the Penal Code."

By this argument respondent attempts to lead the court back through the mazes of technical pleading the absurdities of which moved the legislative almost twenty years ago to amend sections 951, 952, 954, 956 and 959 of the Penal Code so as to simplify and modernize the archaic rules of pleading theretofore governing indictments and informations. The effect of these amendments has more than once been commented on and explained by the courts in the intervening years. See People v. Pierce, 14 Cal.2d 639, 644, 96 P.2d 784 et seq.; People v. Beesly, 119 Cal.App. 82, 84, 6 P.2d 114, 970 et seq.; People v. Mitchell, 40 Cal.App.2d 204, 209, 210, 104 P.2d 545.

Section 68 of the Penal Code provides:

"Every executive or ministerial officer, employee or appointee of the State of California, county or city therein or political subdivision thereof, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punishable by imprisonment in the State prison not less than one nor more than fourteen years; and, in addition thereto, forfeits his office, and is forever disqualified from holding any office in this State."

Penal Code, section 7, subdivision 6 defines the word "bribe" as follows:

"The word 'bribe' signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote, or opinion, in any public or official capacity."

[1] The two sections, as respondent points out, are to be construed together. People v. Glass, 158 Cal. 650, 676, 112 P. 281; People v. Ward, 110 Cal. 369, 42 P. 894.

Section 952 of the Penal Code now provides that the charging part of an information or indictment "may be in the words of the enactment describing the offense or declaring the matter to be a public offense." The opening portion of the indictment fully meets this requirement. It charges in the language of § 7, subd. 6, Penal Code, that defendant asked and received a bribe, i.e. "anything of value" (stated as $200) "asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action * * * in any public or official capacity" (charged as "upon an agreement and understanding and with the corrupt intent * * * that the action of said Benjamin G. Silver * * * should be unlawfully influenced thereby"). It likewise charged substantially in the language of sec. 68, Penal Code, that this bribe was asked and received by the defendant, "upon an agreement and understanding * * * that the action of said Benjamin G. Silver, upon a matter then pending and which might be brought before the said Benjamin G. Silver, in his official capacity * * * should be * * * influenced thereby."

The allegations in the words of the statute of a "corrupt intent" to be "unlawfully influenced" import, and can only mean, that it was a violation of legal duty imposed on defendant to agree for a bribe to disclose the examination questions as charged. To hold otherwise would be to

nullify by judicial fiat the amendment to sec. 952, Penal Code, expressly authorizing the offense to be charged "in the words of the enactment describing the offense."

A similar argument was made by the counsel who appears for the present respondent in People v. Megladdery, 40 Cal. App.2d 748 at pages 782, 783, 106 P.2d 84, 102 (also a bribery case). The court in that case said:

"Respondent contends that the crime of asking for, or agreeing to receive, a bribe can only occur when the act sought to be influenced is an act imposed by law as an official duty of the public officer involved, and that it is necessary to allege that the law imposed upon the defendant such official duty. This is a much too broad statement of the rule. It is sufficient to charge and prove that the subject matter upon which the bribe was to operate existed and could be brought before the public officer in his official capacity. The fact the duty is not specifically conferred upon the officer by statute is immaterial. (Citing cases.)

"The indictment charges Megladdery with being an executive and ministerial officer of the state, that is, the private secretary to the governor, and that in that capacity he asked and agreed to receive from Bent a bribe with the intent that his action 'upon a matter then pending and which might be brought before' him in his official capacity should be unlawfully influenced. This sufficiently charged the offense."

[2] We are satisfied that it will be sufficient to establish defendant's duty not to disclose the questions if the people prove a practice of the state board of architectural examiners not to disclose the examination questions in advance of the examination and that such practice was known by defendant. Such practice being proved the absence of statute or formal rule on the subject would be immaterial. It would be the legal duty of defendant not to violate the established practice known to him.

[3] We agree that proof of a practice permitting the disclosure of the questions in advance of the examination would be a defense to the charge. If such a practice existed defendant might be guilty of a misdemeanor under sec. 70, Penal Code, but he would not be guilty of a violation of sec. 68, Penal Code, as charged.

The order appealed from is reversed.

NOURSE, P. J., and GOODELL, J., concur.




74 Cal.App.2d 959

**Ex parte KINGSBURY.**

**Cr. 1965.**

District Court of Appeal, Third District, California.

June 18, 1946.

**1. Criminal law ⇐1202(1)**

Crime of "issuing check without sufficient funds" was not an offense upon which accused could be adjudged an habitual criminal. Pen.Code, § 644.

**2. Criminal law ⇐1202(1)**

Crime of "obtaining money by false pretenses" in Maryland, which appeared to have been a charge of obtaining but $10 on such false pretenses, was an offense which, had it been committed in California, would have constituted a misdemeanor only, and hence was not one upon which accused could be adjudged an habitual criminal. Pen.Code, § 644.

**3. Criminal law ⇐1202(1)**

Crime of "an attempt to obtain" money by false pretenses was not one upon which accused could be adjudged an habitual criminal. Pen.Code, § 644.

**4. Criminal law ⇐984**

Where each transaction set forth in four charges of grand theft constituted a separate offense, court could order the sentences to run concurrently or consecutively. Pen.Code, §§ 484, 669.

**5. Criminal law ⇐991(2)**

Where three prior convictions charged did not constitute a valid ground for ad-

judging accused to be an habitual criminal, judgment rendered was valid as to sentences imposed for main offenses charged and void only as to excessive imprisonment imposed. Pen.Code, §§ 484, 644, 669.

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Proceeding in the matter of the application of Lloyd A. Kingsbury for a writ of habeas corpus against Robert A. Heinze, Warden of the California State Prison at Folsom.

Judgment in accordance with opinion.

Lloyd A. Kingsbury, of Represa, for petitioner.

Robert W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

On March 23, 1944, an information was filed against petitioner in Los Angeles County, charging him with four counts of grand theft: (1) on June 12, 1943, obtaining from Edward Lunsman, the sum of $500; (2) on June 16, 1943, obtaining from the same victim, the sum of $1000; (3) on June 18, 1943, obtaining from the same victim, the sum of $750; (4) on June 25, 1943, obtaining from the same victim, the sum of $375. The information also charged petitioner with four prior convictions, and service of terms therefor in state prisons. One of the priors was later dismissed on motion of the district attorney.

Petitioner entered his plea of not guilty to the charges in each of the four counts and denied the prior convictions alleged. A jury found him guilty on all four counts of grand theft and also found him guilty of the three prior convictions. He moved for a new trial and his motion was denied. He was adjudged to be an habitual criminal and sentenced to the state prison for the term prescribed by law on each count, it being ordered by the trial court that the sentences on counts 1 and 2 should run concurrently and that the sentences on counts 3 and 4 should run concurrently, but that the term for which he was sentenced on counts 3 and 4 should follow the term of the sentences on counts 1 and 2.

As the ground for adjudging petitioner an habitual criminal each of the judgments of the trial court recited:

"* * * and the jury having found the allegation of first, second, and third prior convictions of felonies as alleged in the information true, to-wit: Issuing Check Without Sufficient Funds, a felony, convicted in the Superior Court of the State of California, Los Angeles County, upon which judgment was rendered on or about September 20, 1913, and having served a term of imprisonment therefor in the State Prison; 'Obtaining Money by False Pretenses,' a felony, convicted in the Circuit Court of the State of Maryland, Baltimore County, upon which judgment was rendered on or about May 9, 1916, and having served a term of imprisonment therefor in the State Prison; and Obtaining Money by False Pretenses, a felony, convicted in the Circuit Court of the State of Illinois, Rock Island County, upon which judgment was rendered on or about March 20, 1928, and having served a term of imprisonment therefor in the State Prison."

From said judgment and from the order denying a new trial defendant appealed and on that appeal contended, among other things, that the trial court had committed prejudicial error in receiving evidence of defendant's prior convictions. The court held that there was no merit in this contention, and affirmed the judgment. See People v. Kingsbury, 70 Cal.App.2d 128, 160 P.2d 587.

On February 28, 1946, Kingsbury filed in this court the petition for a writ of habeas corpus now under consideration, alleging therein that none of the prior offenses charged in the information filed against him in Los Angeles County was a felony comprehended within section 644 of the Penal Code, and that therefore he had been erroneously adjudged to be an habitual criminal; also that the four separate charges in the information all related to one general transaction for which, under section 484 of the Penal Code there could be but one punishment, and that the trial court erred in providing that the sentences on counts 3 and 4 should run consecutively with the sentences on counts 1 and 2.

An answer and return, filed in response to the writ of habeas corpus issued by the court, denied the latter contention of petitioner, but admitted that the prior conviction in the State of Maryland of larceny of $10 was insufficient to constitute grand larceny in California, and should not have been considered by the trial court in adjudicating defendant an habitual criminal.

It is not clear from the record before us whether defendant was adjudged an habitual criminal because of the *three* prior convictions charged in the information, and set forth in the four separate judgments against defendant, or whether but two of them were considered by the trial court as set forth in the minutes of court which recite: "In view of the fact that defendant has *twice* been convicted of Grand Theft, the defendant is adjudicated an habitual criminal under the provisions of Section 644 of the Penal Code." (Italics added.) However, it appears upon the face of the record which was before the trial court that no one of them charges such a felony as is comprehended by said section 644.

[1] The crime charged as "Issuing Check Without Sufficient Funds" in Los Angeles County, California, was held in People v. Shaw, 137 Cal.App. 533, 537, 30 P.2d 1031, not to constitute one of the offenses described in section 644, supra, upon which a judgment finding a defendant an habitual criminal can be based.

[2] The crime charged as "Obtaining Money by False Pretenses" in Maryland in 1916 appears from the record in the trial court to have been a charge of obtaining but $10 on such false pretenses, an offense which, had it been committed in California, would have constituted a misdemeanor only, and is therefore not one upon which a defendant may be adjudged an habitual criminal. See People v. Shaw, supra, 137 Cal.App. at page 536, 30 P.2d 1031; In re Howard, 69 Cal.App.2d 164, 158 P.2d 408; In re Thompson, 72 Cal.App.2d 747, 165 P.2d 533; People v. Richardson, 74 Cal.App.2d 528, 169 P.2d 44.

[3] The crime charged as "Obtaining Money by False Pretenses" in Illinois appears from the record to have been "an attempt to obtain" money and property from one Harry W. Johnson "by means of the confidence game." While in the same indictment Kingsbury was charged with having obtained $10,000 from said Johnson by means of the confidence game, the judgment shows that he was convicted of the attempt only—which is not one of the offenses enumerated in section 644, supra.

[4] As for petitioner's contention that all the sentences on the four counts of grand theft should have run concurrently, he relies upon section 484 of the Penal Code. We find no merit in this contention. Under the facts as they appear in the decision on petitioner's appeal, each transaction set forth in the four charges constituted a separate offense, and under the provisions of section 669 of the Penal Code it was within the power of the court to order the sentences to run either concurrently or consecutively. See People v. Stanford, 16 Cal.2d 247, 251, 105 P.2d 969; People v. Rabe, 202 Cal. 409, 413, 261 P. 303; People v. Ellison, 26 Cal.App.2d 496, 498, 499, 79 P.2d 732; People v. Miles, 37 Cal.App.2d 373, 378, 379, 99 P.2d 551; People v. Serna, 43 Cal.App.2d 106, 108, 110 P.2d 492; People v. Caldwell, 55 Cal.App. 2d 238, 250, 251, 130 P.2d 495.

[5] We think that the record conclusively shows that the three prior convictions charged did not constitute a valid ground for adjudging petitioner to be an habitual criminal for the reasons above stated. However, such adjudication did not render the judgment void. It is still valid as to the sentences imposed for the main offenses charged, and only void as to the excessive imprisonment imposed. In re Williams, 4 Cal.App.2d 351, 40 P.2d 890; In re Howard, supra.

It is not contended by petitioner that he is now entitled to his release, but he does contend that he is entitled to have his term of imprisonment and his right to parole determined upon the valid portion of his sentence only. With this position we agree. We accordingly hold that the Adult Authority should disregard the adjudication of petitioner as an habitual criminal and should fix his term of imprisonment and

determine his eligibility for parole solely on the portion of the sentences imposed upon the main charges of grand theft as stated in the judgment and commitment.

PEEK and THOMPSON, JJ., concur.




74 Cal.App.2d 941

## CHAMBERLAIN CO. v. ALLIS-CHALMERS MFG. CO.

Civ. 15138.

District Court of Appeal, Second District, Division 2, California.

June 18, 1946.

Rehearing Denied July 8, 1946.

Hearing Denied Aug. 15, 1946.

**1. Appeal and error ⇐931(1)**

On defendant's appeal from judgment for plaintiff, the evidence was viewed in the light most favorable to the plaintiff.

**2. Appeal and error ⇐1099(1), 1195(3)**

Where an appellate court in reversing a case and in ordering further proceedings lays down a proposition of law presented on the appeal though not essential to the decision of the case but important for the purposes of a new trial, such ruling becomes the law of the case and, without regard to the correctness of such legal principle, is binding upon the trial court and the appellate courts in subsequent stages of the action. Code Civ.Proc. § 53.

**3. Sales ⇐261(1)**

Statement in written sales contract that pumice sifter would grade two tons per hour of dry pumice at 98½ per cent. efficiency was an "express warranty" within definition of Uniform Sales Act. Civ. Code, § 1732.

See Words and Phrases, Permanent Edition, for all other definitions of "Express Warranty".

**4. Sales ⇐260**

Provision, in sales contract, under which seller agreed and reserved right to repair pumice sifter sold which proved to be defective as to material, workmanship or, design, was not inconsistent with warranty of efficiency of sifter.

**5. Sales ⇐260**

Provision, in conditional sales contract, constituting a separate paragraph excusing seller from delays in performance unavoidable or beyond its control, did not excuse a breach of express warranty, since a "breach of warranty" is not a "delay" nor beyond seller's control.

See Words and Phrases, Permanent Edition, for all other definitions of "Breach of Warranty" and "Delay".

**6. Sales ⇐441(3)**

In action for breach of warranty of efficiency of pumice sifter, evidence was insufficient to show that dropping of sifter before installation was cause of failure of sifter to meet seller's warranty.

**7. Attorney and client ⇐86**

A seller sued by buyer for breach of warranty of efficiency of pumice sifter waived any right to urge buyer's failure to make payments on balance of purchase price as a defense, where seller's counsel informed court during the trial that seller was not making any contention that the first breach of the contract occurred when buyer failed to make the balance of the payments on the purchase price.

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Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the Chamberlain Company against Allis-Chalmers Manufacturing Company to recover damages for breach of an express warranty in a contract for the balance due on a sifting machine. The defendant filed a counterclaim. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

LeRoy B. Lorenz, of Los Angeles, for appellant.

Salisbury, Robinson & Himrod, by B. R. Ware, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff in the sum of $12,703.87, after trial before the

court without a jury, in an action to recover damages for breach of an express warranty in a contract for the balance due on a Nordyke Square Sifter, defendant appeals.

[1] The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are these:

Plaintiff bought from defendant a sifting machine pursuant to the terms of a written contract. The machine was delivered to and operated for a time by plaintiff. After the machine was delivered and before it was installed it was dropped and damaged. Repairs to the machine were made by the McKain Manufacturing Company who was recommended by defendant before the machine was installed. Thereafter the plaintiff brought this action to recover damages for a breach of warranty of the machine. The answer denied the issues of the warranty action and set up a counter-claim for a balance due and unpaid on the purchase price of the machine. At the trial it was stipulated that the balance of the price alleged in the counter-claim was due by the terms of the contract and unpaid leaving for consideration only the question arising on plaintiff's claim for breach of warranty. Judgment went against the plaintiff on its complaint and for defendant on its counter-claim from which judgment plaintiff appealed. The judgment was reversed by the District Court of Appeal. (See Chamberlain Co. v. Allis-Chalmers Mfg. Co., 51 Cal.App.2d 520, 125 P.2d 113.) The opinion in such case was prepared by Mr. Justice Shaw. Upon a retrial of the case judgment was entered in favor of plaintiff and the present appeal ensued.

[2] Preliminarily, in discussion of the points urged for reversal of the judgment by defendant, it should be borne in mind that the rule is established in California, that where an appellate court, in reversing a case and in ordering further proceedings, lays down a proposition of law presented on the appeal though not essential to the decision of the case but important for the purposes of a new trial, such ruling becomes the law of the case and without regard to the correctness of such legal principle is binding upon the trial court and the appellate courts in subsequent stages of the action. (Steelduct Co. v. Henger-Seltzer Co., 26 Cal.2d 634, 643, 160 P.2d 804; Wallace v. Sisson, 114 Cal. 42. 43, 45 P. 1000; Porter v. Muller, 112 Cal. 355, 366, 44 P. 729 et seq; Olney v. Sawyer, 54 Cal. 379, 385; Gwinn v. Hamilton, 75 Cal. 265, 266, 17 P. 212; In re Estate of Baird, 193 Cal. 225, 239, 223 P. 974; Table Mountain Tunnel Co. v. Stranahan, 21 Cal. 548, 551; People's Lumber Co. v. Gillard, 5 Cal.App. 435, 438, 90 P. 556; cf. Section 53 of the Code of Civil Procedure. See also 2 Cal.Jur. (1921) page 958, sec. 562.)

Defendant urges reversal of the judgment on four propositions which will be stated and answered hereunder seriatim:

[3] First: *There was not any express warranty in its contract that the Nordyke Square Sifter which was sold to plaintiff was fit for the purposes for which it had been purchased.*

This proposition is untenable in view of the previous decision of this court in Chamberlain v. Allis-Chalmers Manufacturing Co., supra, deciding to the contrary. At pages 522, 523, of 51 Cal.App.2d, at page 114 of 125 P.2d, this court said:

"At the trial it was stipulated that the words 'at 98½ per cent efficiency' were inserted here in the contract at the request and upon the insistence of plaintiff. * * * But what purpose can be served by the words, 'to be used to grade two tons per hour of Dry Pumice through the following screen meshes at 98½ per cent efficiency,' except that of an assurance to the purchaser of the capacity and efficiency of the article described? We see none. Such a provision might reasonably be expected in a contract of sale of a machine, and while possibly more apt words could have been found, those used are not incapable of the meaning that the sifter will have a 98½ per cent efficiency when used as stated. We therefore ascribe that meaning to them. So construed they amount to a promise by the seller, their natural tendency would be to induce the purchase, and by the terms of section 1732 of the Civil Code they are an express warranty."

It is now the law of this case that there was an express warranty in the contract.

Defendant in a letter dated June 1, 1938, admitted its failure to comply with such

warranty. The pertinent portion of this letter is as follows:

"Referring to your order No. 576 dated May 29, 1937, covering the #422 Nordyke Square Sifter, as you know after an earnest effort at considerable expense, *we have been unable to accomplish the work with this machine* that was expected, therefore, the only suggestion we can make is that it be returned.

"We regret exceedingly the fact that we are not able to make this Sifter come up to your expectations, but *we have proved that due to the peculiar action of your particular material on the screens we are unable to keep the meshes of the sieves open,* regardless of what type of cleaner is used, thus making it impossible to produce the products you desire." (Italics added.)

[4, 5] Second: *Plaintiff was not entitled to recover consequential or special damages for breach of the warranty in the contract since the contract contained two provisions limiting its liability.*

This proposition is likewise untenable since on the previous appeal the appellate court found contrary to defendant's contention. One of the provisions of the contract relied on by appellant to limit its liability was as follows:

"The Company agrees and shall have the right to repair f.o.b. works where made, or furnished without charge f.o.b. its works a similar part to replace, *any portion* of the machinery of its own manufacture which within one year after shipment is proven to have been at the time of shipment *defective as to material, workmanship or design,* provided the Purchaser gives the Company immediate written notice of alleged defects. The Company shall not be held liable for any damage or delay *caused by the said defects* and shall not be responsible for work done, machinery furnished or repairs *made by others.*" (Italics added.)

In the previous opinion it was said at page 524 of 51 Cal.App.2d, at page 116 of 125 P.2d:

"Defendant also argues that the provision in which we find a warranty cannot be so construed because such construction would render it inconsistent with this provision of the contract: 'The company agrees, and shall have the right, to repair f.o.b. works where made * * * any portion of the machinery of its own manufacture which within one year after shipment is proven to have been * * * defective as to material, workmanship or design * * *.' Granting that failure of the sifter to operate with the warranted efficiency would be due to defects of either material, workmanship or design, we see no inconsistency between the warranty and the covenant to repair. The latter may cover many defects which do not result in a breach of the warranty, and also gives the defendant an opportunity to make good its warranty if it can; but if defendant cannot or will not do so, as alleged here, there is nothing about this convenant inconsistent with enforcement of the warranty."

In the previous decision, it was also said at page 526 of 51 Cal.App.2d, at page 116 of 125 P.2d:

"Defendant further contends that the damages alleged in the complaint are all consequential in nature, and that the plaintiff is barred from recovering such damages by the following provisions of the contract: 'This contract is contingent upon strikes, fires, accidents or other delays unavoidable or beyond the reasonable control of the Company. The Company shall not be held responsible or liable for any loss, damage, detention or delay from any cause beyond its control, or in any event for consequential damages; and the receipt of the machinery by the Purchaser shall constitute a waiver of any and all claims for loss or damage due to any delay.' This provision constitutes a separate paragraph of the contract, and it is clearly directed at one subject only, that is, delays in performance by defendant that are 'unavoidable or beyond the reasonable control of' defendant. A breach of warranty is not a delay, nor is it, as far as now appears, beyond the defendant's control. (See Excelsior Motor, etc., Co. v. Sound Equipment, Inc., 7 Cir., 1934, 73 F.2d 725, 728."

[6] Third: *The dropping of the machine before its installation was the cause of the failure of the machine to meet defendant's warranty.*

This proposition is without merit. There is no evidence in the record to indicate that the dropping of the machine caused it to fail to meet the requirements of defendant's warranty, nor did defendant so contend in its letter of June 1, 1938, in which it conceded the machine was unable to accomplish the work for which it was intended.

[7] Fourth: *Plaintiff was in default in making the final payment of the balance of the purchase price of the sifter.*

This proposition is without merit. During the course of the trial defendant's counsel informed the trial court that he was not making any contention that the first breach of the contract occurred when plaintiff failed to make the balance of the payments on the purchase price. Under such circumstances defendant has waived any right to urge plaintiff's failure to make payments on the balance of the purchase price as a defense to the present case.

In view of our conclusions it is unnecessary to discuss other questions argued by counsel.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.




75 Cal.App.2d 61

## DOWNS v. BENATAR'S CUT RATE DRUG STORES et al.

Civ. 13052.

District Court of Appeal, First District, Division 1, California.

June 21, 1946.

**1. Trade-marks and trade-names and unfair competition ⇐68(2)**

If rights of producer of pills to minimum prices under Fair Trade Act accrued before March, 1942, when Office of Price Administration fixed maximum prices, injunction to restrain dealers from selling pills for less than minimum prices would not prevent dealers from selling pills because minimum prices would violate maximum prices, since dealers under OPA rules could have maximum prices correctly adjusted if they had sold pills unlawfully under the Fair Trade Act. Business and Professions Code, §§ 16900-16905, 16902.

**2. Trade-marks and trade-names and unfair competition ⇐68(2)**

If rights of representative of producer of pills sold under registered trade-mark to a minimum price under the Fair Trade Act accrued after March, 1942, when OPA fixed maximum prices for commodities, those rights were not entitled to protection under the Fair Trade Act, since the OPA supersedes the Fair Trade Act to the extent that the Act defeats the purpose of the OPA. Business and Professions Code, §§ 16900-16905, 16902.

**3. Trade-marks and trade-names and unfair competition ⇐68(2)**

If a producer has an agreement with some of his buyers, written or oral, formal or informal, that a specified product, assuming that it meets all necessary classification requirements of the Fair Trade Act, be not resold for less than a minimum price, and another buyer has knowledge of such agreement, though there is no agreement with that other buyer, and sells the product for less than the price specified in the agreement, then he has subjected himself to suit under the Fair Trade Act. Business and Professions Code, §§ 16900-16905, 16902.

**4. Trade-marks and trade-names and unfair competition ⇐68(2)**

Under the Fair Trade Act, the delivery of a product to a dealer with an accompanying notice of a minimum price, and receipt of the product by the dealer, are prima facie evidence that the dealer accepts under the specifications set forth in the notice. Business and Professions Code, §§ 16900-16905, 16902.

**5. Trade-marks and trade-names and unfair competition ⇐99**

Whether contracts between producer of a product and a dealer are entered into when notice of minimum retail prices are given so that the Fair Trade Act is appli-

cable, is a question of fact. Business and Professions Code, §§ 16900-16905, 16902.

**6. Trade-marks and trade-names and unfair competition ⇐68(2)**

Invoices may be contracts establishing minimum prices under provisions of the Fair Trade Act, or evidence of the conditions on which products are delivered, since the Act requires no particular formality for contracts establishing minimum prices. Business and Professions Code, §§ 16900-16905, 16902.

**7. Trade-marks and trade-names and unfair competition ⇐68(2)**

Where invoice accompanying pills sold under registered trade-mark contained the words "stop price" which testimony showed meant minimum price and representative of producer of pills sent letter to dealers stating that producer was operating under the Fair Trade Act, evidence supported finding that representatives entered into contracts within meaning of Act for minimum prices. Business and Professions Code, §§ 16900-16905, 16902.

See Words and Phrases, Permanent Edition, for all other definitions of "Stop Price".

**8. Trade-marks and trade-names and unfair competition ⇐93(3)**

In suit by representative of producer of pills sold under registered trade-mark to enjoin dealers from selling the pills at prices less than prices allegedly fixed by contracts as minimum prices under the Fair Trade Act, evidence sustained finding that dealers had knowledge prior to March, 1942, when OPA established maximum prices, that minimum prices had been established and continued to sell the pills below the minimum price.

**9. Appeal and error ⇐1122(2)**

Where trial court did not make finding essential to judgment in favor of respondent, though evidence required such finding, District Court of Appeal on appeal made such finding to conform to the evidence and affirmed the judgment. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

**10. Appeal and error ⇐931(4)**

Where no finding was called to attention of District Court of Appeal by appellants covering plea of laches, court was required to assume that if there was such a finding it would be adverse to appellants.

**11. Equity ⇐72(1)**

In defense of laches, it is necessary to show that one seeking to take advantage of the defense has suffered some injury as the result of delay.

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Appeal from Superior Court, San Francisco County; Frank T. Deasy, Judge.

Suit by E. W. Downs, doing business as the San Francisco Von Company, against Benatar's Cut Rate Drug Stores, a copartnership, and Morris V. Benatar and Tessie Benatar, individually and as copartners doing business under the name and style of Benatar's Cut Rate Drug Stores, a copartnership, to restrain and enjoin the defendants, their agents, and employees from selling or offering for sale a certain commodity at prices fixed by the system of prices generally accepted by dealers. From a judgment in favor of the plaintiff, the defendants appeal.

Findings modified and judgment affirmed.

Tobriner & Lazarus, of San Francisco, for appellants.

Simeon E. Sheffey, of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment restraining and enjoining defendants, their agents and employees from selling or offering for sale a certain commodity designated as "Von's Pink Tablets" at prices fixed by the system of prices generally accepted by dealers. Plaintiff's original complaint for injunctive relief relied on an allegation that on or about August 15, 1942, plaintiff adopted a system of business wherein written contracts were entered into in order to maintain minimum retail prices on the above commodity. Business and Professions Code, sec. 16902, formerly sec. 1 of the Fair Trade Act. A copy of the contract was attached to the complaint. It was further alleged that defendants refused to execute the contract. Plaintiff was permitted to file an amendment to the com-

plaint to allege that contracts were entered into on or about January 1, 1939 and the written agreement attached to the original complaint was omitted. Only one paragraph of the original complaint was materially amended.

Briefly, the facts, which are free from conflict, are as follows: Plaintiff owns the rights to conduct the business of selling the pills in California. In this state he is the representative of the producers. The product is a registered trade mark commodity. Since its inception in 1929, in conducting the business, the practice has been to accompany the goods with an invoice whereon appear the words "stop price." It was plaintiff's testimony that "stop price" is a term in trade usage and created an agreement that the product would not be sold for less than the respective sums specified after the words "stop price." Many of these invoices were sent and received prior to March 1942. It is admitted that during this period (1939, 1940 and 1941) defendants sold the 100 size for $3 and the 27 size for $1.09, prices which were below the "stop price." On April 11, 1939, plaintiff sent a letter to defendants, calling attention to their violation of the "California Fair Trade Act" which included the following sentence: "We do operate within the meaning of the California Fair Trades Act and therefore recommend that you change your prices immediately." At some time subsequent to the last invoice in 1941, after a personal telephone call from plaintiff to defendants, plaintiff ceased selling his product to defendants and thereafter defendants secured the pills from jobbers. In July 1942 plaintiff's product was added to the retail druggists' list of drugs with minimum resale prices. At that time plaintiff prepared the formal written contracts heretofore referred to in the original complaint. There is no definite evidence that any of these contracts was ever signed by any of the retailers, though there is evidence with reference to the meaning of "stop prices" and evidence that one drug company with stores throughout the state had been notified that the product was "fair traded" and the drug company needed no further notice but immediately discontinued cutting the price of the pills.

On the basis of these facts and pleadings the trial court found that "on or about the 1st day of January, 1939, plaintiff * * * did adopt a system of doing business * * * [whereby] written contracts were entered into between plaintiff and his wholesale and jobbing distributors, * * * that defendants declined to execute said contracts * * * [and] That on the 9 day of July, 1942, defendants received notice of the fact that plaintiff was operating his business under the terms of the Fair Trades Act."

[1, 2] Preliminarily it must be noted that any rights which plaintiff has must be predicated on rights accruing prior to March, 1942. A federal bureau known as the Office of Price Administration, fixed the maximum prices for commodities and services as the highest price charged to a purchaser of the same class by the seller during March, 1942. The federal law is controlling and all merchants are required during the existence of the OPA to continue the particular price in vogue in 1942 unless exception is made. However, there is no evidence that the OPA has operated or been administered with any purpose of interfering with a fair trade act. Amendment 62, adopted June 3, 1944, to the General Maximum Price Regulation under the heading "Adjustment of Maximum Prices" provides for an upward adjustment of prices "(d) In the case of any seller at retail who shows: (1) That his maximum price for any commodity established under this Regulation is less than the minimum price in effect for such commodity during March 1942 pursuant to a contract entered into in accordance with a Fair Trade Act of any state." It appears that one who had sold products unlawfully, that is, contrary to the provision of a fair trade act, should, under the OPA rules, have the prices correctly adjusted. Consequently there is no merit in appellants' contention that if this injunction is sustained they will be unable to sell plaintiff's products. Respondent's position—that even though his rights under the Fair Trade Act accrued after March, 1942, he is entitled to their protection—is not well taken. To protect minimum prices fixed after the General Maximum Price Regulation would defeat the purpose of

the federal law, which during the period of the emergency is paramount. To permit injunctions against the sale of articles at less than minimum prices fixed after the General Maximum Price Regulation would raise the price of particular articles beyond the maximum prices of March, 1942. Those sellers whose maximum price was less than the minimum price could no longer sell the article, and hence only the channels with the higher price would be open, thereby raising the price to the ultimate consumer beyond the March, 1942, levels. To the extent that the purpose of the Office of Price Administration would be defeated, it must be considered to have superseded the fair trade acts of the state. Therefore the basic issues to be decided concern whether the facts proved give plaintiff any rights under the Fair Trade Act (secs. 16900–16905 of the Business and Professions Code) prior to March, 1942, and if so, has the trial court so found.

The pertinent provisions of the Business and Professions Code, upon which this action is based, read:

"Section 16902 * * * (a) No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others violates any law of this State by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(2) That the vendee or producer require the person to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

"(b) Such provisions in any contract imply conditions that such commodity may be resold without reference to such agreement in the following cases:

"(1) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

"(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

"(3) By any officer acting under the orders of any court."

Section 16904 of the Business and Professions Code provides: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

[3] Certain general principles must be noted with respect to these sections. There is no provision therein that the contract shall be in writing. There may be a violation of the Fair Trade Act by one who "is or is not a party to such contract." Sec. 16904. If a producer has an agreement with some of his vendees, written or oral, formal or informal, that a specified product, assuming it meets all necessary classification requirements of section 16902, be not resold for less than a minimum price, and another vendee has *knowledge* of such agreement, though there is no agreement with that vendee, and sells the product for less than the price specified in the agreement, then he has subjected himself to suit under the Act. In Dr. Miles C. Co. v. Sontag C. Stores Co., 8 Cal.2d 178, at pages 178, 179, 64 P.2d 726, the court said:

"The action was brought to restrain defendant from selling plaintiff's trade-marked articles at cut-rate prices, and in violation of a system of *contracts, of which defendant had knowledge,* between plaintiff and its distributors, both wholesale and retail, fixing the resale price of plaintiff's products. The complaint alleges that defendant was tendered such a contract but refused to execute it. The activities of defendant are described in detail, and it is alleged that such tactics have been indulged in for the purpose of inducing other distributors to break their contracts with plaintiff. The relief prayed for is that defendant be enjoined from selling plaintiff's trade-marked articles at prices less

than the resale price fixed by plaintiff in its contracts with other distributors.

"The amended complaint was filed in August, 1932, and judgment of dismissal was entered in January, 1933. Subsequent to the rendition of the judgment herein, the Legislature amended the Fair Trade Act (Stats.1931, p. 583) by adding thereto section 1½ (Stats.1933, p. 793). This amendment prohibits the selling of any trademarked commodity at less than the price stipulated in resale contracts such as are described in the complaint 'whether the person so * * * selling is or is not a party to such contract,' and defines such activities as unfair competition, and permits injunctive relief." (Emphasis added.)

[4-7] Many years prior to the adoption of the Fair Trade Act, the California Supreme Court in D. Ghirardelli Co. v. Hunsicker, 164 Cal. 355, 128 P. 1041, held that a minimum resale price attached to a *case* of chocolate, if defendant's attention was called thereto at the time of purchase, could be the basis of an action for breach of contract. See, also, Grogan v. Chaffee, 156 Cal. 611, 105 P. 745, 27 L.R.A.,N.S., 395. Under the Fair Trade Act the delivery of a product with an accompanying notice of a minimum price, and the receipt of the product by the vendee, are prima facie evidence that the vendee accepts under the specifications set forth in the notice. Ingersoll & Bro. v. Hahne & Co., 88 N.J.Eq. 222, 101 A. 1030; Id., 89 N.J.Eq. 332, 108 A. 128, cited with approval in Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 177. The cases dealing with anti-trust laws hold that it is a question of fact in view of all the circumstances whether contracts are entered into when notice of minimum retail prices are given. United States v. Colgate & Co., 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992, 7 A.L.R. 449; 19 A.L.R. 926; 103 A.L.R. 1331; 104 A.L.R. 1452. There is no practical difference in the question of mutual assent necessary to form a contract whether the Fair Trade Act or the anti-trust laws are involved. It is a question of fact whether contracts are entered into when notice of minimum retail prices are given. There is no merit in the appellants' contention that invoices may not be contracts under the provisions of the Fair Trade Act or evidence of the conditions upon which products are delivered inasmuch as the statute requires no particular formality. A California case cited in support of their position is Universal C. Co. v. McC. Gale, Inc., 40 Cal. App.2d 796, at page 800, 105 P.2d 1003, at page 1004, wherein, considering an invoice, the court stated: "* * * that standing alone an invoice is not regarded as evidence of title. It is neither a bill of sale nor evidence of a sale, and does not transfer the title, and it is as appropriate to a bailment as to a sale." That language is not pertinent to the question here involved. Respondent asserts that the invoices were contracts indicating the terms of the sale according to business custom and that no specific form of contract is required under the code. It is unnecessary to decide whether the invoices standing alone would constitute a contract. The invoices, when taken in connection with plaintiff's testimony concerning the meaning of "stop price," and the plaintiff's conduct, as evidenced by the letter and his actions, are sufficient to support the finding that plaintiff entered into contracts. That part of the finding concerning written contracts is immaterial, except insofar as it shows the confusion in the findings based upon the first complaint under which no relief could have been given because of the federal laws.

[8, 9] The vital question in this case concerns the appellants' knowledge of the contracts at the time they sold for less than the minimum price. The respondent's right under the statute is incomplete unless the vendee sells with knowledge. The following facts prove that prior to March 1942 defendants had knowledge that "Von's Pink Tablets" should not be sold at a retail price lower than that designated by plaintiff: (a) The invoices read as follows: "1 dozen Von's Pink Tablets 100s $28.00 dz Discount 7½% $25.90 Stop Prices: 27s—$1.25 100s—$3.50." (b) There was uncontradicted testimony that "stop price" is a term of trade usage, meaning that the commodity should not be sold for a sum less than that specified in the in-

voice. (c) There is evidence to show that defendants were notified by telephone communications monthly that there was a violation of the Fair Trade Act. (d) In 1939 plaintiff forwarded a letter to defendants reading: "We have again investigated the prices you are asking for Von's Pink Tablets and again your sales people quoted $1.19 and $3.39 instead of $1.25 plus State Sales Tax and $3.50 plus State Sales Tax. *This as you know is a direct violation of the California Fair Trades Act.* We *do* operate within the meaning of the California Fair Trades Act and therefore recommend that you change your prices immediately." (Emphasis added.) (e) The plaintiff refused to supply the pills to defendants after a certain telephone call, and defendants' action in obtaining the commodity from jobbers. Defendants testified that a conversation was held relative to the price at which the items were sold. (f) The defendants stated that the price was reduced "to make a lead." (g) Defendants testified that they knew each bottle carried the retail price. (h) Defendants testified that "Fair Traded" articles are recognized from contracts or "by the fact that there is a universal knowledge in the business that they are 'Fair Traded.'" The foregoing evidence called for a finding that defendants had knowledge prior to March, 1942, and continued to sell below the minimum price; but despite such evidence the trial court found only that on the 9th day of July, 1942, defendants received notice of the fact that plaintiff was operating his business under the terms of the Fair Trade Act. The date so specified was evidently taken from the original complaint. In order to support a judgment in plaintiff's favor, because of the General Maximum Price Regulation, it was essential that the trial court find that defendants had knowledge prior to March, 1942. Therefore, in order that there be a finding which will conform to the evidence in the case, this court, exercising the authority conferred by article VI, section 4¾ of the Constitution, and by section 956a of the Code of Civil Procedure, does hereby find that defendants had knowledge that the product, Von's Pink Tablets, was subject to contracts requiring retail minimum prices under the Fair Trade Act prior to March, 1942, and sold said product prior to March, 1942, at less than those minimum prices.

[10, 11] A minor question arises as to whether any right of plaintiff is barred by the statute of limitations or laches. In pleading the statute of limitations it is necessary to refer to the "section and *subdivision* thereof" relied upon. Code Civ. Proc. sec. 458. (Emphasis added.) Defendants failed to plead the statute of limitations properly. There is no finding called to our attention covering the plea of laches. It must be assumed that if there was such a finding it would be adverse to appellants. In the defense of laches, it is necessary to show that the party taking advantage of the defense has suffered some injury as the result of delay. Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062; Zakaessian v. Zakaessian, 70 Cal.App.2d 721, 161 P.2d 677. In the present case no prejudice to defendants has been shown. If they desire now to obey the Fair Trade Act it is an easy matter to adjust with OPA. OPA GMPR Amdt 62 to Commodities and Service, Part 1499; Schreier v. Siegel, 265 App. Div. 36, 37 N.Y.S.2d 624; Helena Rubenstein, Inc., v. Charline's Cut Rate, Inc., 135 N.J.Eq. 145, 36 A.2d 910.

The findings are modified as herein indicated. The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

75 Cal.App.2d 83

**Ex parte BORGFELDT.**

**Cr. 1967.**

District Court of Appeal, Third District, California.

June 21, 1946.

**1. Pardon ⇐14**

Where parolee was convicted, prior to his discharge date, of violating the Vehicle Code, and Adult Authority thereafter suspended the parole and ordered that prisoners listed in the order, including parolee, who had terms set at less than maximum should be considered as serving the maximum until further order of the Authority, and thereafter the Authority adopted a resolution that no credits be allowed parol violators while charges of violation of parole were under investigation, a subsequent order formally revoking parole and forfeiting all credits earned and to be earned was not invalid because allegedly made after expiration of term as originally fixed. Vehicle Code, §§ 502, 503.

**2. Pardon ⇐14**

Where parolee had violated terms of his parole and was outside prison walls as a fugitive from justice on date that Adult Authority adopted resolution that no credits be allowed parole violators while charges of violations of their paroles were under investigation, and parolee was present and pleaded guilty to violation of his parole, on date that his credits were formally forfeited, revocation of parole and forfeiture of credits were not unauthorized as allegedly entered without hearing. Pen.Code, §§ 1168, 2924, 3020, 3060.

Habeas corpus proceeding by Rudolph D. Borgfeldt against Robert A. Heinze, Warden of the California State Prison at Folsom.

Writ theretofore issued discharged and prisoner remanded.

Rudolf Borgfeldt, in pro. per.

Robert W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

The petition for writ of habeas corpus filed in this proceeding alleges that petitioner was received at San Quentin Prison on August 11, 1942, after having been convicted of a violation of section 503 of the Vehicle Code; that on August 18, 1943, his term of imprisonment was fixed at the maximum term of five years, with parole granted the last fifteen months; that he was granted credits amounting to 151 days, and released on parole August 11, 1944, with his discharge date fixed as of October 12, 1945; that prior to the expiration of such term and while on parole he was convicted of a violation of section 502 of the Vehicle Code; that a portion of the sentence imposed upon that conviction was suspended and he was taken to the State Prison at Folsom on August 3, 1945; that his parole had been suspended on July 13, 1945; that adding the twenty days elapsing between that date and the date of his return to his original discharge date, his term of imprisonment with benefit of credits granted expired not later than October 31, 1945; that no order of forfeiture of his credits earned was made until after his term, as originally fixed, had expired, and that he was therefore entitled to his discharge.

The writ prayed for having issued, an answer and return thereto was filed by the Warden, and hearing was had before this court. From the record now before us it appears that before his parole was granted, and as a condition thereof, petitioner agreed, among other things, to refrain from violating any of the penal laws of the state, and it was specifically provided and agreed that should he violate his parole in any way all of his credits earned might be forfeited, his parole suspended or revoked, and his term of imprisonment increased by the Adult Authority. On July 12, 1945, it was recommended to the Adult Authority by the Chief State Parole Officer that petitioner's parole be suspended because of stated violations thereof, including his conviction of violation of section 502 of the Vehicle Code on July 11, 1945. On July 13, 1945, the Adult Authority suspended the parole, ordered petitioner's return to the Warden at Folsom, and further or-

dered that, in accordance with a resolution adopted by the Board of Prison Terms and Paroles and readopted by the Adult Authority on May 1, 1944, the prisoners listed in the order (including Borgfeldt) who had terms set at less than the maximum should be considered as serving the maximum until the further order of the Authority.

Under this order Borgfeldt's term will not expire until August 11, 1947.

On July 19, 1945, the Authority adopted a resolution that no credits be allowed parole violators while charges of violation of their parole were under investigation. On December 13, 1945, petitioner's parole was formally revoked, parole was denied, all his credits earned and to be earned were forfeited and his case was put upon the August, 1946 calendar.

[1] Petitioner's contention is that as his term was originally fixed to expire October 12, 1945, even if for twenty days of the time he was on parole he was to be considered as a fugitive, nevertheless the term expired October 31, 1945, and the order of the Authority made on December 13, 1945, was therefore made after the term had expired, and was invalid under the authority of Ex parte Shull, 23 Cal.2d 745, 146 P.2d 417.

We think that petitioner misreads the decision in that case for the facts therein are entirely different from those before us. There, after the prisoner's term as originally fixed on one of two judgments under which he was serving imprisonment, as reduced by credits granted, had expired, the prisoner violated a regulation of the prison and all of his credits were declared forfeited. It was this forfeiture for conduct on the part of the prisoner occurring after the expiration of the reduced term which was held to be in excess of the power of the Board. In the case before us Borgfeldt's term, even under his own statement, had not expired when the acts for which his parole was revoked and his term refixed at the maximum were committed. That decision is inapplicable here, for petitioner's term was redetermined on July 13, 1945.

Section 3020 of the Penal Code, enacted in 1941, provides that in the case of all persons thereafter sentenced under the provisions of section 1168 of that code, the board may determine and redetermine after the expiration of six months from and after the actual commencement of imprisonment, what length of time such person may be imprisoned; and in the recent case of In re Etie, 27 Cal.2d 753, 167 P.2d 203, it was held that such action could be taken without notice or hearing. It was there said, at page 758 of 27 Cal.2d, at page 206 of 167 P.2d: "From 1931 to 1941 section 1168 of the Penal Code gave the Board of Prison Terms and Paroles the power to redetermine a sentence, and a redetermination on the ground of the infraction of the rules of the prison or the violation of the terms of parole could not be made except after a hearing, at which the prisoner was entitled to be present and produce evidence and witnesses in his behalf. In 1941, Stats.1941, p. 1080, the provision for a hearing in the event of such a redetermination was eliminated, and under section 3020 of the Penal Code the board had power to redetermine the length of time of imprisonment within the minimum and maximum terms in any case without notice or hearing." Also see Ex parte Payton, 28 Cal.2d 194, 169 P.2d 361.

[2] Petitioner also contends that he was not given a hearing before his parole was revoked and his credits forfeited, and that the Authority therefore violated sections 3060 and 2924 of the Penal Code. However, section 3060 gives the Authority power to suspend, cancel or revoke a parole without notice, and if it be assumed that petitioner's credits were revoked by virtue of the resolution of the Authority of July 19, 1945, under petitioner's own statement he was on that date outside the prison walls as an escapee and a fugitive from justice—having violated the terms of his parole—and therefore was not entitled to a hearing under section 2924, supra. And on December 13, 1945, when his credits were formally forfeited the record shows that he was present and pleaded guilty to violation of his parole.

We conclude that the Authority acted within its powers in redetermining petitioner's sentence and suspending his parole on July 13, 1945, and that his credits were revoked within the term of his imprisonment and upon notice and hearing. Therefore, the writ heretofore issued is discharged, and the prisoner is remanded.

THOMPSON and PEEK, JJ., concur.




75 Cal.App.2d 24

**In re REMICK'S ESTATE.**

**Civ. 7221; Sac. 5748.**

District Court of Appeal, Third District, California.

June 19, 1946.

**1. Judgment ⇐316, 326**

A court may, at any time, and with or without notice, or on its own motion, correct a judgment by nunc pro tunc order so as to make the judgment as entered conform to judicial decision actually made.

**2. Judgment ⇐316, 321, 326**

A court may not correct a judicial error by entry of order nunc pro tunc, but errors due to failure of record to speak the truth or to conform to decision rendered, and clerical misprisions generally, of which the record affords the evidence, may be corrected at any time by the court upon its own motion or upon motion of an interested party, with or without notice.

**3. Judgment ⇐326**

A "clerical error" in a decree, which may be corrected by a nunc pro tunc order, is not necessarily one made by clerk, but such error may be that of the court or judge.

See Words and Phrases, Permanent Edition, for all other definitions of "Clerical Error".

**4. Judgment ⇐306**

Where it appears on face of the record that a clerical error has been committed and carried into a decree, the court has the power to correct such error.

**5. Judgment ⇐306**

Where a clerical error in court's decree is apparent on face of the record, no time limit exists as far as right of the court to correct the error is concerned.

**6. Judgment ⇐297**

A judge who has made a decision may thereafter decide whether judgment or decree as written expresses his decision, and in so acting he is exercising one of the functions of his judicial office.

**7. Appeal and error ⇐935(1)**

Where trial court has made a nunc pro tunc order correcting its prior judgment or decree, every intendment is in favor of regularity and validity of the nunc pro tunc order.

**8. Judgment ⇐649**

Where nunc pro tunc order is entered correcting prior judgment or decree, the record as so corrected and order making the correction are conclusive upon any other court in which the record is offered in evidence.

**9. Judgment ⇐326**

A minute order, which was made by trial judge shortly after the trial in which decree of distribution was directed, was evidence of decree court intended to make, as regards issue whether decree as made contained a clerical error which could be corrected by a nunc pro tunc order.

**10. Judgment ⇐326**

Proof that language used in distributive portion of decree of distribution did not conform to testatrix' will, to prayer of the petition, to minute order made by trial judge after the trial, nor to the finding, indicated that use of the words "or the proceeds thereof" instead of "or the value thereof" constituted a "clerical error" which could be corrected by a nunc pro tunc order.

**11. Appeal and error ⇐1024(4)**

Where trial court's determination that use of the words "or the proceeds thereof" instead of "or the value thereof" in decree of distribution was inadvertent and con-

stituted a clerical error found support in the record, trial court's conclusion was binding on appeal.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Proceeding in the matter of the estate of Stella Remick, also known as Stella S. Remick, deceased. From an order amending a decree of distribution nunc pro tunc, Roger T. Remick and L. C. Remick, individually, and L. C. Remick as administrator of the estate of Robert Murray Remick, deceased, appeals, opposed by Charles Herring and others.

Affirmed.

J. A. Pardee, of Susanville, and Rowland & Craven, of Sacramento, for appellants.

Wm B. Chaplin, of Oakland, for respondents.

PER CURIAM.

This is an appeal from an order amending a decree of distribution nunc pro tunc. In March, 1937, Stella Remick died testate, leaving surviving her her husband, Robert Murray Remick, and five brothers. The will of decedent, which was holographic, was duly admitted to probate, D. R. Herring, one of the brothers of Stella Remick, being appointed as executor of the estate pursuant to directions in the will. In due time said executor rendered his account, and petitioned for a decree of distribution, which decree was rendered November 1, 1937.

In May, 1945, Charles Herring, M. B. Herring, H. E. Herring and Grover Herring, the surviving brothers of Stella Remick, moved the court for an order correcting the aforesaid decree of distribution, on the ground that same did not conform to the findings of the court in certain respects nor with the will of decedent and that the alleged error in the decree was the result of a clerical error. Objection to the granting of the motion was made by Roger T. Remick and L. C. Remick, brothers of Robert Murray Remick, L. C. Remick appearing individually and as administrator of the estate of Robert Murray Remick, deceased; though in what respect they are parties in interest does not appear from the record before us.

The trial court granted the motion to amend, and this appeal was taken from its order.

It appears from the record before us, which is presented in a bill of exceptions, that the will of Stella Remick provided, among other things, as follows:

"To my husband, Robert Murray Remick, I bequeath all real estate belonging to me, situated in North Arm of Indian Valley, Plumas County, California, and also all personal belongings. Seventy-two (72) shares of stock in the Quincy Branch of the Bank of America, and two thousand dollars ($2000.00) worth of Stock in the Pacific Gas and Electric Company—with this understanding, that when the above Robert Murray Remick passes on, all the above named property *or value thereof* be divided equally among my brothers who may be alive at that time, they to decide the ways and means of dividing the same. Brothers, namely: Charles Herring, M. B. Herring, H. E. Herring, D. R. Herring, and Grover Herring." (Italics added.)

It also appears that the petition for distribution of her estate recited:

"That under the terms of the last will and testament of said deceased, all of the real property situate in the North Arm of Indian Valley, and all personal property, including 72 shares of stock in the Bank of America, N. T. & S. A., and stock of Pacific Gas and Electric Company, and also all personal belongings, were devised and bequeathed to said husband, Robert Murray Remick, with the provision that on the death of said Robert Murray Remick, all of said property, *or the value thereof,* was to be divided equally amongst the brothers of said decedent who might be living at the time of the death of said husband; * * *" (Italics added.)

The petition also set forth the properties of the estate to be distributed to Robert Murray Remick, and concluded with a prayer that the estate be distributed "in the proportions hereinabove set forth, in accordance with the terms of said last will and testament, to the parties entitled thereto, as therein and hereinabove set forth."

The decree of distribution contained the following finding:

"The Court finds that under the terms of the last will of said decedent, Robert Murray Remick is entitled to all of the personal property of said deceased, except moneys in savings banks, to be held by said Robert Murray Remick with the provision that on the death of said Robert Murray Remick, all of said property, *or the value thereof,* is to be divided equally amongst the brothers of said decedent who might be living at the time of the death of said Robert Murray Remick; * * *" (Italics added.)

It then made a finding as to the assets of the estate which were to be distributed to Robert Murray Remick, with the proviso as above set forth.

However, the portion of the decree which ordered distribution of the described assets to Robert Murray Remick contained the words "provided that as to any of said property hereby distributed to said Robert Murray Remick, *or the proceeds thereof,* remaining at the time of the death of said Robert Murray Remick, shall go in equal shares to the brothers of said decedent living at the date of the death of said Robert Murray Remick." (Italics added.)

The order amending the decree nunc pro tunc recited that it appeared to the court that the decree entered was not a correct memorial of the order and decree announced by the court in that said order and decree as rendered and announced by the court provided that the petition for distribution be granted as prayed for, which petition prayed for distribution "In accordance with the Last Will and Testament to the parties entitled thereto, as therein and hereinabove set forth"; that it appeared from the will, petition for distribution, findings of the court and the recollection of the judge that the order of distribution did not conform thereto or to any of them, and that from inadvertence and clerical error the order and decree contained the language: "provided that as to any of said property hereby distributed to said Robert Murray Remick, or the proceeds thereof, remaining at the time of the death of said Robert Murray Remick, shall go in equal shares to the brothers of said decedent living at the date of the death of said Robert Murray Remick," which did not express the order and decree announced or intended by the court. It was therefore ordered that the said decree be amended by substituting for the language above-quoted, the following: "provided that all of said property hereby distributed to said Robert Murray Remick, or the value thereof, shall go in equal shares to the brothers of said decedent living at the date of the death of said Robert Murray Remick."

The only question on this appeal is whether the said amendment constituted the correction of a clerical error, or the attempted correction of a judicial error.

[1] The great weight of authority is to the effect that a court may, at any time, and with or without notice, or on its own motion, correct a judgment by a nunc pro tunc order so as to make the judgment as entered conform to the *judicial decision* actually made. See Takekawa v. Hole, 170 Cal. 323, 149 P. 593; Dutton Dredge Co. v. Goss, 77 Cal.App. 727, 732, 247 P. 594; Goatman v. Fuller, 191 Cal. 245, 248, 216 P. 35; Kaufman v. Shain, 111 Cal. 16, 23, 43 P. 393, 52 Am.St.Rep. 139; Carter v. J. W. Silver Trucking Co., 4 Cal.2d 198, 204, 205, 47 P.2d 733; Carpenter v. Pacific Mutual Life Insurance Co., 14 Cal.2d 704, 96 P.2d 796; Scamman v. Bonslett, 118 Cal. 93, 97, 50 P. 272, 62 Am.St.Rep. 226; E. Clemens Horst Co. v. Federal, etc., Co., 22 Cal.App.2d 548, 71 P.2d 599; Crim v. Kessing, 89 Cal. 478, 486, 26 P. 1074, 23 Am.St.Rep. 491; In re Estate of Soboslay, 4 Cal.2d 177, 179, 47 P.2d 714; McKannay v. McKannay, 68 Cal.App. 709, 712, 230 P. 218; 14 Cal.Jur., sec. 40, p. 931; Pappas v. Taylor, 138 Wash. 31, 244 P. 393, 394; O'Bryan v. American Inv. & Imp. Co., 50 Wash. 371, 97 P. 241, 242. Also see Notes in 10 A.L.R. 526, 67 A.L.R. 828, and 126 A.L.R. 956.

[2] While it is also well established that a court may not correct a judicial error by an order so entered, errors due to the failure of a record to speak the truth or to conform to the decision rendered, and clerical misprisions generally, of which the record affords the evidence, may be corrected at any time by the court upon its

own motion or upon motion of an interested party, with or without notice. 14 Cal. Jur. 1007.

[3-6] Also a clerical error is not necessarily one made by a clerk, but such error may be that of the court or judge. In Re Estate of Goldberg, 10 Cal.2d 709, 76 P.2d 508, the court had for consideration the validity of an order correcting a decree of distribution nunc pro tunc as of the date of the original decree entered thirty-five years previously. It first stated the general rule that when on the face of a record it appears that a clerical error has been committed and carried into the judgment or decree the court has the power to correct such error; and as to what constitutes a clerical error within such rule it stated, 10 Cal.2d at page 715, 76 P.2d at page 511, that while in its original and literal significance, a clerical error is one made by a clerk or some subordinate agent, latterly the meaning has been broadened and extended so that now it may include an error that may have been made by the judge or court. It also said, 10 Cal.2d at page 717, 76 P.2d at page 513, that as to such clerical errors, when same are apparent upon the face of the record, no time limit exists as far as the right to make the correction is concerned, and that the trial court has full power to determine whether the error was clerical or judicial in character, citing Harman v. Cabaniss, 207 Cal. 60, 276 P. 569. Carpenter v. Pacific Mutual Life Insurance Company, supra, is to the same effect. Also in Kohlstedt v. Hauseur, 24 Cal.App. 2d 60, 74 P.2d 314, where the power of the court to amend a judgment nunc pro tunc on an ex parte application was in question, the court said that the superior court has inherent power to correct its records so as to make them speak the truth, regardless of the lapse of time, even though the misprision was that of the court. It also said that it is for the judge who made the original decision to decide whether the judgment as written expresses his decision, and that in so acting he is exercising one of the functions of his judicial office, citing Kaufman v. Shain, supra, and Kowalsky v. Nicholson, 23 Cal.App. 160, 137 P. 607. It also quoted from Livesay v. Deibert, 3 Cal.App.2d 140, 147, 39 P.2d 466, where the court said that it was for the trial judge to determine whether the order was all that he intended it to be; that if the mistake was clerical it could be corrected; that it must be presumed that he found it to be his own clerical error; that the facts were within his knowledge and that he had a right to rely upon his own memory.

[7, 8] In Haynes v. Los Angeles R. R. Corp., 80 Cal.App. 776, at page 781, 252 P. 1072, at page 1074, the court said that the court having made the nunc pro tunc order, every intendment is in favor of its regularity and validity. And in Crim v. Kessing, supra, 89 Cal. at page 486, 26 P. at page 1076, 23 Am.St.Rep. 491, it was said, that, when made, a record so corrected, and the order making the correction, are conclusive upon any other court in which the record is offered in evidence. Also see 14 Cal.Jur. 994 and cases cited in 10 A.L.R. 624, 625.

[9] In the case before us the record shows that on November 1, 1937, the trial court made a minute order that recited that "The Court having heard the account and having duly considered the same, it is ordered that the said account be, and the same is hereby settled, allowed and approved as rendered, and further ordered that the petition for distribution be, and the same is hereby granted *as prayed for.*" (Italics added.) This order is evidence of the intent of the court as to the decree it intended to make (Bastajian v. Brown, 19 Cal.2d 209, 215, 120 P.2d 9); and the petition for distribution recited that on the death of Robert Murray Remick all the said property "or the value thereof" was to be divided equally among the brothers of decedent, Stella Remick, and prayed for distribution "in accordance with the terms of said last will and testament, to the parties entitled thereto, as therein and hereinabove set forth."

[10, 11] In the decree itself the court found that Robert Murray Remick was entitled to said property, with the provision that on his death all of such property, *or the value thereof,* was to be divided equally among the brothers of said decedent who might be living at the time of the death of

said Robert Murray Remick. It therefore appears without question that the language used in the distributive portion of the decree did not conform to the will, to the prayer of the petition, to the minute order, or to the findings, all of which indicates that the use of the words "or the proceeds thereof" instead of "or the value thereof" was inadvertent and constituted a clerical error, as the court in its order amending states that it did. The trial court's determination to that effect finds support in the record and under such circumstances its conclusion is binding upon this court. Bastajian v. Brown, supra.

The order appealed from is therefore affirmed.




75 Cal.App.2d 6

## BLAKE v. HEARST PUBLICATIONS, Inc., et al.

Civ. 15133.

District Court of Appeal, Second District, Division 1, California.

June 19, 1946.

Rehearing Denied July 9, 1946.

Hearing Denied Aug. 15, 1946.

**1. Judgment ⇐199(1)**

The power of the trial court to set aside verdict and enter a contrary judgment is the same as the power to grant a nonsuit. Code Civ.Proc. § 629.

**2. Judgment ⇐199(3)**

A motion for judgment non obstante veredicto for plaintiff may be properly granted only when disregarding adverse evidence and giving to plaintiff's evidence all the value to which it is legally entitled and indulging every legitimate inference which may be drawn from such evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff. Code Civ. Proc. § 629.

**3. Judgment ⇐199(3)**

In passing on motion for judgment notwithstanding the verdict, the court has no power to weigh the evidence, but is bound to view it in the light most favorable to the verdict. Code Civ.Proc. § 629.

**4. Libel and slander ⇐19**

In determining whether published articles constituted a libel, both the text and the cartoons illustrating text must be considered. Civ.Code, § 45.

**5. Libel and slander ⇐19**

In determining whether an article is libelous under the Code, the article must be considered in its entirety. Civ.Code, § 45.

**6. Libel and slander ⇐15**

Where text praised plaintiff for his work as a counterspy against the Japanese, the cartoons accompanying the text could be construed only as portraying plaintiff in the role assumed by him and not as plaintiff actually was and as so construed were not libelous. Civ.Code, § 45.

**7. Judgment ⇐199(3)**

Where there was no evidence of sufficient substantiality to support verdict, trial court properly granted motion for judgment notwithstanding the verdict. Code Civ.Proc. § 629.

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Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Al Blake against Hearst Publications, Inc., and King Features Syndicate, Inc., for alleged libel. From a judgment for defendants notwithstanding a verdict for $15,000 for plaintiff, the plaintiff appeals.

Judgment affirmed.

Harold A. Fendler and Bertin A. Weyl, both of Los Angeles, for appellant.

Lawler, Felix & Hall, John M. Hall, and A. Laurence Mitchell, all of Los Angeles, for respondents.

YORK, Presiding Justice.

Plaintiff by the instant action sought damages from defendants in the sum of $160,000 for the publication of alleged libelous matter consisting of a cartoon strip entitled "Betrayal from the East".

The original complaint alleged that the defendants, Hearst Publications Incorporated, and King Features Syndicate, had libeled the plaintiff by publishing in the Los Angeles Examiner, a newspaper of general circulation of more than half a million readers in the City of and County of Los Angeles, a series of eight separate cartoon strips each entitled "Betrayal from the East", consisting of a series of pictures expressly identifying the plaintiff by name and depicting him as a "degenerate, dissolute, disheveled, slovenly and unkempt person, addicted to the use of narcotics and with a physical and facial appearance characteristic of a person addicted to the use of narcotics, and which pictures and each of them, did expose the plaintiff to hatred, contempt, ridicule and obloquy, and which had a tendency to, and still have a tendency to, injure him in his reputation, and in his occupation and profession of acting and lecturing upon the public lecture platform, and which have caused plaintiff to sustain severe shock, strain, great mental anguish, mortification, humiliation and shame * * *"; that such pictures were false and defamatory and did not truly nor correctly represent, depict, portray or picture the plaintiff's true physical or facial appearance; that at the time defendants published said pictures, they knew that the pictures were false and untrue and did not truly nor correctly depict plaintiff's true physical or facial appearance.

The trial court sustained a demurrer to the complaint on the ground that the pictures themselves should have been incorporated in said complaint, whereupon plaintiff filed an amended complaint, in practically the same words as the original, and attached thereto by reference the said pictures.

Defendants denied generally and specially all the allegations as to the defamatory character of the publications, and as separate defenses alleged (a) "that to the extent that said pictures purported to depict plaintiff, the same were a truthful portrayal of plaintiff's appearance during the events narrated in the text which said pictures were designed to illustrate"; (b) "that none of the pictures complained of purported to portray the real Al Blake, but on the contrary all of them purported to and were understood to portray Al Blake while he was engaged in acting the part of such depraved and despicable character."

During the trial defendants made a motion for a directed verdict, which was by the court denied. Thereafter the jury returned its verdict for $15,000 in favor of the plaintiff, whereupon the defendants moved for a judgment notwithstanding the verdict, which motion was granted. Both of said motions were made on the following grounds: That plaintiff had no case (1) "because the pictures do not convey the defamatory meaning ascribed to them by the pleaded innuendo"; (2) "because the pleaded innuendo is not supported by any pleaded inducement"; (3) "because the pictures are at least susceptible of innocent interpretation and no special damages have been pleaded."

This appeal is prosecuted by plaintiff from such judgment notwithstanding the verdict.

In support of the judgment notwithstanding the verdict, respondents urge (1) that the pictures were not defamatory, and hence were not actionable; (2) that even if the pictures be regarded as susceptible of a defamatory meaning, they were also susceptible of an innocent meaning, hence were not libelous per se, and since no special damages are pleaded, they are not actionable.

[1-3] It appears to be the well-established law of this state that "the power of a trial court to set aside a verdict and enter a contrary judgment is absolutely the same as its power to grant a nonsuit. Sec. 629, Code Civ.Proc.; Card v. Boms, 210 Cal. 200, 291 P. 190; Hunt v. United Bank & Trust Co. of California, 210 Cal. 108, 291 P. 184; 7 Cal.Jur. [10-Yr.] Supp. 268, § 65c. Therefore, a motion for judgment non obstante veredicto may properly be granted 'when, and only when, disregarding conflicting (adverse) evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of t

plaintiff.' Card v. Boms, supra, 210 Cal. at page 202, 291 P. at page 191." Neel v. Manning, Inc., 19 Cal.2d 647, 649, 122 P.2d 576, 577. Moreover, the power of the court in passing upon such a motion is strictly limited. "It has no power to weigh the evidence, but is bound to view it in the most favorable light in support of the verdict. * * * In other words, the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict. Although the trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial, it may not do so on a motion for a directed verdict." Collins v. Nelson, 16 Cal.App.2d 535, 538, 61 P.2d 479, 480.

Appellant took the stand and testified, briefly, as follows: During the early part of 1941, he was approached by a Japanese ex-employee of Charles Chaplin, who inquired if the appellant had not been previously enrolled in the United States Navy, and specifically if he did not then have friends in the Navy. Appellant invented a story of an imaginary friend whom he stated was the Admiral's personal yeoman on the U.S.S. Pennsylvania, flagship of the United States Fleet, stationed at Honolulu, and also stated that he (appellant) was desperately in need of money. An appointment was arranged for the following day with a Japanese from Washington, D. C., who offered appellant several thousand dollars if Blake were "willing to play ball with the Japanese". Appellant reported these conferences to the United States Naval Intelligence at Los Angeles, and agreed to accept employment as a counter-espionage agent. Part of the plan concocted by Naval Intelligence was to place another secret agent on board the U.S.S. Pennsylvania at Pearl Harbor, who would masquerade as the fictitious friend of the appellant. Thereafter, appellant informed the Japanese that he had contacted his friend on the U.S.S. Pennsylvania, and he was asked to leave for Honolulu immediately in order to secure any naval records which might be of value to the Japanese Imperial Navy.

Appellant arrived in Honolulu, registered at the Royal Hawaiian Hotel, contacted his fictitious friend on the U.S.S. Pennsylvania, and secured from him documents prepared by United States Naval Intelligence for transmission to the Japanese which "had it been used by the Japanese would have done them more harm than good." For this service, appellant received $5,000 from the Japanese which he "turned over to Naval Intelligence to be used for evidence." Appellant then made arrangements for a second trip to Honolulu for the ostensible purpose of securing additional Naval information to be sold to the Japanese and upon his return to the United States, he co-operated with the United States Navy and the Federal Bureau of Investigation in arresting the heads of the Japanese spy ring in Los Angeles. Appellant testified that during the entire time he was employed by Naval Intelligence, he used no make-up of any character and used ordinary business and sport clothes. Snapshots of appellant taken upon his Hawaiian trip were received in evidence as Exhibits 14 and 15. He here claims that a comparison of Exhibits 1 to 8, inclusive (the cartoon strips published in the Examiner), fully corroborate his express testimony that none of the cartoon-illustrations truthfully or correctly depicted his appearance at the time in question. He expressly testified that he never dressed or appeared as depicted in the cartoons.

Appellant further testified that he was 58 years of age and had lived in California for about 45 years; that he was engaged in the profession of lecturer upon the public platform at the time the respondents' publications appeared; that he received a "terrible shock" when he saw himself depicted in the illustrations as a degenerate and depraved character; that he sustained a serious physical and nervous reaction which required treatment by a physician; that he was unable to work for weeks after the publications and "would suddenly break out in a cold sweat and raise up in bed"; was unable to hold food on his stomach and was confined to his home for two months

after the publications appeared during which period his weight decreased from 136 pounds to 118 pounds, and that it was several months before he was able to resume his work of lecturing. "As a matter of fact, it is just recently here that I have gotten to a point where I can give a fairly comprehensive talk on the subject that I spoke of."

An examination of the record herein discloses that the alleged libelous cartoons were accompanied by and were designed to illustrate the text of a so-called best seller written by Alan Hynd, which was based upon the experiences of appellant in the role of a counter-espionage agent, as recited in appellant's testimony hereinbefore set out. The story, published as a serial in the Los Angeles Examiner, began on March 23, 1944, and the text thereof, illustrated by the first three pictures or cartoons appearing on that date, stated among other things that "Throughout this maze of spying and counterspying there were many heroic and dramatic roles played by individual Americans, Federal agents and just plain citizens. But the story of Al Blake probably tops them all in stark drama. In the fall of 1940, Blake, an alert-looking man of middle age, was part owner of an exhibit at Treasure Island during the San Francisco World Fair. He was a former vaudeville and screen performer known as 'King of the Robots.' He had remarkable control over his voluntary and involuntary muscles, and could stand immobile for hours."

The text which was illustrated by the last three pictures in the group complained of, i.e., the publication of April 4, 1944, stated: "Al Blake's true role in this drama of spy and counterspy did not come out until after Pearl Harbor. The King of the Robots today can well regard himself as a true patriot. Pearl Harbor, as bad as it was, would have been considerably worse, had it not been for his intelligent, courageous counter-espionage." Between the two dates mentioned, the stories continued from day to day accompanied by the illustrations of which appellant complains. In the language of respondents, these stories told "of Blake's adventures while acting under orders from the United States Office of Naval Intelligence * * * of the dangers encountered and surmounted by Blake in this patriotic work * * * risking his life to fool Japanese agents. There is nothing in the text which so much as hints at anything derogatory in Blake's behavior, motives, morals or habits. On the contrary, the narrative as it unfolds shows how Blake's unfailing intelligence and adroitness enable him to frustrate wickedness and emerge a hero."

[4, 5] Obviously, the cartoons were not meant to be a true portrayal of appellant's physical appearance, but rather were intended to represent the part he played as a counter-spy. While they may have been extremely distasteful to him, they were in no sense defamatory, even when viewed without the accompanying text. True, he is shown clad in a plaid suit, smoking cigarettes and sitting at a bar mostly in company with Japanese, and in several instances he is shown in what might be regarded as an emaciated and disheveled condition, owing mainly to the fact that the illustrations were somewhat crudely drawn, but there is nothing vulgar, contemptuous or ridiculous about them. However, in determining whether the published articles constituted a libel, both the text and the cartoons must be taken into consideration, because as stated in the case of Stevens v. Storke, 191 Cal. 329, 334, 216 P. 371, 372: "Section 45 of the Civil Code provides: 'Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.' In determining whether or not, under this definition, an article is libelous, it must be considered in its entirety. It may not be divided into segments and each portion treated as a separate unit. Van Vactor v. Walkup, 46 Cal. 124; Brewer v. Chase, 121 Mich. 526, 80 N.W. 575, 46 L.R.A. 397, 80 Am.St.Rep. 527; Graves v. Waller, 19 Conn. 90. Thus, in Bettner v. Holt, 70 Cal. 270, 11 P. 713, it was held that, in determining whether or not a libel was charged —'A court of justice is to put such construction upon the words which it contains as may be derived "as well from the ex-

pressions used as *from the whole scope and apparent object of the* writer." Spencer v. Southwick, 10 Johns.(N.Y.) 259; Cooper v. Greeley, 1 Denio (N.Y.) [347], 358.' (Italics ours.)" See, also, Bates v. Campbell, 213 Cal. 438, 441, 2 P.2d 383; Rosenberg v. J. C. Penney Co., 30 Cal.App.2d 609, 619, 86 P.2d 696, and cases there cited.

[6] When considered as illustrations of the accompanying text which described appellant in terms of glowing praise, it must have been obvious to the most casual reader of the publication that appellant was portrayed, not actually, but in a role assumed by him for the purpose of deceiving the Japanese: i.e., a derelict character, who would betray his country for money.

Appellant, in support of his contention that a picture or caricature, with or without words, may be defamatory and constitute a libel, calls attention to the case of Gloria v. A Colonia Portuguesa, 128 Cal.App. 640, 644, 18 P.2d 87, 88, where, quoting from the opinion, "appellant newspaper published a cartoon of an ass in grotesque form, which the complaint alleges, and the evidence shows, was intended to portray and represent respondent, and that it was so understood by many readers of the appellant newspaper. Printed with the cartoon was certain reading matter, printed in the Portuguese language, which by innuendo charged respondent with corruptly and dishonestly accepting money for defending said member, who by innuendo was referred to as a 'wild boar,' all of which, so the complaint alleges and the evidence tended to show, was done maliciously and with intent to injure, defame, and disgrace him, and to expose him to hatred, contempt, ridicule, and obloquy, and to injure his good reputation and the business of the newspaper he was publishing. Without further describing the cartoon or the reading matter accompanying the same, it will be sufficient to say that the same constituted a libel * * *." From the foregoing, it can readily be seen that the court in the cited case in making its decision considered the article in its entirety, to-wit: the cartoon and the accompanying reading matter.

[7] An examination of the entire record herein leads to the conclusion that there is no evidence of sufficient substantiality to support the verdict in favor of appellant, and therefore, that the trial court properly granted respondents' motion for judgment notwithstanding thhe verdict.

For the reasons stated, the judgment is affirmed.

DORAN and WHITE, JJ., concur.

Hearing denied; CARTER, J., dissenting.




75 Cal.App.2d 44

## GOOSSEN v. CLIFTON et al.

Civ. 13072.

District Court of Appeal, First District, Division 1, California.

June 20, 1946.

Rehearing Denied July 20, 1946.

Hearing Denied Aug. 15, 1946.

**1. Venue ⇐21**

Generally, a defendant is entitled to have action tried in county of his residence, and the right of plaintiff to have action tried elsewhere is the exceptional right that must find its justification in the terms of some statute, the burden being upon plaintiff to bring himself within some exception to the general rule.

**2. Venue ⇐7**

Actions in contract, except as specifically provided by statute, are personal actions triable in county of defendant's residence. Code Civ. Proc. § 395.

**3. Venue ⇐21**

The code section conferring on defendants the right to have action tried in county where they, or some of them, reside, is remedial in nature and should be liberally construed to the end that defendants may not be unjustly deprived of that right. Code Civ.Proc. § 396b.

**4. Venue ⇐46**

Where first cause of action alleged a contract in the form of a mutual, open and current book account arising out of an arrangement for maintenance, management and supervision of certain trucks in certain

counties other than Santa Clara county and contained no allegation that contract was entered into or was performable in Santa Clara county or that any defendant resided there, so far as first count was concerned, defendants were entitled to a change of venue from Santa Clara county. Code Civ.Proc. §§ 395, 396b.

**5. Venue ⇐7**

Where second cause of action of complaint alleged that in Santa Clara county an account was stated, if second count stood alone, Santa Clara county would be a proper county in which to try the action, notwithstanding that such allegation was denied in defendants' affidavits in support of motion to change venue. Code Civ.Proc. §§ 395, 396b.

**6. Venue ⇐16½**

Where plaintiff joined in one complaint two causes of action based on contract, in one of which defendants were entitled to a change of venue and in the other of which they were not, the action was triable in county of defendants' residence upon motion for change of venue. Code Civ. Proc. §§ 395, 396b.

**7. Venue ⇐16½**

Where there is any one cause of action alleged in complaint in which defendant is entitled to a change of venue to county of his residence, he is entitled to have venue of action changed to such county, no matter how many other causes may be set forth in which he is not entitled to a change. Code Civ.Proc. §§ 395, 396b.

**8. Venue ⇐41**

Where there are several defendants in a personal action, a defendant not a resident of county where suit is brought is not entitled to a change of venue in absence of a showing that none of the defendants resided in county where suit was brought.

**9. Venue ⇐41**

Where a change of venue is sought on the ground that none of the defendants reside in the county of the forum, some of the defendants may apply for a change without joining all of the defendants if they show that none of the defendants reside in the county of the forum. Code Civ.Proc. §§ 395, 396b.

**10. Venue ⇐70**

Where two defendants, who were residents of Los Angeles county, sought a change of venue from Santa Clara county on the ground that none of the defendants were resident therein, and their motion was properly before the court, third defendant's affidavit in support of motion for change of venue, reciting that he was a resident of Alameda county, could be considered as evidence on behalf of the Los Angeles defendants, regardless of whether Alameda defendant was properly before the court because of his failure to answer or demur. Code Civ.Proc. § 396b.

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Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by Fred H. Goossen against W. E. Clifton and others to recover a balance due upon a mutual open and current book account and upon an account stated. From an order denying their motion for a change of venue from the County of Santa Clara to the County of Los Angeles, defendants appeal, wherein an order to show cause for a writ of supersedeas and a temporary stay of proceedings were granted.

Order to show cause and temporary stay discharged, and order reversed.

Fred Aberle, of Los Angeles, and Rankin, Oneal, Luckhardt & Hall, of San Jose, for appellants.

Campbell, Hayes & Custer and Austen D. Warburton, all of San Jose, for respondent.

PETERS, Presiding Justice.

Defendants appeal from an order denying their motion for a change of venue from the County of Santa Clara to the County of Los Angeles. On application of defendants for a writ of supersedeas an order to show cause and a temporary stay of proceedings were granted. (Civ. 13,-054.)

The complaint is in two counts. In the first count the plaintiff seeks to recover upon a mutual, open and current book account in the sum of $17,500.08, which sum is the claimed balance due and owing to plaintiff for the maintenance, management and supervision, between May 1, 1942, and

April 15, 1943, of fifteen Ford trucks owned by defendants at construction jobs in Richmond, Camp Beale, Santa Rosa and Alameda, together with certain sums advanced by the plaintiff at defendants' request. A copy of the claimed mutual, open and current book account is attached to the complaint. It should be noted that neither in the attached exhibit nor in the allegations of the first count is the County of Santa Clara in any way connected with this cause of action or with defendants.

The second cause of action alleges that on April 15, 1943, and again on March 15, 1944 "in plaintiff's office in the City of San Jose, County of Santa Clara, State of California, an account was stated between the plaintiff and the defendants and upon such statement the sum of $17,500.08 was found due to the plaintiff from the defendants."

After having been served with process, and on October 17, 1945, the two Clifton defendants filed general and special demurrers to the complaint, and on the same day there was filed on behalf of all of the defendants a notice of motion for a change of venue from Santa Clara County to Los Angeles County on the ground that the action was personal in nature and that Los Angeles County was, at the commencement of the action, the residence of the two Cliftons.

The affidavit of W. E. Clifton filed in support of the motion, avers that he was served in Los Angeles; that the alleged claim of plaintiff is based upon a mutual open book account arising out of an oral contract made and entered into in Richmond, Contra Costa County, in February, 1942; that at that time this defendant was a resident of the State of Washington; that at no time has this affiant been a resident of Santa Clara County; that on August 1, 1943, affiant established his residence in Los Angeles County, and his place of business is now there; that under the contract forming the basis of plaintiff's claim the moneys were not payable within the County of Santa Clara, but all moneys were payable and were paid in Contra Costa County; that at the time of filing the action, and on the date of service, affiant was a bona fide resident of Los Angeles County, and that the proper court to try the case is the Superior Court of Los Angeles County. A proper affidavit of merits is included.

The affidavit of J. S. Clifton, filed at the same time, alleges the same matters, except that it is averred that this defendant was a resident of Alameda County when the oral contract was entered into, but that since August 1, 1943, and at the time of filing the complaint, and on the date of service, he has been a resident of Los Angeles County.

Thereafter, on October 30, 1945, the defendant Walter J. Vollmer filed an affidavit in support of the motion. Therein, he alleged that he had not yet been served with summons or a copy of the complaint, but that he is thoroughly familiar with the allegations of the complaint; that when the contract in question was entered into he was a resident of Alameda County; "that at no time has said affiant herein been a resident of the County of Santa Clara." He then alleges in substance the same matters set forth in the two Clifton affidavits; alleges that the two Cliftons are Los Angeles residents; that Los Angeles is the proper county to try the action, and joins in the request of the other two defendants for a transfer to Los Angeles County. A proper affidavit of merits is included.

On the same day each of the Cliftons filed a supplemental affidavit wherein they alleged in substance that at no time prior to the institution of this action, or at any other time, was an account stated between the parties in Santa Clara County or any other place. No counter-affidavits were filed by plaintiff.

Under these facts it is clear that defendants are entitled to a change of venue to Los Angeles County. Both causes of action sound in contract. In the absence of statute, contract actions are triable in the county of the defendant's residence. Section 395 of the Code of Civil Procedure provides, so far as is pertinent here, that: "In all other cases, except as in this section otherwise provided, * * * the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action. * * * When a defend-

ant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary. * * *" Section 396b of the Code of Civil Procedure provides that the court where the action is commenced, if it has jurisdiction of the subject matter, shall have jurisdiction to try the case although not designated as the proper court "unless the defendant, at the time he answers or demurs, files with the clerk * * * an affidavit of merits and notice of motion for an order transferring the action or proceeding to the proper court." The section then requires the court, in a proper case, to transfer the action to the proper court.

[1-3] Before directly discussing the facts of this case there are certain well settled rules that must be kept in mind. The general rule is that a defendant is entitled to have actions tried in the county of his residence. The right of the plaintiff to have the action tried elsewhere is the exceptional right, and must find its justification in the terms of some statute. It is the duty of a plaintiff to bring himself within some exception if he can—otherwise, the defendant's right is to have the case tried in the county of his residence. See cases collected 25 Cal.Jur. p. 866, § 13. Actions in contract, except as provided in § 395 above quoted, are personal actions triable in the county of defendant's residence. See 25 Cal.Jur. p. 869, § 15. It has been held that § 396b of the Code of Civil Procedure conferring on defendants the right to have the action tried in the county where they, or some of them, reside, is remedial in nature and should be liberally construed to the end that defendants may not be unjustly deprived of that right. Lyons v. Brunswick-Balke etc. Co., 20 Cal.2d 579, 582, 127 P.2d 924, 141 A.L.R. 1173. The same case on page 584 of 20 Cal.2d, page 927 of 127 P.2d, 141 A.L.R. 1173 states: "The right of the defendant to have certain actions tried in the county of his residence 'is an ancient and valuable right, which has always been safeguarded by statute and is supported by a long line of judicial decisions. "The right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional, and, if the plaintiff would claim such right, he must bring himself within the terms of the exception." Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209.' Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 522, 274 P. 977, 979."

[4] If these general rules be applied to the facts here involved what is the result? So far as the first cause of action is concerned, a contract is alleged in the form of mutual open and current book account. There is no allegation at all as to where that cause of action arose, except that it arose out of an arrangement for the maintenance, management and supervision of certain trucks owned by the defendants on jobs in certain counties, but not including Santa Clara County. There is no allegation that the contract was entered into in Santa Clara County, or that it was to be performed there. There is no allegation that any of the defendants reside in Santa Clara County. It is obvious, therefore, that so far as the first count is concerned, were it the only count, plaintiff, having failed to bring himself within the exceptions contained in § 395, the defendants, upon a proper showing, would be entitled to have the cause transferred under § 396b to the county where they, or some of them, reside. Plaintiff makes no serious contention to the contrary.

[5] As to the second cause of action, it is alleged that in Santa Clara County an account was stated. This is denied in the Cliftons' affidavits, but, of course, the allegations of the complaint are themselves sufficient to create a conflict on this issue. East-West Dairymen's Ass'n v. Dias, 59 Cal.App.2d 437, 138 P.2d 772. It follows that if the second count stood alone, Santa Clara County would be a proper county in which to try the action.

[6] This brings us to the specific problem here involved—when a plaintiff joins in one complaint two causes of action based on contract, in one of which defendants are entitled to a change of venue, and in one of which they are not, what are the rights of the respective parties? Neither counsel has referred us to any case, and we have found none, involving two contract actions. This is probably because the exception providing for trying the action where the contract was entered into or to be performed, found in § 395, was added as of a relatively recent date. Prior to the amendment all contract actions, being personal in nature, were triable in the county of defendant's residence. But although there seems to be no contract cases directly in point, there are many cases, other than contract cases, holding that if a plaintiff unites in one complaint two causes of action, in one of which the defendant has the right to have it tried in the county of his residence, in the other of which he is not, the defendant is entitled to have the cause tried in the county of his residence. There are many cases holding, for example, that where a cause of action in personam is joined with a local action, the defendant is entitled to the change of venue, although, had the local action been sued upon alone, no such right to a change would exist. This has been the rule since 1891 when Smith v. Smith, 88 Cal. 572, 26 P. 356 was decided, and the rule has been reaffirmed many times. See Bardwell v. Turner, 219 Cal. 228, 25 P.2d 978; Turlock Theatre Co. v. Laws, 12 Cal.2d 573, 86 P.2d 345, 120 A.L.R. 786; Howe v. Tucker, 219 Cal. 193, 25 P.2d 832; Hays v. Cowles, 60 Cal.App.2d 514, 141 P.2d 26; Neet v. Holmes, 19 Cal.2d 605, 122 P.2d 557; see, also, Abbott v. Peoples Nat. Fire Ins. Co., 132 Cal.App. 357, 22 P.2d 544; Ah Fong v. Sternes, 79 Cal. 30, 21 P. 381.

[7] The rule is fundamental. The important right to protect is that of the defendant to have the cause tried in the county of his residence. For the plaintiff to be entitled to the exceptional right of having the cause tried in some other county, he must clearly bring himself within a statutory exception. If, by joining several causes of action, the defendant could be deprived of his right, the right would be lost in many cases. It is for that reason that the courts hold that the test is whether on any one of the causes of action the defendant is entitled to a change to the county of his residence. If there is one such cause, then defendant is entitled to the change no matter how many other causes may be set forth in which he is not entitled to the change. That is the situation here presented.

[8-10] The plaintiff raises several technical points. He points out that defendant Vollmer did not demur or answer when he filed his affidavit, and it is urged that he is, therefore, not a party to the motion. Plaintiff also relies upon the rule that where there are several defendants in a personal action, a defendant not a resident of the county where suit is brought is not entitled to a change of venue in the absence of a showing that none of the defendants resided in the county where suit was brought. That is undoubtedly the law. Donohoe v. Wooster, 163 Cal. 114, 124 P. 730; County of Modoc v. Madden, 136 Cal. 134, 68 P. 491; Bloom v. Michigan Salmon Min. Co., 11 Cal.App. 122, 104 P. 324; see discussion 25 Cal.Jur. p. 909, § 42. Based on these premises, plaintiff contends that there is nothing in the record to indicate that defendant Vollmer was not a resident of Santa Clara County at the commencement of the action. The Vollmer affidavit alleges that, when the contract was entered into, he was a resident of Alameda County, and "that at no time has said affiant herein been a resident of the County of Santa Clara." But the plaintiff urges that the affidavit of Vollmer was never properly before the court because this defendant filed no answer or demurrer. It is contended that it is only at the time of answering or demurring under § 396b of the Code of Civil Procedure that a motion for change of venue may properly be made. There is authority to support plaintiff's contention. Nicholl v. Nicholl, 66 Cal. 36, 4 P. 882; but see Lyons v. Brunswick-Balke etc. Co., 20 Cal.2d 579, 127 P.2d 924, 141 A.L.R. 1173. But it need not be determined in this case whether Vollmer was properly a party to the motion. Where a change is sought on the ground that none of the defendants reside in the county of the forum, some of

the defendants may apply for a change without joining all of the defendants if they show that none of defendants reside in the county of the forum. Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 274 P. 977; Sims v. Mains, 131 Cal.App. 307, 21 P.2d 447. Here, whether Vollmer was a formal party to the motion need not be determined. His affidavit can at least be considered as evidence on behalf of the other moving defendants. Since from all the affidavits it appears that none of the defendants resided in Santa Clara County at the time of the commencement of the action, that is all that is required.

The order to show cause and the temporary stay of proceedings issued upon the application for a writ of supersedeas are discharged. The order denying the motion for change of venue to Los Angeles County is reversed.

WARD, J., and SCHOTTKY J. pro tem., concur.




75 Cal.App.2d 186

**McCANCE v. MONTROY.**

**CROCKER v. SAME.**

**Civ. 3388.**

District Court of Appeal, Fourth District, California.

June 27, 1946.

**1. Automobiles ⇐224(6)**

The rule concerning the question of the duty of a guest to leave an automobile operated by an obviously drunk driver is, what would a reasonable person have done in guest's position, seeing what he saw, knowing what he knew in the light of the circumstances, and affected by human propensities or elements ordinarily entering into formation of and influencing judgment.

**2. Negligence ⇐72**

When a person is placed, without his fault, in a position of peril, he may not be held strictly accountable if, in light of full deliberation, it finally appears that some other course might have been wiser than the one he instinctively followed.

**3. Automobiles ⇐224(6)**

Where female plaintiffs had choice of remaining as guests in automobile and facing danger incident to riding with a drunk driver, or of leaving the automobile in a slum district of the city late at night, trial court properly concluded that plaintiffs were not contributorily negligent in failing to leave automobile.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Consolidated actions by Lorena McCance against Martin J. Montroy and Margaret Ann Crocker against Martin Joseph Montroy for personal injuries suffered in a motor vehicle collision between another automobile and one owned and operated by defendant in which plaintiffs were riding as guests. From judgment awarding each plaintiff damages, defendant appeals.

Judgment affirmed.

William K. Young, of Los Angeles, for appellant.

Ray Miller and C. H. Augustine, both of San Diego, for respondent McCance.

Arthur F. H. Wright, of San Diego, for respondent Crocker.

MARKS, Justice.

This is an appeal from a judgment in consolidated actions, whereby each plaintiff was awarded damages for personal injuries suffered in a motor vehicle collision between another automobile and one owned and operated by defendant in which plaintiffs were riding as guests.

The accident happened in the early hours of August 2, 1943, on 12th Street between "J" and "K" Streets in the city of San Diego, during the period that dim-out regulations were in effect. That it was caused by the negligence of defendant, induced by his intoxication, was established by the evidence. The finding to that effect is not questioned by defendant.

The sole ground urged for a reversal of the judgment is the contributory negligence of plaintiffs in riding in the automobile operated by an obviously drunk driver.

Defendant and two soldiers wound up an evening of drinking at the Botsford Hotel in San Diego where they met plaintiffs. Shortly before midnight defendant suggested that the five obtain something to eat at an all-night barbecue stand situated on 30th Street not far from Market Street in San Diego. The left the hotel in the automobile of defendant which was being driven by one of the soldiers, Sergeant Darold H. Seat, who was not intoxicated and who seemed to be a competent driver. Sergeant Seat was not acquainted with San Diego streets and defendant tried to direct him to the barbecue stand without any success. The party finally found themselves at or near the corner of 32d and "K" Streets where defendant directed Sergeant Seat to stop the car while he attempted without success to obtain more liquor. Just when defendant took the wheel of the car is not entirely clear. It was probably about six blocks from the place of the stop. Sergeant Seat tried unsuccessfully to dissuade defendant from driving. Defendant had been drinking about fifteen minutes before the accident happened. No one was able to tell the route he took during this time. The party found itself proceeding north on 12th Street near the gas tanks of the San Diego Gas and Electric Company. The collision happened shortly thereafter.

The question of the contributory negligence of the plaintiffs must depend on their duty, as reasonably prudent persons, to have left the automobile when it was stopped to permit defendant to take the wheel and thereafter drive the car. No contributory negligence as a matter of law can be imputed to them for entering the automobile at the Botsford Hotel for it was to have been driven by Sergeant Seat who was not intoxicated and who proved hiimself a competenr driver.

[1] The question of the duty of a guest to leave a car operated by an obviously drunk driver was discussed in Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 55 P.2d 870. The opinion quotes from Hirsch v. D'Autremont, 133 Cal.App. 106, 23 P.2d 1066, as follows [5 Cal.2d 480, 55 P.2d 875]: "'We are also of the opinion that the question as to whether or not plaintiff should have left the car when it stopped at the railroad crossing to let the freight train pass, considering that it was among orange groves and in the middle of the night, even though she knew that the driver was under the influence of intoxicating liquor, is one upon which reasonable men might well differ and was in consequence one for the jury to determine.'" The Supreme Court then added the following: "The rule therefore is, What would a reasonable person have done in plaintiff's position, seeing what he saw, knowing what he knew in the light of the circumstances of his situation, and affected by the human propensities or elements which ordinarily enter into the formation of and influence the judgment."

While the place where defendant took the wheel is not exactly located, it was somewhere in the southeast section of San Diego not far from the Bay Front. Defendant commented on the locality as follows: "Well, under ordinary circumstances a woman that would go down there alone at night it would not be safe. However, if a person in the process of arriving at a destination and under anything but ordinary circumstances, I would not say that it would be too unsafe if they were accompanied by males, because it is all really a slum district, as I know it, and it is patrolled. In fact, the proof of it is the ambulance and the police got there almost immediately after the accident. As far as that goes I would not say that any place these days in San Diego was safe for women alone at night."

Thus it appears that when defendant undertook to drive his automobile, plaintiffs were suddenly confronted with a dangerous situation not of their own making. They had the choice of remaining in the car and of facing the danger incident to riding with a drunk driver, or of leaving the automobile in "a slum district" of San Diego and facing the obvious dangers incident to two unattended women alone on darkened streets in such a district at about 1 o'clock in the morning.

[2, 3] We believe the rule "to the effect that, when a person is placed, without his fault, in a position of peril, he may not be held strictly accountable if, in the light of full deliberation, it finally appears that some other course might have been wiser than the one he instinctively followed" should be applied here. Toby v. Hubbard, 125 Cal.App. 261, 13 P.2d 869, 870. Plaintiffs were confronted with a sudden peril and the trial court was fully justified in concluding that they should not be held guilty of contributory negligence because subsequent events proved they had made an unwise choice in seeking to avoid that peril.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.




74 Cal.App.2d 898

**In re HOTALING'S ESTATE.**

**MAYHEW et al. v. BANK OF CALIFORNIA NAT. ASS'N et al.**

**Civ. 12972.**

District Court of Appeal, First District, Division 2, California.

June 17, 1946.

Hearing Denied Aug. 15, 1946.

**1. Internal revenue ⇐1746**

Under state statute providing for proration of federal estate taxes except where testator otherwise directs in his will, any language fairly indicating that testator does not intend proration would suffice, without further elaboration as to which legatees or devisees shall be charged. Probate Code, § 970.

**2. Internal revenue ⇐1746**

Testator's reference to inheritance taxes without mention of federal estate tax would still permit construing his definite direction that legacies be paid in full and without deduction as a direction against proration of federal estate taxes within statute, since "proration" necessarily means deduction and deduction necessarily means that legacies cannot be paid in full. Probate Code, §§ 102, 970.

See Words and Phrases, Permanent Edition, for all other definitions of "Proration".

**3. Wills ⇐437**

The law in effect when will was drawn must be consulted in arriving at a testator's intention.

**4. Internal revenue ⇐1746**

The court must place itself in the position of testator on date will was drawn in determining whether testator intended to direction a proration of federal estate taxes. Probate Code, § 970.

**5. Internal revenue ⇐1746**

The statute relating to proration of federal estate taxes, after passage by the Legislature, and signing by the Governor, had no force and did not even operate as notice to persons to be affected by it, until date upon which the statute became effective. Probate Code, § 970 et seq.

**6. Internal revenue ⇐1746**

Under will which was drawn prior to effective date of statute requiring proration of federal estate taxes except where testator otherwise directs in his will, an intention of testator at that time to have cash legacies paid in full without deductions for any taxes should be given effect although testator made no express mention of the federal estate tax. Probate Code, § 970.

**7. Internal revenue ⇐1746**

Testator's direction that bequests, devises and benefits under trusts be paid and delivered in full and without deduction constituted a direction within statute requiring that federal estate taxes be prorated except where testator "otherwise directs". Probate Code, § 970.

See Words and Phrases, Permanent Edition, for all other definitions of "Otherwise Directs".

**8. Courts ⇐89**

Each case of construction of a will depends upon its own peculiar facts and little aid can be procured from adjudged cases.

**9. Constitutional law ⇐46(1)**

Where court had determined that testator had "otherwise directed" within stat.

ute requiring proration of federal estate taxes unless testator otherwise directs, court would not pass upon constitutionality of the statute. Probate Code, § 970 et seq.

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Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Frederick Charles Hotaling, also known as Frederick C. Hotaling, also known as F. C. Hotaling, deceased, wherein the Bank of California National Association and Byron G. Mobbs, as executors, filed with their second account a petition for partial distribution requesting the court to prorate the federal estate tax. From part of decree ordering such proration, Mrs. Joan Rapp Mayhew, sometimes called Johan Rapp Mayhew, and others took an appeal, opposed by the executors and others.

Reversed.

Cushing & Cushing, Cullinan, Trowbridge & Gorrill, of San Francisco, for appellants.

Matt Wahrhaftig and Ridley D. Stone, Jr., both of Oakland, amici curiae in support of position of appellants.

John A. Grennan, of Oakland, for Bank of California and Byron G. Mobbs, as executors and testamentary trustees.

Gavin McNab, Schmulowitz, Aikins, Wyman & Sommer, Nat Schmulowitz, Peter S. Sommer, and Sidney F. DeGoff, all of San Francisco, for Marie Gildroy Gray and Alexander Gildroy as beneficiaries of trust.

GOODELL, Justice.

Charles F. Hotaling died on October 30, 1943, leaving a large estate which he disposed of by a will executed on July 9, 1943. Legacies of upwards of $100,000 were left to numerous persons, among whom are the five appellants, whose legacies aggregate $14,500.

The executors filed with their second account a petition for partial distribution wherein they requested the court to "pro rate the federal estate tax * * * among the specific devises and bequests * * * in accordance with * * * Section 970 et seq. of the Probate Code." From that part of the decree ordering such proration this appeal was taken.

The 1943 legislature, Stats.1943, p. 2740, wrote eight new sections, numbered 970–977, into the Probate Code.

Section 970 reads: "Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, trustee or other fiduciary has paid an estate tax to the Federal Government under the provisions of any Federal estate tax law, now existing or hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, * * * shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues."

Section 971 reads: "The proration shall be made by the court having jurisdiction in probate of any property in the estate in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate."

The federal law imposes the estate tax "upon the net estate of the decedent as a unit" (Estate of Miller, 184 Cal. 674, 678, 195 P. 413, 415, 16 A.L.R. 694), and in enacting it Congress "did not undertake in any manner to specify who was to bear the burden of the tax" and "did not contemplate that the Government would be interested in the distribution of the estate after the tax was paid", but "intended that state law should determine the ultimate thrust of the tax." Riggs v. Del Drago, 317 U.S. 95, 98, 63 S.Ct. 109, 110, 87 L.Ed. 106, 111, 142 A.L.R. 1131.

New York in 1930, Tax Law, Consol. Laws, c. 60, § 249-m et seq., and Pennsylvania in 1937, 20 P.S. § 844, enacted legislation settling the "ultimate thrust" of the federal estate tax in those states, but our

Legislature did not deal with the subject until 1943, when it patterned the California law largely after the legislation in those two states.

Our new law, following the New York and Pennsylvania acts, leaves it within a testator's control whether there shall be proration, and the only question to be decided herein is what *this* testator intended. The appellants contend that he directed that there should be no proration; the respondents contend that he did not so direct.

The second paragraph of the will reads: "I hereby direct that all of my just debts, funeral and testamentary expenses shall be paid by my Executors, hereinafter named, as soon as convenient after my death, and I hereby will and direct that all inheritance taxes chargeable against any and all bequests and/or devises and/or benefits under trusts made or given by this my Last Will and Testament, and all inheritance taxes chargeable to any and all persons for, upon or by reason of any bequest or bequests, devise or devises or benefits under trusts made or given by this my Last Will and Testament, shall be paid by my said Executors in the same manner as, and from the same source as that from which, the administrative expenses of my estate are to be paid, and that such payments of inheritance taxes shall not be considered as advancements on account of but shall be in addition to the bequests, devises or benefits under trusts out of which they arise, *so that said bequests, devises and benefits under trusts shall be paid and delivered in full and without deduction.*" (Emphasis added.)

[1] "The question presented on this appeal", say the respondents, "is whether or not in the absence of any specific and unambiguous direction by the testator in his will as to which legatees or devisees shall be charged with the payment of federal estate taxes, the quoted provisions of the will are sufficient to overcome the statutory proration provision. * * *" In the first place, this is an overstatement. The statute simply provides for proration "except in a case where a testator otherwise directs in his will." Any language fairly indicating that he does not intend proration would suffice, without further elaboration "as to which legatees or devisees shall be charged", for as long as it is clear that he "otherwise directs", the tax burden will remain, in any given case, where it has always rested, i. e., on the corpus or residue.

[2] The respondents' contention may be summed up thus: that because the testator did not *in so many words* speak of the federal estate tax, but did speak of inheritance taxes, he could not have intended to direct against proration. The trouble with this argument is that proration necessarily means deduction and deduction necessarily means that the legacies can *not* be "paid and delivered in full", whereas in the concluding nineteen words of the second paragraph *the testator definitely directed their payment "in full and without deduction."* Such contention denies to this last phrase its full operative effect, contrary to the provisions of section 102 of the Probate Code that "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative; * * *"

[3-5] At the time when this will was drawn, on July 9, 1943, the objective which the testator sought to reach when he directed that the "bequests, devises and benefits * * * shall be paid and delivered in full and without deduction" could be fully and completely accomplished without mentioning federal estate taxes at all, for the new California law calling for proration was not then in effect. The "ultimate thrust" or burden of the federal tax fell at that time only where the federal law left it (see Riggs v. Del Drago, supra). Under the law then in effect in this state, which must be referred to and consulted in arriving at a testator's intention (Estate of Axcelrod, 23 Cal.2d 761, 767, 147 P.2d 1; Estate of Carter, 49 Cal.App.2d 251, 254, 121 P.2d 540; 26 Cal.Jur. pp. 882, 883, §§ 197, 198; Page on Wills, Lifetime Ed., Vol. 2, § 939; 2 Schouler on Wills, etc. 6th Ed., §§ 938, 939), a testator would have had to make a special direction to lift the burden of inheritance taxes from individual legacies; but not so as to fed-

eral estate taxes, for they were not then spread or prorated. Placing ourselves, as we should, in the position of this testator on July 9, 1943 (Page, supra, § 920; Estate of Wilson, 65 Cal.App. 680, 689, 225 P. 283), we find that the Legislature had then passed, and the governor had signed, the bill which enacted these eight new proration sections, but they had not yet become law (23 Cal.Jur. pp. 622, 623, §§ 21, 22). This is conceded by the respondents. When the constitutional ninety day period expired the situation was "as though the Legislature was in session on the day the act took effect, and passed the law on that day" Gilmore v. Pearson, 71 Cal.App. 284, 288, 235 P. 665, 666, quoting Nickerson v. Winslow, 22 Wyo. 259, 138 P. 184, 140 P. 834; People v. Righthouse, 10 Cal.2d 86, 88, 72 P.2d 867. That was August 4, 1943. A new law "has no force whatever until it goes into effect * * *. It speaks from the date it takes effect and not before. * * * *'It does not even operate as notice to persons to be affected by it* * * *.'" People v. Righthouse, supra; emphasis added. At 2 Schouler on Wills etc. 6th Ed., §§ 938, 939, the author says, "It is also presumed that * * * a testator made his will with knowledge of the well-settled law of the State. The maxim that every one is presumed to know the law, applies to existing but not to future enactments. * * *"

[6, 7] Conceding that the testator knew nothing, when he made his will, of the novel provisions of the law then in embryo, if *at that time* he intended his cash legacies should be paid in full without deductions for *any* taxes that intention should be given effect although he made no express mention of the federal estate tax. The words "so that said bequests, devises and benefits under trusts shall be paid and delivered in full and without deduction" are all-inclusive and are certainly sufficient to show the intent that the legacies should be burdened with *no* taxes whatever. Instead of contemplating proration they *"otherwise direct"*.

The respondents argue that inheritance taxes are payable as of the date of death. They also point out that the new law expressly provides that it applies only to the estates of persons dying after its effective date. Neither point is controlling. Federal estate taxes are not, as respondents themselves argue, inheritance taxes. It may be conceded that, but for an effective direction in the will, the federal estate tax herein would have to be prorated equitably in accordance with values as of the date of death. The only question presented is whether it was the testator's intention as expressed in his will (Estate of Lawrence, 17 Cal.2d 1, 108 P.2d 893; sec. 101, Prob.Code) that it should not be prorated at all, and this intention, as we have seen, is to be determined as of the making of the will.

[8] Authorities from outside jurisdictions have been cited by both sides as bearing upon the construction of this will but nothing will be gained by discussing them for the courts have repeatedly said that "each case depends upon its own peculiar facts * * * very little aid can be procured from adjudged cases in the construction of wills". Estate of Henderson, 161 Cal. 353, 119 P. 496, 498; Estate of Lawrence, supra; Estate of Axcelrod, supra.

[9] Our conclusion renders it unnecessary to pass upon the constitutionality of the new sections, challenged by the appellants (see 5 Cal.Jur. p. 614, § 45 and 24 Cal. Jur. p. 432, § 401) and, likewise, as to the points raised in the brief of amici curiæ.

That part of the decree appealed from is reversed.

NOURSE, P. J., and DOOLING, J., concur.

74 Cal.App.2d 917

## CROCKER FIRST NAT. BANK OF SAN FRANCISCO v. HORGAN.

Civ. 13095.

District Court of Appeal, First District, Division 2, California.

June 17, 1946.

1. Internal revenue ⇐983, 1718, 1721

Federal estate tax took effect at time of death of testator and tax became at once a lien on property of estate, enforceable by sale, if not paid, on proceedings in court.

2. Taxation ⇐585, 590

Tax liabilities generally may be enforced by actions in the superior court against personal representatives of the decedents.

3. Courts ⇐198

The probate court is without jurisdiction to determine right of a taxing body to collect a tax from the estate unless such jurisdiction is expressly conferred on it by statute.

4. Courts ⇐198

Where trustee was a stranger to estate, and sought to enforce for benefit of the trust an obligation of estate to pay estate tax which accrued by reason of the transfer of trust property to it by decedent during his lifetime, probate court was without jurisdiction and such adversary claim could only be adjudicated in an independent action in superior court.

5. Courts ⇐199

Statute purporting to give probate court jurisdiction over apportionment of federal estate tax between the estate in probate and strangers taking title to other property of the decedent by transfers inter vivos, was inapplicable where testator's death occurred prior to effective date of statute. Probate Code, §§ 970–977; St. 1943, p. 2740, § 2.

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Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by the Crocker First National Bank of San Francisco, as trustee, against Thomas Horgan, executor of the last will and testament of Patrick Guerin, deceased, for declaratory relief. Judgment for plaintiff, and defendant appeals.

Affirmed.

Richard Belcher and Lingenfelter & Powell, all of Marysville, for appellant.

Chickering & Gregory, of San Francisco, for respondent.

DOOLING, Justice.

Plaintiff, as trustee of a trust created by Patrick Guerin before his death, commenced this action against the defendant Horgan, as executor of the will of said Patrick Guerin, for declaratory relief, praying that the court declare that defendant Horgan as such executor had no interest in the trust funds held by plaintiff as trustee. By answer defendant Horgan, as executor, raised the additional issue of the respective liabilities for the federal estate tax as between the plaintiff trustee and the defendant executor. The trial court by its judgment determined the issue of title in favor of the plaintiff trustee and further adjudged that the defendant Horgan, as executor, "shall pay from the assets of the Estate of Patrick Guerin all of the Federal estate tax levied against said estate including all property held by plaintiff under said trust agreements."

Defendant Horgan appeals from this judgment. On his appeal he presents only one argument, that the Superior Court in this action had no jurisdiction to determine that the burden of the federal estate tax should fall on the estate in the hands of the executor, but that jurisdiction of that question rests exclusively in the probate court.

In Wells Fargo Bank & Union Trust Co. v. Older, 50 Cal.App.2d 724, 123 P.2d 873, a declaratory judgment placing the burden of the estate tax in a similar case was affirmed by this court, but the jurisdictional question here presented was admittedly not there raised or considered.

[1-3] The federal estate tax "took effect at the time of death and the tax became at once a lien on the property of the

estate, enforceable by sale, if not paid, on proceedings in court." Page v. Skinner, 8 Cir., 298 F. 731, 732. Tax liabilities generally may be enforced by actions in the Superior Court against the personal representatives of the decedents (People v. Olvera, 43 Cal. 492; Hancock v. Whittemore, 50 Cal. 522; County of Los Angeles v. Morrison, 15 Cal.2d 368, 101 P.2d 470, 129 A.L.R. 443) and the probate court is without jurisdiction to determine the right of a taxing body to collect a tax from the estate unless such jurisdiction is expressly conferred on it by statute. In re Estate of Schneider, 62 Cal.App.2d 463, 145 P.2d 90.

[4] The plaintiff trustee is a stranger to the estate. It is seeking to enforce for the benefit of the trust an obligation of the estate to pay the estate tax which accrued by reason of the transfer of the trust property to it by the decedent during his lifetime. Its claim against the estate that the full burden of the tax should fall on the estate is an adversary claim by a stranger to the estate of which the probate court has no jurisdiction and such an adversary claim can only be adjudicated in an independent action in the Superior Court. McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026; Texas Co. v. Bank of America, etc., Ass'n, 5 Cal.2d 35, 53 P.2d 127; Parr v. Reyman, 215 Cal. 616, 12 P.2d 440; McCarthy v. McCarthy, 205 Cal. 184, 270 P. 211; Bauer v. Bauer, 201 Cal. 267, 256 P. 820; In re Estate of Howe, 161 Cal. 152, 118 P. 515; Martinovich v. Marsicano, 137 Cal. 354, 70 P. 459; Miller & Lux, Inc., v. Katz, 10 Cal.App. 576, 102 P. 946.

[5] Since the testator's death the Legislature has expressly purported to give the probate court jurisdiction over the apportionment of the federal estate tax between the estate in probate and strangers taking title to other property of the decedent by transfers inter vivos. (Prob.Code, secs. 970–977.) Without regard to the constitutionality or possible effect of these new sections (matters which were argued in Estate of Hotaling, Cal.App., 170 P.2d 111, but which we found it unnecessary to pass on in that case) it is sufficient to point out that the sections are only applicable "to the estates of persons dying after the effective date hereof." (Stats.1943, p. 2740, sec. 2.)

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.




75 Cal.App.2d 80

## ENGASSER v. ENGASSER.

Civ. 7280.

District Court of Appeal, Third District, California.

June 21, 1946.

**1. Appeal and error ⇐907(3)**

On appeal from judgment or order of trial court, in absence of a duly authenticated transcript of evidence or bill of exceptions, every presumption is in favor of validity of the judgment or order, and necessary facts consistent with its validity will be presumed to have existed rather than one which may defeat it.

**2. Divorce ⇐183**

On appeal from order modifying final decree of divorce, affidavits could not be considered even though they were included in the proceedings on appeal, if they were not certified by trial judge to have been considered by him on motion to modify the decree. Code Civ.Proc. §§ 670, 953a; Rules on Appeal, rules 4, 7.

**3. Divorce ⇐183**

An order modifying final decree of divorce could not be disturbed on appeal unless trial judge certified that record contained all of the evidentiary matter used or considered by him at the hearing on the motion to modify the decree. Code Civ. Proc. §§ 670, 953a; Rules on Appeal, rules 4, 7.

**4. Divorce ⇐183**

Affidavits on motion for order modifying final divorce decree were no part of the judgment roll. Code Civ.Proc. § 670.

**5. Appeal and error ⇐616(1)**

Trial judge is only one who is authorized to authenticate documents used upon a hearing before him. Code Civ.Proc. § 953a; Rules on Appeal, rules 4, 7.

**6. Divorce ⇐312**

In absence of duly authenticated transcript of evidence or a settled statement, appeal from order modifying final decree of divorce by awarding custody of child to mother with privilege of removing child from state was required to be determined on judgment roll only. Code Civ.Proc. §§ 670, 953a; Rules on Appeal, rules 4, 7.

**7. Divorce ⇐312**

Where appeal from order modifying final divorce decree by awarding custody of minor child to mother with privilege of removing child from state was required to be determined on judgment roll only because of absence of duly authenticated transcript of evidence or a settled statement, District Court of Appeal would presume that evidence which was adduced at hearing of motion to modify the decree adequately showed that it was for best interest of minor child to award it to custody of mother, and that it was likewise for best interest of minor that mother be permitted to take child outside of state. Code Civ. Proc. §§ 670, 953a; Civ.Code, § 138; Rules on Appeal, rules 4, 7.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Thelma Dorothy Engasser against Melvin Jacob Engasser for divorce. From order modifying a final decree of divorce by awarding custody of Gary Roger Engasser, a four-year-old boy, the issue of the marriage, to the plaintiff with privilege of removing the child from the State of California, the defendant appeals. On motion to dismiss appeal.

Motion granted and appeal dismissed.

Goldstein, Barceloux & Goldstein, of Chico, for appellant.

King & Savage, of Oroville, for respondent.

THOMPSON, Justice.

The defendant has appealed from an order modifying a final decree of divorce by awarding the custody of Gary Roger Engasser, a four year old boy, the issue of the marriage, to the mother with the privilege of removing the child from the State of California. Subsequent to the rendering of the final decree of divorce, plaintiff married M. V. Lamb, serving in the United States Army Air Force, whose home is in the State of Ohio. The plaintiff moved this court to dismiss the appeal on the ground that appellant failed to procure or file in this court a transcript or bill of exceptions of the proceedings on motion for a modification of the decree of divorce with respect to the custody of the minor child, within the time allowed by law, or at all, that the trial judge has not certified to the record on appeal, or any part thereof, and that the clerk of the trial court has merely certified to the accuracy of the documents contained in the judgment roll.

The interlocutory decree of divorce, which was rendered September 30, 1944, determined that both spouses are fit and proper persons to assume custody of the minor child, and awarded the custody of the child to each spouse for a period of six months each year. The final decree, which was rendered and entered October 15, 1945, approved the preceding award of custody. Plaintiff subsequently moved to modify the decree of divorce so as to award to her the sole custody of said minor child, and to permit her to take the child with her to her home "outside of the State of California." Both parties were represented by counsel at that hearing. Affidavits were filed in behalf of the respective parties, and the order of the court recites that evidence was presented. The affidavits are included in the record on appeal, but they are not endorsed as presented or read upon that hearing. This court has no means of determining what evidence was adduced at that hearing. The court subsequently filed its written order January 14, 1946, modifying the decree of divorce and awarding the custody of the child to plaintiff with the "right to take said minor child outside of the State of California," but granting the defendant the privilege of

visiting the child at "all reasonable times and places."

From the foregoing order the defendant gave notice of appeal, January 17, 1946. No transcript of evidence has been prepared or filed. No bill of exceptions has been settled. Upon notice duly served and filed, the plaintiff moved this court on June 5, 1946, to dismiss the appeal as previously stated. The record on appeal contains no certificate of the trial judge. The clerk of the trial court merely certified to the correctness of the documents constituting the judgment roll.

The motion to dismiss the appeal should be granted.

[1-5] On appeal from a judgment or order of the trial court, in the absence of a duly authenticated transcript of evidence or bill of exceptions, every presumption is in favor of the validity of the judgment or order, and necessary facts consistent with its validity will be presumed to have existed rather than one which may defeat it. Borenstein v. Borenstein, 20 Cal.2d 379, 125 P.2d 465. On appeal this court may not consider affidavits, even though they may be included in the proceedings on appeal, unless they are certified by the trial judge to have been considered by him on the motion to modify the judgment. Nor may the order be disturbed on appeal unless the trial judge certifies "that the record contains all of the evidentiary matter so used or considered." Wynecoop v. Superior Court, 17 Cal.2d 657, 111 P.2d 332, 333. The transcript on this appeal is defective. The affidavits are no part of the judgment roll. Sec. 670, Code Civ.Proc.; Drummond v. Drummond, 39 Cal.App.2d 418, 422, 103 P.2d 217; Bonfilo v. Ganger, 58 Cal.App.2d 315, 136 P.2d 632. It has been frequently held that the judge of the trial court is the only one who is authorized to authenticate documents used and considered by him upon a hearing. Sutliff v. Dempsey, 5 Cal.App.2d 246, 42 P.2d 677.

[6] Under the circumstances of this case, in the absence of a duly authenticated transcript of evidence pursuant to section 953a of the Code of Civil Procedure and Rule 4 of Rules on Appeal or a settled statement as provided by Rule 7, the appeal must be heard and determined on the judgment roll only. Culver v. Culver, 65 Cal.App.2d 149, 150 P.2d 295. It is not contended that error appears upon the face of the judgment roll. Every presumption is in favor of the validity of the order modifying the decree of divorce with respect to the custody of the minor child.

[7] We must presume that the evidence which was adduced at the hearing of the motion to modify the decree adequately shows that it was for the best interest of the four year old minor child to award it to the custody of the mother, and that it was likewise for the best interest of the minor that the mother be permitted to take the child outside of the State of California. White v. White, 68 Cal.App.2d 650, 157 P.2d 415; Sec. 138, Civil Code; Roosma v. Moots, 62 Idaho, 450, 112 P.2d 1000; 27 C.J.S., Divorce, § 313, p. 1179.

The motion is granted and the appeal is dismissed.

ADAMS, P. J., and PEEK, J., concur.




75 Cal.App.2d 117

**MULLINS et al. v. HENDERSON et al. (PETROS, Intervener).**

**No. 12944.**

District Court of Appeal, First District, Division 1, California.

June 26, 1946.

Petition for Rehearing Stricken July 26, 1946.

Hearing Denied Aug. 22, 1946.

**1. Mandamus ⇐187(9)**

In mandamus proceeding to compel San Francisco officers to comply with proclamations issued by mayor in exercise of charter emergency powers, whether existing conditions justified the exercise of such powers was question of fact for trial court.

**2. Appeal and error ⇐996, 1011(1)**

The trial court's conclusions on questions of fact are conclusive on appeal, where the evidence is conflicting, or where

fair and impartial men may draw different conclusions from unconflicting evidence.

**3. Municipal corporations ⇐213**

Evidence that operating employees of privately owned street railway threatened not to accept employment at beginner's pay with San Francisco purchasing and consolidating such railway into the municipally owned street railway system, that failure of employees to enter the municipal service would cause a shutdown of a portion of the consolidated railway system, and that a shutdown would have seriously impeded the war effort, warranted trial court's conclusion that emergency existed justifying mayor's exercise of charter emergency powers to grant parity pay to such employees.

**4. Municipal corporations ⇐168**

An "emergency" within San Francisco charter giving mayor certain powers in case of a public emergency involving or threatening public property or the lives, property or welfare of the citizens, is not limited to a public disaster such as an earthquake, fire, flood or bombing.

See Words and Phrases, Permanent Edition, for all other definitions of "Emergency".

**5. Municipal corporations ⇐213**

The shutdown during the war of part of consolidated San Francisco street railway system which would result from failure of employees of privately owned street railway which was purchased by San Francisco and consolidated into municipally owned street railway system, to enter municipal service at beginner's pay, constituted an "emergency", justifying mayor's exercise of charter emergency powers to grant parity pay to such employees, notwithstanding that charter set forth a procedure for wartime appointments under civil service, where such procedure could not fill the needs of the consolidated railway in the event that the employees of the privately owned street railway failed to enter the municipal service.

**6. Municipal corporations ⇐168**

The mayor of San Francisco can exercise his charter emergency powers without a declaration of an emergency by the board of supervisors and without passage of ordinances to enable the mayor to carry out his emergency powers, notwithstanding that the charter accelerates the procedure of board of supervisors in enacting emergency legislation and authorizes expeditious passage of ordinances in aid of the mayor's emergency powers.

**7. Municipal corporations ⇐79**

A municipal charter adopted pursuant to the Constitution is supreme over general laws in respect to municipal affairs. Const. art. 11, §§ 6, 8.

**8. Municipal corporations ⇐65**

Under San Francisco charter, the city has autonomous rule with respect to municipal affairs. Const. art. 11, §§ 6, 8.

**9. Municipal corporations ⇐65**

The operation of municipally owned street railway by San Francisco is a "municipal affair" within rule that San Francisco, under its charter, has autonomous rule with respect to municipal affairs. Const. art. 11, §§ 6, 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

**10. Municipal corporations ⇐79**

Where municipal affairs are involved, the provisions of San Francisco charter prevail over any conflicting provisions of the general law. Const. art. 11, §§ 6, 8.

**11. Municipal corporations ⇐170**

A provision in San Francisco charter enjoining officers to discharge their duties as imposed by the general laws does not incorporate the general laws into the charter. Const. art. 11, §§ 6, 8.

**12. Municipal corporations ⇐220(2)**

A provision in Political Code vesting the power to fix salaries in board of supervisors was not incorporated into San Francisco charter by charter provision enjoining officers to discharge their duties as imposed by the general laws. Pol.Code, § 4001; Const. art. 11, §§ 6, 8.

**13. Municipal corporations ⇐8**
**Statutes ⇐194**

The rule of ejusdem generis does not apply where the legislative intent is clear from the statute or charter provision itself.

**14. Municipal corporations ⇐177**

The provision in San Francisco charter authorizing mayor in an emergency to summon, organize and direct the forces of any municipal department in any needed service, and to summon, marshal, deputize or otherwise employ other persons, or to do whatever else the mayor deems necessary to meet the emergency, conferred broad powers on the mayor, and the ejusdem generis doctrine would not be applied to limit the power of the mayor, in respect to hiring and fixing compensation of persons employed in an emergency, to obtaining the gratuitous help of patriotic citizens.

**15. Municipal corporations ⇐8**

Ordinarily, specific provisions in a charter will supersede general provisions.

**16. Municipal corporations ⇐220(2)**

The provisions of San Francisco charter vesting the power to fix compensation of municipal employees in board of supervisors may be suspended in an emergency under the charter provision conferring broad emergency powers on the mayor.

**17. Municipal corporations ⇐220(2)**

The salary standardization section of San Francisco charter may be suspended in an emergency under the charter provision conferring broad emergency powers on the mayor.

**18. Municipal corporations ⇐871**

The constitutional prohibition against gift of public funds is not applicable to municipality operating under a freeholders' charter. Const. art. 4, § 31; art. 11, § 6.

**19. Municipal corporations ⇐48(2)**

A city operating under a freeholders' charter is subject only to the restrictions provided for in the charter. Const. art. 11, § 6.

**20. Municipal corporations ⇐871**

Proclamations under freeholders' charter emergency powers by San Francisco mayor granting parity pay to employees of privately owned street railway which was consolidated with municipally owned street railway, were not violative of constitutional prohibition against "gift of public funds," since such constitutional prohibition is not applicable to a municipality operating under freeholders' charter. Const. art. 4, § 31; art. 11, § 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift of Public Funds".

**21. Municipal corporations ⇐213**

The San Francisco salary standardization ordinance and annual salary ordinance passed by board of supervisors and approved by mayor after issuance of emergency proclamations of mayor giving parity pay to employees of privately owned street railway which was consolidated with municipally owned street railway, did not repeal emergency proclamations, which continued in force during the emergency, where the ordinances were not intended to have any influence on the emergency proclamations.

**22. Municipal corporations ⇐46**

Emergency proclamations of San Francisco mayor giving parity pay to employees of privately owned street railway which was consolidated with municipally owned street railway was not void as amending charter without following the constitutional procedure, where charter did not prescribe the pay to be received by such employees. Const. art. 11, § 8.

**23. Municipal corporations ⇐46**

An emergency measure prescribing a temporary deviation from an express rule of municipal charter is not an "amendment" of charter within constitutional provision prescribing the procedure for amending charter. Const. art. 11, § 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Amendment".

**24. Municipal corporations ⇐63(1)**

Courts cannot amend, revise, or rewrite any portion of San Francisco freeholders' charter.

**25. Municipal corporations ⇐168**

The exercise of charter emergency powers by San Francisco mayor must be reasonable and must be invoked only to protect public property or the lives, property or welfare of the citizens, and then only when such an emergency actually exists, and the emergency action of the mayor is always subject to review.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Mandamus proceeding by Daniel J. Mullins and others against William L. Henderson, substituted in the place and stead of Kathleen Dolen, etc., and others, to compel compliance with the terms of a series of three proclamations issued by the Mayor of San Francisco. William Petros, taxpayer, filed a complaint in intervention and an answer. From the judgment, the intervener appeals.

Affirmed.

James C. Purcell and William E. Ferriter; both of San Francisco, for appellant.

Walter McGovern, of San Francisco, for respondents.

KNIGHT, Justice.

Plaintiffs petitioned the superior court for a writ of mandate to be directed to various officers of the City and County of San Francisco requiring them to comply with the terms of a series of three proclamations issued by the Mayor of San Francisco in the exercise of the emergency powers conferred upon him by section 25 of the city charter, which so far as here involved reads: "In case of a public emergency involving or threatening the lives, property or welfare of the citizens, or the property of the city and county, the mayor shall have the power, and it shall be his duty, to summon, organize and direct the forces of any department in the city and county in any needed service; to summon, marshal, deputize or otherwise employ other persons, or to do whatever else he may deem necessary for the purpose of meeting the emergency. * * *"

In response to the alternative writ that was issued, one group of four defendants, consisting of the secretary and executive officers of the Civil Service Commission, and three members of the commission, being represented by their own attorney, joined in filing one answer to the petition; and the remaining defendants, being represented by the city attorney, joined in filing a separate answer. Prior to the commencement of the trial William Petros asked for and was granted leave, as a taxpayer and resident of the city, to file a complaint in intervention and an answer to the petition; and the attorneys representing him took an active part in the trial and introduced much evidence in opposition to the issuance of the writ. The principal issue tried was whether the action taken by the mayor pursuant to the emergency powers conferred upon him by section 25 of the charter was justified by the grave conditions existing at that time. The trial extended over a period of approximately two weeks, and shortly after it concluded the trial court rendered its decision upholding the action of the mayor in every particular; whereupon it directed the issuance of a permanent writ. The intervener alone has appealed.

For many years there were two major transportation systems operating street cars and bus lines within the city. One was the Market Street Railway Company, a privately owned company, and the other the San Francisco Municipal Railway system. At an election held on May 16, 1944, the electorate adopted a charter amendment numbered 119.1, which called for the extension of the municipal system by the acquisition of the operating properties of the Market Street company for a sum not exceeding seven and a half million dollars, payable as follows: two million dollars to be paid forthwith out of the surplus earnings of the municipal lines, then on hand, and the balance to be paid thereafter in installments out of the earnings of the unified systems. Shortly after the election a contract of purchase was entered into between the city and the Market Street company to be consummated on September 29, 1944; and as will hereinafter be shown, the emergency powers granted by section 25 of the charter were invoked and proclamations were issued during the months of August and September, 1944, when the world war was in its most critical stage, in order to prevent a shut down of the Market Street Railway system which the city had acquired and was about to take over pursuant to the mandate of the electorate of the city as expressed at the election on May 16, 1944. However, about August first it was ascer-

tained that about ninety per cent of the employees of the Market Street system intended to terminate their employment as such and obtain outside employment because under the provisions of existing salary ordinances they would have to start in with the city at beginner's pay, which was much less than they were then receiving from the Market Street company; also considerably less than was paid to the Municipal Railway employees based on the same length of service, and far less than they would receive from outside employments. Upon learning of this critical situation the mayor held numerous conferences with the representatives of the Market Street Railway employees, the city controller, the city administrator, the city attorney, the manager of public utilities, the vice president of the Market Street Railway Company, and others; and as a result of these conferences and in order to retain the services of the Market Street employees and thus prevent a shut down of the Market Street system, the mayor issued his proclamations under the emergency powers granted him by section 25 of the charter.

The first proclamation was issued on August 8, 1944; this was followed on August 21st by a supplemental proclamation in almost identical language, and on September 18th, to clarify the situation, the mayor issued the third proclamation, a copy of which is attached to the petition for the writ. It directed, among other things, that all employees of the operating system of the Market Street company who possessed charter qualifications be blanketed into the city service; that they be paid out of the revenues of the consolidated railway system the same compensation then being paid to Municipal Railway employees, and that they be granted equal seniority rights with Municipal Railway employees; that is to say, that service with the Market Street company should be deemed service with the city in determining runs and compensation under the compensation fixed for like service with the city. In view of the mayor's proclamations most of the Market Street employees entered the city service on September 29th when it took over the Market Street system. However, some of the city officers having charge of such matters declined to carry out the terms of the proclamations until the action taken by the mayor was favorably passed upon by the superior court; whereupon plaintiffs, in behalf of themselves and a great many other platform workers and bus operators formerly in the employ of the Market Street company brought the present proceeding. Two "time rolls" have since been kept, one on the basis of beginner's pay, and the other on the basis of "parity" pay; the former Market Street employees being paid the "beginner's" pay, and the difference being impounded, to be paid if this judgment becomes final.

[1, 2] The question as to whether the existing conditions shown by the evidence justified the action taken by the mayor pursuant to the emergency powers granted by the charter was and is one of fact to be determined by the trial court. At the oral argument on appeal counsel for appellant expressly so conceded, and the following cases definitely so held. Spreckels v. City and County of San Francisco, 76 Cal.App. 267, 244 P. 919; San Christina etc. Co. v. City and County of San Francisco, 167 Cal. 762, 141 P. 384, 52 L.R.A.,N.S., 676; Josselyn v. City and County of San Francisco, 168 Cal. 436, 143 P. 705. Therefore, under the well established rule governing reviewing courts in dealing with fact cases, if the evidence on that issue is conflicting, or if not conflicting, the evidence is such that fair and impartial minds may draw different conclusions therefrom, the conclusions drawn by the trial court are conclusive on appeal. Spreckels v. City and County of San Francisco, supra, citing numerous cases.

[3] The trial court's decision contains complete findings of fact, which sustain generally all of the material allegations of the petition and negative the vital allegations of the complaint in intervention and the intervener's answer to the petition for the writ; and in upholding the legality of the action of the mayor in the exercise of the emergency power conferred upon him by said section 25 the trial court found as

conclusions of law that continuously from and after August 21, 1944, there existed in San Francisco an actual public emergency involving the lives, property and welfare of its citizens, as well as property of the city, and that such emergency directly affected the street car transportation system of the city; and that on account of such conditions the action taken by the mayor in declaring the emergency and issuing the proclamations was and is a reasonable and necessary exercise of his powers as mayor, and constituted a reasonable exercise of his public duties and power as mayor under the Charter of the City and County of San Francisco.

The evidence, beyond question, supports the trial court's decision. In addition to the facts hereinabove set forth, the evidence establishes the following: At the time the city voted to acquire the Market Street system there were 1029 platform personnel in the operative service of that company who were eligible to become permanent civil service employees under section 125 and other charter requirements. Section 125, which became effective in January, 1941, provided in part: "All persons employed in the operative service of any public utility hereafter acquired by the city and county, at the time the same is taken over by the city and county, and who shall have been so employed for at least one year prior to the date of such acquisition, shall be continued in their respective positions and shall be deemed appointed to such positions, under, and entitled to all the benefits of, the civil service provisions of this charter; provided, however, that no person who is not a citizen of the United States shall be so continued in or appointed to his position." The 1029 platform men above mentioned had been in the service for more than a year; they were citizens and residents of San Francisco, and under 70 years of age. Section 145.1 of the charter provided that employees who were unable to meet the charter qualifications—those over 70; those who had not been employed for a year; those who could not meet the residence requirements—would become "limited tenure" employees, for the duration of the war and six months thereafter. There were 496 employees who came in as limited tenure employees, including 25 who were over 70.

However, on March 20, 1944, which it will be noted was shortly prior to the date on which section 119.1 was adopted, the board of supervisors passed a Salary Standardization Ordinance fixing the compensation of conductors, street car operators (female) and motormen of the Municipal Railway at 90 cents an hour for the first six months of their employment, 92½ cents per hour for the second six months, 95 cents an hour for the third six months, and thereafter 97½ cents an hour. The ordinance further provided that employees "entering the municipal service" after July 1, 1944, should be paid the "entrance rate"; and shortly after the election, to wit, on June 5, 1944, the supervisors adopted the "annual salary ordinance" fixing the compensation of the employees of the Municipal Railway the same as was fixed by the Salary Standardization Ordinance; and it provided also that all employees entering the municipal service after July 1, 1944, should be paid the entrance rate. Therefore, since the Market Street system was not to be taken over by the city until September 29, 1944, all employees of that system entering the city service would, under the provisions of existing salary ordinances, be paid only at the "entrance rate." And as above stated, about August 1, 1944, the mayor was advised that approximately ninety per cent of the Market Street platform personnel were intending to terminate their services and obtain employment in war industry plants unless they were assured of parity pay. He was so informed by the president and the secretary of the carmen's union and their associates; also by those in charge of the city's public utilities. The union secretary told the mayor the matter was acute—that the men were aroused—that if they entered the city service they would lose many advantages, among them being certain governmental social security rights peculiar to private employment, and numerous working advantages; and that unless they got parity pay they would not continue in their positions but would seek employment else-

where. Mr. Edward G. Cahill, the Manager of Utilities, talked to the personnel of the Market Street line and their union representatives, and he testified that he became convinced that some 90 per cent of the Market Street employees would not come into the city service unless they received parity pay. 900 had signed cards pledging they would not go to work for the city unless they received parity pay. Questionnaires were sent out, and 300 employees failed to answer, so that the status of this number was not known. The Civil Service Commission had posted a list in the car barns of 513 Market Street employees who would not be eligible for service with the city. Mr. Cahill testified that he put these facts before the mayor and told the mayor that if 90 per cent of the employees of the Market Street line failed to come over to the city service, the Market Street division of the consolidated system would have to be shut down until the management was able to train new employees, and that it would take a year to put it back into operation if they had to train all new personnel. The vice president of the Market Street company also informed the mayor that he was fearful of what might be the situation on September 29th unless the Market Street employees were assured of wages based on their experience and comparable to wages being paid to Municipal employees; that a large number of the Market Street employees had already quit and taken other employment. And it was quite obvious that the declared intention of the Market Street employees to discontinue their services and seek other employment unless they received parity pay was not an idle threat because there had been an acute labor shortage in the San Francisco area for about two years which constituted an actual manpower shortage. It involved all important industries in the bay area as well as the transportation lines which served such industries. In August, 1944, the War Manpower Commission promulgated a program making it mandatory on commission officials to staff certain establishments in the bay area, designated as "must" because they were producing items of immediate need and necessity in the war effort; and various industries were advertising for additional employees in the newspapers, on billboards, over the radio and through the United States Employment Service. Mr. Cahill also testified that there was already a vast shortage in the platform personnel of the Market Street company, and that many of its cars remained idle as the result thereof; that only 150 applicants could be trained every three weeks due to lack of instructors and other problems, and that only 50 out of 150 trainees eventually became employees. At these conferences the provisions of section 25 of the charter and the scope of the power that could be exercised thereunder by the mayor were also thoroughly discussed; and among others Mr. Cahill and the city controller advised the mayor that in order to prevent a shut down of the Market Street system it was imperative that he exercise the emergency powers conferred by section 25; and the mayor testified that he had definitely reached the same conclusion. Finally the city attorney drafted and the mayor signed the necessary proclamations.

The evidence also shows and the trial court found that as the result of the wars in which the United States was engaged, the port of San Francisco had become the greatest naval port in the world, and that the City of San Francisco was the very heart of the multifarious industries involved in the centralization of the tremendous war effort in this locality. The stress and strain caused by the movement of troops, warships, munitions and other supplies through the port of San Francisco to various strategic points in the Pacific area was augmented by the establishment in and about San Francisco of numerous naval, military and other federal emergency agencies, as well as various government and privately owned shipyards and other enterprises engaged in producing and repairing the instruments of war. Most of these numerous war industries located about the bay area had their headquarters in San Francisco. Thousands of persons employed in San Francisco were compelled to live, because of the acute housing shortage, in nearby communities. Thousands of other employees, working in different points about the bay, were compelled, for the same reasons to live in San Francisco. These catastrophic conditions

were aggravated by the acute housing shortage and the constantly increasing cost of living, all of which contributed to the severe labor shortage. The many thousands of newcomers used the public utilities, including street cars, even out of proportion to the rapidly swelling population. During rush hours standing room on street car fenders came at a premium. The acute scarcity of labor developed into one of the most alarming aspects of this threatening public emergency. Many operable street cars were not operated because of the manpower shortage. Fantastic wages were paid everywhere for unskilled labor. Employers vied with each other in using newspaper display advertising, radio, billboards and personal solicitation in seeking help.

Furthermore the evidence shows and the trial court found that due to the geographical location of San Francisco, its street car transportation systems became a most vital artery in the tremendous emergency job that was being carried on. Gasoline was rationed, and had the overtaxed street railway system broken down, to any appreciable extent, the war effort would have been dangerously crippled; and certainly the threatened impairment of the war effort actually threatened the lives, property and welfare of the people of the entire bay area, as well as the property of the City of San Francisco. Morover the federal and state governments, and many of the municipalities were operating under emergency laws. As stated by the trial judge in the oral opinion delivered by him in deciding the case, the failure of the mayor, under the existing circumstances, to declare an emergency and direct a parity of pay so as to prevent the shut down of the Market Street division of the consolidated street railway system would have amounted to a dereliction of duty.

It was apparent that any attempt to follow the normal procedure prescribed by section 151 of the charter would have delayed the granting of parity pay for more than a year after the time of the crisis, because the effect of the provisions of that section is that an ordinance fixing the compensation of any employee included in the schedule of compensations adopted subsequent to April 1, 1944, would not become effective until July 1, 1946. In the present case the Salary Standardization Ordinance was passed prior to the election by which the charter was amended so as to purchase the Market Street line; and there was no assurance at the time it was passed that the charter would be so amended, because the purchase of the Market Street line had been several times rejected by the voters.

Much more evidence could be narrated showing the absolute necessity for the action taken by the mayor in exercising the emergency powers conferred upon him by section 25, but it would seem that the foregoing is more than sufficient to sustain the trial court's decision in so holding.

[4] In support of his contention that no emergency, as that term is used in section 25 of the charter, existed at the time the proclamations were issued, appellant argues that such an emergency exists only after the happening of a public disaster which has been brought about by an earthquake, or a fire, flood, bombing or similar calamity; that therefore even though ninety per cent of the Market Street Railway employees did threaten to terminate their services and obtain other employment when the city took over the Market Street system unless they were granted parity pay with the Municipal Railway employees for like services, such situation did not constitute an emergency within the meaning of said section 25. There is no merit in the contention or in the argument advanced in its support.

As will be noted, section 25 declares that "in case of a public emergency involving *or threatening* the lives, property *or welfare of the citizens, or the property of the city and county,* the mayor shall have power" etc. (Italics added.) And there is no language used in the section indicating that it was intended to restrict its operation to emergencies brought about by the elements, bombings or like causes. Furthermore, the courts of this state have consistently held in numerous cases that as defined by Webster, the word "emergency" means "an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy." For instance, in County of Los Angeles v. Payne, 8 Cal.2d 563, 66 P.2d 658, 662, the Supreme Court said:

"This court * * * accepted the definition of emergency given by Webster as, 'An unforeseen occurrence or combination of circumstances which calls for an immediate action or remedy; pressing necessity, exigency.'" Among the other California cases holding to the same effect are Fennessey v. Pacific Gas & Electric Co., 20 Cal.2d 141, 124 P.2d 51, and Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 291 P. 839, 71 A.L.R. 161. In the former case the Supreme Court said [20 Cal.2d 141, 124 P.2d 53]: "The law governing this question indicates that 'emergency' has reference to a method adopted as an expedient for meeting a situation which ordinarily calls for immediate action. Mason v. Crawford, 17 Cal.App.2d 529, 62 P.2d 420." And in Los Angeles Dredging Co. v. City of Long Beach, supra, the Supreme Court said [210 Cal. 348, 291 P. 843]: "To state what constitutes an 'emergency' is not an easy task. The term depends greatly upon the special circumstances of each case; and the authorities are not very helpful in the present inquiry. By definition, the term 'emergency' implies a sudden or unexpected necessity requiring speedy action. San Christina Inv. Co. v. City and County of San Francisco, 167 Cal. 762, 773, 141 P. 384, 52 L.R.A.,N.S., 676; Spreckels v. City and County of San Francisco, 76 Cal.App. 267, 244 P. 919; Mallon v. Board of Water Com'rs, 144 Mo. App. 104, 128 S.W. 764." There are also many cases from other jurisdictions holding to the same effect, among them being People ex rel. Highway Commissioners v. Board of Supervisors, 21 Ill.App. 271, and Onsrud v. Kenyon, 238 Wis. 496, 300 N. W. 359. The cases cited by appellant are not in point for the reason that they are based on circumstances essentially different from those here under consideration.

[5] Appellant contends that the evidence shows that there was no emergency because the secretary of the Civil Service Commission testified that the procedure set forth in section 145.1 (war-time appointments under civil service) was adequate to fill any of the needs of the consolidated railway. This testimony, however, was completely overcome by that of Mr. Cahill, the Manager of Public Utilities, who testified that out of 150 applicants sent to the railway by the Civil Service Commission, only 50 eventually became employees; that the railway was only able to train 150 employees every three weeks because that was all the instructors available, so that when the Civil Service Commission sent more applicants than could be adequately trained, the railway asked civil service to send no more people—the result being that regardless of how many people the Civil Service Commission sent as applicants, the railway was still short on platform men and clerical help.

[6] Appellant argues also that the charter provides a complete scheme for the exercise of powers in an emergency, and that the mayor acted contrary to those provisions of the charter; that sections 13 and 16 of the charter specifically authorize the board of supervisors to immediately enact legislation to meet any emergency which actually exists, and which the board must declare to exist, and that such legislation is effective on passage; that, in addition, section 179 provides that "ordinances necessary to enable the mayor to carry out any of the powers vested in him in the case of a public emergency as defined in section 25 * * * shall not be subject to the referendum." It is appellant's contention in effect that these provisions of the charter should have been followed, that is, that the board of supervisors should have declared an emergency, and passed ordinances to enable the mayor to carry out the powers given him by section 25; and that in the absence of any action by the board of supervisors the mayor's action was contrary to the plain provisions of the charter. The provisions of section 13 and 16 of the charter show, however, that they deal only with an acceleration of the legislative procedure of the board of supervisors and of the effectiveness of the ordinances in cases considered as emergency legislation in that special respect, and that a fair construction of section 179 is that it merely provides for expeditious passage of such ordinances as may be necessary to enable the mayor to carry out the emergency powers vested in him

by section 25, but that it does not require any ordinance or resolution to be passed.

Appellant also relies on several of the cases (including the San Christina case, supra) which involved the right of the board of supervisors under a former charter to declare an emergency and suspend the "dollar tax" limit. He contends that these cases are authority for the proposition that the provisions of the charter cannot be disregarded under the pretext of an emergency. These cases so relied on are clearly distinguishable on their facts. The emergency involved therein was the 1906 fire, and as stated by respondents as late as 1915 the supervisors were "nursing" the emergency, using it as an excuse to raise the tax levy. Furthermore, in those cases the courts held that when the board acted no emergency actually existed; whereas, here, the court held that when the mayor acted it did. Also, the charter provision there involved referred to a "great" emergency, but here the provision (sec. 25) reads: "In case of a public emergency involving or threatening the lives, property or welfare of the citizens, or the property of the city and county. * * *"

[7-12] Appellant next contends that by section 18 of the charter the provisions of the general laws are incorporated into the local charter, and that accordingly the general law, and particularly section 4001 of the Political Code vests the power to fix salaries in the board of supervisors. In order to sustain appellant's theory it would be necessary to hold that the charter which was adopted pursuant to the provisions of sections 6 and 8 of Article XI of the Constitution is subject to and limited by the general laws on purely municipal matters; and of course it cannot be so held, because a charter so adopted is supreme over general laws in respect to municipal affairs. As held in West Coast Advertising Co. v. City and County of San Francisco, 14 Cal. 2d 516, where a city has availed itself of the provisions of sections 6 and 8 of Article XI of the Constitution, it has full control over its municipal affairs unaffected by general laws on the same subject matters, and it has such control whether or not its charter specifically provides for the particular power sought to be exercised, so long as the power is exercised within the limitations or restrictions placed in the charter. In other words, under the present charter of San Francisco the city has autonomous rule with respect to municipal affairs; and the operation of its street railway by a municipality is a municipal affair. In re Orosi Pub. Utility Dist., 196 Cal. 43, 235 P. 1004. It follows, therefore, that where municipal affairs are involved the charter provisions prevail over any conflicting provisions of the general law. Moreover, section 18 of the charter does not incorporate the general laws into the charter; it merely enjoins officers to discharge their duties as imposed by the general laws; and the cases cited by appellant are easily differentiated from the present one on the ground that the provisions of the charter therein involved especially incorporated the general laws—none of them hold that reference to a general law for one express purpose also incorporates the law in any other respect.

Appellant argues that section 25 does not vest in the mayor the broad powers claimed by respondents; that applying the doctrine of ejusdem generis to the charter provision that "the mayor shall have the power, and it shall be his duty, to summon, organize and direct the forces of any department in the city and county in any needed service; to summon, marshal, deputize or otherwise employ other persons, or to do whatever else he may deem necessary for the purpose of meeting the emergency" precludes the interpretation that under these provisions the mayor has the right to fix the compensation of municipal employees; that the word "employ" does not mean to hire, and therefore to fix the compensation of those he hires, but that it simply means "to make use of." In other words, appellant interprets this charter provision as giving the mayor the right to summon or marshal help in times of disaster, which help would be rendered gratuitously by patriotic citizens. He contends that the word "employ" must be interpreted in this way because of the words which precede it (summon, marshal, deputize); also that the last clause, "to do

whatever else he may deem necessary for the purposes of meeting the emergency," likewise takes color from what preceded it, and is restricted to a sense analogous to that of those less general. Thus, appellant argues, the mayor may summon, marshal, deputize, employ or do whatever else he may deem necessary in an emergency, but such acts must be in connection with the summoning, marshaling, deputizing or employing (in the sense of "making use of") of persons to meet the emergency; and that it does not and cannot mean that he has the right to hire and to fix the compensation of those he hires.

[13, 14] It has been repeatedly held, however, that the rule of ejusden generis does not apply where the legislative intent is clear from the statute or charter provision itself. As said in California Jurisprudence (vol. 23, p. 756), "The doctrine of ejusdem generis is but a rule of construction to aid in ascertaining the meaning of the legislature, and may be used to carry out, but not to defeat, the legislative intent. Thus if it can be seen that a particular word following a general word was inserted for a distinct object, and that, to carry out the purpose of the statute, the general word ought to govern, the ejusdem generis rule should not be applied. The doctrine must also yield to the rule that every part of a statute should, if possible, be upheld and given its proper force." It is clear from reading the words employed in section 25, that the powers granted thereby are very broad, and that there was no intention on the part of the freeholders who framed the section, nor the voters who adopted it, to place thereon the narrow restrictions contended for by appellant. As will be seen, the phrase "to do whatever else he may deem necessary for the purpose of meeting the emergency" is a clear and sharp expression of the intent to give wide powers, which is inconsistent with the theory that it is a restriction to do nothing more than acts with respect to summoning, marshaling, deputizing and employing of persons to meet the emergency.

The attack respondents make upon the soundness of appellant's contention that the word "employ" as used in section 25 does not mean to hire and therefore to fix the compensation of those hired, finds substantial support in the case of City of Youngstown v. First Nat. Bank, 106 Ohio St. 563, 140 N.E. 176. There the question was presented as to whether additional police, which the mayor had by statute been empowered to employ for an emergency, were entitled to pay, and the court held that the city was liable for the pay, notwithstanding the fact that the statute did not say anything about it. The court said (140 N.E. at page 178): "When one employs another in some work or service, it is the common ordinary understanding that there shall be a resulting or reciprocal compensation for such work and service rendered by such employe."

Appellant concedes that section 25 is a broad section and contains general and comprehensive language, but he contends that the construction placed on it by the trial court is inconsistent with other specific sections of the charter. He calls attention to the sections of the charter relating to compensation of public employees and the manner in which it shall be fixed, and argues that by these sections the duty and responsibility of fixing salaries for employees of the city rests entirely with the board of supervisors; that no exceptions are made therein, and that under the rules of statutory construction these specific sections prevail over a general section such as section 25; and that if it had been intended that these specific sections were to be inoperative during an emergency, unmistakable language would appear therein.

[15, 16] While it is true that, ordinarily, specific provisions in a charter will supersede general ones, it is self-evident from the very broad language of the section that it was intended to prevail, in an emergency, over the provisions of the charter written for ordinary times; that otherwise the concluding paragraph of section 25 would be meaningless. In other words, although the power to fix the compensation of municipal employees is vested in the board of supervisors, these powers, by the broad terms of section 25, may be suspended in an emergency. None of the cases cited and relied on by appellant, holding that the

board of supervisors has exclusive power to fix salaries, involved an emergency.

[17] Appellant also argues that any power that the mayor might have had to fix salaries was taken away by section 151 of the charter, the salary standardization section, and that if it had been intended to give the mayor any control over public salaries some mention would have been made of that intent in section 151. However, as contended by respondents, if the provisions of section 25 supersede the ordinary provisions of the charter in case of an emergency, then section 151 would also be superseded by section 25.

[18-20] Nor is there any merit in appellant's contention that the mayor's attempt to order payment to employees in excess of the compensation to which they were entitled under the salary ordinance and the Civil Service Commission rules would constitute an attempt on the part of the mayor to make a gift of public funds, and would therefore be a violation of section 31 of Article IV of the Constitution. The case of Conlin v. Board of Supervisors, 99 Cal. 17, 33 P. 753, 21 L.R.A. 474, 37 Am.St.Rep. 17, upon which appellant relies, was decided when the City and County of San Francisco was operating under a former charter which constituted direct grant of power from the Legislature, whereas now it is operating under a freeholders' charter; and it has been definitely held that section 31 of Article IV has no application to a city operating under a freeholders' charter, and that where a city is so operated it is subject only to the restrictions and limitations provided for in its charter (Los Angeles Gas & Electric Corporation v. City of Los Angeles, 188 Cal. 307, 205 P. 125); that is to say, since the amendment in 1914 of section 6 of Article XI of the Constitution, which gives the right to chartered cities to control their municipal affairs, the charter of a city availing itself of that right is the supreme law of the city on its municipal affairs, and section 31 of Article IV of the Constitution does not apply to such a chartered city. Smith v. City of Glendale, 1 Cal.App.2d 463, 36 P.2d 1083.

[21] As hereinbefore stated, the original Salary Standardization Ordinance was passed March 20, 1944; the election authorizing the acquisition of the Market Street line was held on May 16, 1944; and the mayor's proclamations were issued in August and September of that same year. In September, 1944, a new Salary Standardization Ordinance and Annual Salary Ordinance were passed by the board of supervisors and approved by the mayor. These later ordinances were exact duplicates of the ordinances passed in March and June of 1944, all of which were effective forthwith, by reason of the emergency provisions thereof. They did not make any changes in the compensation to be paid the employees, but only in the number of employees affected thereby, and as stated in these ordinances they were passed as emergency measures to become effective forthwith because of the time limitation provided for in the charter. In this regard it will be remembered that section 151 of the charter provided in effect that if an ordinance fixing the compensation of any employee or class of employees included in the schedule of compensations was adopted subsequent to April 1, 1944, it would not become effective until July 1, 1946. Appellant contends that since the new Standardization and Annual Salary Ordinances were adopted by the board and approved by the mayor after the issuance of his proclamations, they superseded and repealed the proclamations. This contention is not sustainable. These later ordinances did not purport to repeal the proclamations. It is clear that they were not intended to have any influence whatsoever on the emergency proclamations of the mayor. They did not deal with the actual emergency, but were based on normal pay and enacted as part of the ordinary financial machinery of the city, and were intended to become operative only after the emergency had passed. The emergency proclamations of the mayor stand in the relation of a special and exceptional rule to the ordinances of the board of supervisors, which constitute the general rule for normal times. In such case the special rule remains in force as an exception

to the general rule, during the emergency, and only during the emergency. Upon the termination of the emergency and the lifting of the emergency proclamations (and this could have conceivably happened at any time), the usual and ordinary financial ordinances would then become fully effective. Neither the board nor the mayor knew, at the time the mayor issued the emergency proclamations, or at the time said ordinances were adopted, how long the actual emergency would last. For that reason, principally, the supervisors were justified in leaving the exercise of the emergency powers to the mayor.

[22, 23] Appellant contends that the mayor's proclamation constituted an attempt to amend the charter and was void under section 8 of Article XI of the Constitution because the amending procedure of that provision was not followed. He argues that when the mayor in the exercise of his emergency power suspends charter provisions or supersedes them he is amending them under another name. Admittedly, however, there is no section of the charter prescribing that the Market Street Railway personnel should receive only beginner's pay; and this is the only part of the emergency proclamation which is of importance; therefore, there is no question of amending the charter. Moreover, an emergency measure which prescribed a temporary deviation from an express rule of the charter is not an amendment of the charter requiring the procedure of section 8 of Article XI of the Constitution, if another charter provision expressly grants the power to do so.

[24, 25] As claimed by respondents, an analysis of the San Francisco Charter shows that it grants the mayor unusually broad and extensive executive, administrative and emergency powers, all of which culminate in the admittedly vast emergency powers conferred upon him in the concluding paragraph of section 25 of the charter, which is here involved. In the present case appellant has indulged in some criticism of the broad emergency powers thus granted to the mayor. But it should be borne in mind that we are not here dealing with a political question. The charter was prepared by a board of freeholders elected by the people of the city, and afterwards adopted by the voters of the city, and any of its provisions may be changed at any time by the voters. It is not, however, within the power of the courts to amend, revise or rewrite any portion of the charter. Of course the exercise of the emergency powers by the mayor must be reasonable and must be invoked only to protect the lives, property or welfare of the citizens or the property of the city and county, and then only when such an emergency actually exists; and the emergency action of the mayor is always subject to judicial review. In the present case the trial court, after hearing all of the evidence, decided that the mayor had not abused the emergency powers conferred upon him, and the evidence, in our opinion, fully sustains the trial court decision.

At the oral argument on appeal, additional briefs were asked for on the question of the applicability of section 125 of the charter as construed in Handlon v. Wolff, 72 Cal.App.2d 53, 164 P.2d 46, which was decided subsequent to the filing of the briefs in this case. Since, however, the present action was decided in the trial court upon the issue of the legality of the mayor's action in exercising the emergency powers conferred upon him by section 25 of the charter, and since there is ample evidence to sustain the trial court's conclusion on that issue, we do not deem it necessary to discuss or decide the question argued in the additional briefs.

The other points raised in the briefs are but incidental to those discussed, and are determined by the decision of the main points involved.

The judgment is affirmed.

WARD, J., concurs.

PETERS, Presiding Justice (concurring).

I concur in the order affirming the judgment but I do so on different grounds from those set forth in the majority opinion.

It is there held that the various proclamations of the mayor were justified in that an

emergency in fact existed within the meaning of § 25 of the charter, and that under that section the mayor possesses the vast and practically unlimited powers described in the majority opinion. The results of such a holding are far reaching indeed. It means that if the mayor determines that there is an emergency, and if the evidence of the existence of such emergency is conflicting, the mayor has unlimited and unrestricted power by proclamation and executive fiat to set aside and to disregard every ordinance passed by the lawmaking body, even though the lawmaking body is then available in session, and even though all departments of government, including the lawmaking body are then functioning, and to set aside and to disregard every other provision of the charter limiting the mayor's powers. In a very real sense such a holding means that during the existence of such an emergency the mayor, and the mayor alone, constitutes the entire government of the city. If it be assumed that the charter confers such unusual and extraordinary powers on the mayor (and I have grave doubts that § 25 was ever intended to have the broad effect given to it by the majority) it is quite clear that the provision should not be called into operation unless an emergency of the gravest nature exists.

In the present case the fundamental question presented was whether the Market Street employees, when the Market Street system was taken over by the city and county, were entitled to "parity" pay, or were entitled to beginner's pay. There was no doubt an extremely grave situation presented when the Market Street platform and other operating employees threatened not to accept employment with the city and county unless they were granted "parity" pay. Had that portion of the streetcar system been forced to cease operations during that critical war period it would have been a catastrophe not only to the city but to the nation. But that grave situation did not call for the declaration of an emergency within the meaning of § 25, and the setting aside of the normal functions of government, because, in my opinion, as a matter of law, quite independent of the mayor's proclamations, the Market Street operating employees were entitled to parity pay.

Section 125 of the Charter provides, in part, that: "All persons employed in the operating service of any public utility hereafter acquired by the city and county, at the time the same is taken over by the city and county, and who shall have been so employed for at least one year prior to the date of such acquisition, *shall be continued in their respective positions and shall be deemed appointed to such positions, under, and entitled to all the benefits of, the civil service provisions of this charter;* provided, however, that no person who is not a citizen of the United States shall be so continued in or appointed to his position. * * *" (Italics added.)

There can be no doubt at all that under this section the Market Street operating personnel had a charter right to be blanketed into civil service. But the charter does not merely give these employees the right to be employed as beginners. It provides that they shall be "continued in their respective positions" and "shall be deemed appointed to such positions" and entitled to "all the benefits" of civil service. That language clearly and without ambiguity provides that the positions these employees had with Market Street shall be continued, and that in such positions such employees shall be entitled to the civil service rights attaching to those positions. The charter itself gives the employees this right without the necessity of further action by the mayor, the board of supervisors, or the civil service commission. The charter guarantee is to a position substantially similar in kind and degree to the one held by them under Market Street. The language quoted is capable of no other reasonable construction.

This construction is not mine alone but is the exact construction given to § 125 by the unanimous opinion of this court in the recent case of Handlon v. Wolff, 72 Cal. App.2d 53, where at page 58, 164 P.2d 46, at page 49, it is stated: "In effect section 125 provides that if one has been employed for one year in an acquired utility such employee shall be deemed appointed to such position and entitled to 'all benefits' of the service under the municipality. 'Such position' if not the identical position should be interpreted as meaning a similar position in kind and degree—one that in salary,

authority, duties, etc. is reasonably comparable to the employee's former position. If no comparable position exists then it appears that 'such position' by the terms of the charter is 'continued.' The 'position' in the private utility is adopted as a city position. The legislative or administrative means of continuing the employee in his position is a mechanical problem subordinate to the declaration in the freeholder's charter that he 'shall be continued' in his position."

It seems too clear to require extended argument that an employee with important seniority rights attaching to his position with Market Street is not "continued" in his "respective" position, nor in the words of the Handlon case, has he been appointed to "a similar position in kind and degree—one that in salary, authority, duties, etc. is reasonably comparable to the employee's former position," if after working for Market Street for many years he is offered a beginner's job with no seniority benefits with the city, and at beginner's pay. Such a holding would mean that the Market Street employee would not be given substantially the same position with the city that he had with Market Street, but would be offered a position substantially, materially and realistically lower in rank.

Appellant contends that such a construction would mean that the Market Street employees would be entitled to the retirement benefits provided for city and county employees. That conclusion by no means follows. The retirement system is a contributive one. The Market Street employees have not contributed for the period they were working for Market Street. Retirement benefits are not civil service benefits per se. They are the result of a special charter enabling provision, and statutes passed pursuant thereto. They have no relation to the "kind" or "degree" of position involved.

For these reasons I believe the judgment should be affirmed, not because there was an emergency within the meaning of § 25, but because the Market Street employees were entitled to all the benefits purportedly granted them by the mayor's proclamation by virtue of § 125 of the charter.

Hearing denied; CARTER, J., dissenting.

75 Cal.App.2d 178

## CITY OF REDDING v. HOLLAND.

Civ. 7292.

District Court of Appeal, Third District, California.

June 27, 1946.

1. Municipal corporations ⇐918(2)

Provision in ordinance calling for election to authorize issuance of municipal bonds to defray cost of proposed sewage system, respecting payment, did not preclude payment of a portion of the indebtedness prior to three years from the date of the issue of the bonds and was not in conflict with the provision in statute requiring payment of series of such bonds "each and every year" beginning with the date of issuance thereof and did not mislead voters to their prejudice, so as to render bonds issued pursuant thereto void. Gen.Laws, Act 5178, §§ 2, 3.

2. Municipal corporations ⇐918(2)

Even though the proceedings leading up to issuance of municipal bonds create a contractual relation between city and its taxpayers, a departure from statements of ordinance calling for bond issue election, which is not in conflict with statute, will not invalidate the bonds unless the defect complained of would result in an increased burden on taxpayers. Gen.Laws, Act 5178.

Petition by City of Redding against Doris L. Holland, as clerk of City of Redding, for a writ of mandamus to require respondent, as clerk of City of Redding, to countersign and execute municipal bonds in the sum of $200,000, which were voted at an election and authorized by ordinance of the city for defraying the cost of proposed sewage system.

Peremptory writ granted.

Glenn D. Newton, of Redding, for petitioner.

Orrick, Dahlquist, Neff, Brown & Herrington, of San Francisco, for respondent.

THOMPSON, Justice.

This is a petition for a writ of mandamus to require the respondent as clerk of the City of Redding to countersign and execute municipal bonds in the sum of $200,000, which were voted at an election and authorized by ordinance of the city for defraying the cost of a proposed sewage system. The respondent demurred to the petition on the ground that it fails to state facts sufficient to warrant the issuance of the writ.

The respondent contends that the bonds are void because the ordinance calling for the election stated that "*at least* one-thirty-eighth part of the principal sum of said indebtedness shall be paid each and every year, * * * *beginning three years from the date of the issue of such bonds,*" instead of providing for the payment of a series of such bonds "each and every year" beginning with the date of the issuance thereof. It is asserted that the foregoing quoted language of the ordinance is in conflict with the statute and misled the voters to their prejudice.

The petitioner contends that the language of the ordinance is not misleading or prejudicial since it does not purport to fix the time of payments of the *whole indebtedness* of $200,000, but merely states that "at least one-thirty-eighth part" thereof will be paid each and every year beginning three years from the date of the bonds; that the statute does not require the *ordinance calling for an election* to state the time for payment of the bonds, but contemplates that the legislative body will subsequently fix the terms and conditions of payment of the bonds after they have been duly voted and approved, which was exactly what the city council did in this case. It is claimed that the language of the ordinance is not misleading, even though it may be ambiguous, since the voters must be presumed to know that the law requires payments of series of bonds each and every year from the date of their issuance, and that the challenged language of the ordinance does not prohibit the council from conforming with the law by subsequently providing for payments of the series to become due in the first and second years after the date of issuance thereof, which the council did by a duly enacted ordinance.

The issuance of the bonds was authorized and the election was held April 9, 1946, pursuant to the provisions of the act, as amended, for incurring indebtedness for municipal improvements. Stats.1901, p. 27, 2 Deering's General Laws, p. 1723, Act 5178. At the election the bonds were carried by an overwhelming vote. Ordinance No. 316 was duly passed and published by the city council in accordance with the provisions of sections 2 and 3 of the act. The ordinance called for the election to be held on April 9, 1946, at a specified time and designated precincts, as required by law, to vote on the proposed bonded indebtedness of the City of Redding, in the sum of $200,000, for the construction of a sewage plant and system. It stated the purpose and amount of the proposed indebtedness and that the rate of interest would not exceed 3½% per annum, which is all that section 2 of the act requires. It specifically declared what should be printed on the ballots and the exact form thereof under the caption "Measures to be Voted On." That form of ballot stated the aggregate amount and purpose of the proposed indebtedness and the rate of interest thereon. The ballots did not state the form of the bonds which would be issued, nor the dates or times when the several bonds would be payable. The statute does not require such statements to be made on the ballot. But section 8 of the ordinance did state that: "If at said regular election it shall appear that two-thirds of all the votes cast thereat were in favor of and authorized the incurring of a bonded debt for the purpose set forth in the proposition hereinbefore stated, then said * * * bonds will be issued to defray the costs of the said sanitary sewage treatment plant, * * *. Such bonds shall be of the form and character known as serials and *at least* one-thirty-eighth part of the principal sum of said indebtedness shall be paid each and every year, * * * *beginning three years from the date* of the issue of such bonds, until all of said bonds shall have been paid." (Italics added.)

On June 3, 1946, the city council duly passed Resolution No. 1413, declaring the

approval of said bonds by more than two-thirds of the electors voting at said election, and authorized the issuance of said bonds accordingly, in the aggregate sum of $200,000, to be paid with interest at the rate of 3½% per annum payable semiannually; that said bonds would be consecutively numbered from 1 to 200, inclusive, of the denomination of $1,000 each, and dated January 15, 1946. It was then provided that said bonds "shall mature and be payable in consecutive numerical order, from lower to higher, as follows, to wit: $10,000 principal amount of bonds shall mature and be payable on June 15th in each of the years 1947 to 1966, both inclusive."

The resolution provided for payment of all interest coupons on the 15th day of June and December of each year. The exact form of the $1,000 bonds, in accordance with provisions of the statute, was fully set out in this resolution, and the proper officers were directed to execute the bonds by affixing their signatures thereto. Paragraph 5 of section 5 of the Act provides that the bonds shall be signed by the treasurer, "and shall be countersigned by the clerk, or one or more of his deputies."

The clerk refused to countersign the bonds. This petition for a writ of mandate was then filed, to require the clerk to perform her duty by countersigning the bonds. To that petition the respondent has filed a demurrer as previously stated.

The only issue in this case is the question as to whether the bonds are void for the asserted reason that the voters were misled to their prejudice by the statement contained in paragraph 8 of Ordinance No. 316, which reads in part: "Such bonds shall be of the form and character known as serials and *at least one-thirty-eighth part* of the principal sum of said indebtedness shall be paid *each and every year,* in lawful money of the United States, *beginning three years from the date of the issue of such bonds, until all of said bonds shall have been paid.*" (Italics added.)

The respondent claims that the foregoing language is in conflict with the third paragraph of section 5 of the act, which declares that the bonds "shall be paid *each and every year* on a day and date, and at a place or places to be fixed by the legislative body of the municipality. * * *"

[1] We are of the opinion the voters were not misled or prejudiced by the language used in paragraph 8 of Ordinance No. 316, previously quoted. The statute does not require the ordinance submitting to the voters the approval of the proposed bonded indebtedness, to include therein a provision as to when or how the bonds shall be paid. Paragraph 3 of section 5 of the act does provide that the bonds "shall be paid each and every year on a day and date, and at a place or places to be fixed by the legislative body of the municipality." The voters must be presumed to have known that was the law. The city council complied with that provision of the law in its duly enacted resolution No. 1413, which was passed June 3, 1946. We think that resolution is not necessarily in conflict with the language of paragraph 8 of Ordinance No. 316, previously quoted. That language merely stated that "*at least* one-thirty-eighth part of the principal sum of said indebtedness shall be paid each and every year, * * * beginning three years from the date of the issue of such bonds." That language does not necessarily mean that no portion of the principal sum of the indebtedness would be payable the first or the second year after the bonds were issued. The words used may be construed to mean that the definite amounts to be paid annually were left to be subsequently determined by the city council. Nothing was said in that ordinance which compels the conclusion that no portion of the indebtedness would be paid prior to three years from the date of the issue of the bonds. We must assume the voters knew that the law required some payments to be made "each and every year" after the date of the bonds. State ex rel. Utah Saving & Trust Co. v. Salt Lake City, 35 Utah 25, 99 P. 255, 260, 18 Ann.Cas. 1130. One-thirty-eighth of the total indebtedness of $200,000 is $5,263.16. The ordinance merely stated that sum, *at least,* would be paid each year beginning with the third year after the date of issuance. It did not say that no payments would be made prior thereto.

The subsequent resolution fixing the specific amounts and dates of payments of $10,000 "on June 15th in each of the years 1947 to 1966, both inclusive," is not in conflict with the challenged language of section 8 of Ordinance No. 316. The $10,000 payments are "at least one-thirty-eighth" of the entire indebtedness. Indeed they are much more than that sum. Since there was an omission in said section 8 to provide for payments in the first and second years, or to specify the exact amount to be paid annually thereafter, the voters could not have been misled to their prejudice, if misled at all, by that language, even though we may concede that it may have been ambiguous. We therefore conclude the challenged language of section 8 of Ordinance No. 316 did not invalidate the bonds.

In support of his contention that the bonds are invalid for the reason previously stated, the respondent relies chiefly on City of North Sacramento v. Irwin, 94 Cal.App. 652, 271 P. 788, 789, 272 P. 767. That case is not in conflict with what we have previously said regarding the alleged misleading language of the ordinance. In that case the city voted bonds for a sewer system in the sum of $15,000. The published ordinance, upon which the bonds were held to be invalid, specifically and definitely provided that "One-tenth part *of the whole amount* of the principal of said indebtedness created under the said proposition shall be paid each and every year, that is to say: $1,500 of the principal of said bonds *shall mature* on the 1st day of January of each year beginning with the 1st day of January, 1931, to and including the 1st day of January, 1940." Also the ordinance passed by the city council after the election specifically provided that the first numbered bonds should be payable January 1, 1931, and the subsequent ones on the first day of January of the years following for the ten years. The bonds which were presented to the city clerk for countersigning likewise so provided. It was therefore apparent in that case that upon the faces of the bonds themselves their terms were in conflict with the statute by which they were authorized, in that payments thereof were not to begin until three years after their authorization. Since the maturity dates and payments of the bonds representing "the whole amount" of the $15,000 indebtedness were fixed on and after January, 1931, there was no room to assume that the council could or would subsequently provide for payment of any bonds prior to the last-mentioned date, and it did not do so. The court there said that the bonds themselves were invalid. The court was therefore justified in saying in the Irwin case that: "There was no authority in the city council, in disregard of the plain requirements of the statute, to provide that no interest shall be paid prior to January 1, 1930, or that no part of the principal shall be paid prior to January 1, 1931."

No such statement was made by the council in the present case. The difference in the language used in this and the Irwin case distinguishes them in that regard. Here the bonds themselves comply with the statute, and the only ground urged as to their invalidity is that they do not comply with the original ordinance.

The other cases relied on by the respondent are likewise distinguishable from the facts of this case.

In the Salt Lake City case, supra, 99 P. at pages 259, 260, the court said with reference to a variance between the notice of election and the statutory requirements, that:

"The taxpayer thus cannot authorize, nor can the city officials issue, bonds without adopting the statutory method of payment. * * * The taxpayers, like all others, are thus charged with notice of the scope of the powers conferred upon such agency, since in submitting a proposition to vote bonds the city council cannot exercise implied or ostensible powers, * * *. The taxpayers, in incurring a bonded indebtedness, cannot even authorize the city council to agree to any other method of payment than the one prescribed by the statute. * * * If he is permitted to urge this as an objection to the issuance of the bonds, it must be upon the theory that he is not required to take notice of the law, nor of the powers conferred thereby upon the city council. * * *

"The statement may, therefore, be considered as mere surplusage and harmless. That similar statements in submitting questions to be voted for have been held mere surplusage, is illustrated by the following cases: City of Santa Barbara v. Davis, 6 Cal.App. 342, 92 P. 308; Hamilton v. Village of Detroit, 83 Minn. 119, 85 N.W. 933; City of Cheyenne v. State [ex rel. E. H. Rollins & Sons] 17 Wyo. 90, 96 P. 244; Yesler v. City of Seattle, 1 Wash. 308, 25 P. 1014."

The Salt Lake case was cited with approval with respect to the principle previously herein stated in Allison v. City of Phoenix, 44 Ariz. 66, 33 P.2d 927, 930, 93 A.L.R. 354.

In City of Santa Barbara v. Davis, 6 Cal.App. 342, 92 P. 308, a writ of mandate issued to compel the clerk to countersign and issue municipal improvement bonds as prayed for. The notice of election improperly stated that the proposed indebtedness of $50,000 would be represented by 40 bonds of the denomination of $1,250. The statute provided that no bond shall exceed the sum of $1,000. After the election the council adopted an ordinance fixing the denomination of the bonds at the sum of $625 each. The error of the notice of election in stating the denomination of the bonds to be issued was held to be immaterial. The bonds were declared to be valid.

In City of San Diego v. Millan, 127 Cal.App. 521, 16 P.2d 357, 360, municipal improvement bonds were held to be valid, which bonds specified that they were to be paid in "lawful money of the United States" in spite of the fact that the notice of election stated they would be payable in "gold coin." The court said that method of payment did not increase the burden on the taxpayers, and that it was immaterial. In support of that conclusion, the last-mentioned case cited with approval Town of Martinez v. Johnson, 201 Cal. 397, 257 P. 853, in which the Supreme Court held that municipal bonds which provided by ordinance for payment of 5% interest instead of 6%, as the notice of election stated, was nevertheless valid, since it did not increase the burden on the taxpayers. It was held that change was discretionary with the council, and that the statute did not require the notice of election to specifically state the exact rate of interest which the bonds would bear.

In City of Crescent City v. Griffin, 31 Cal.App.2d 133, 87 P.2d 414, a writ of mandate issued to compel the clerk to countersign the bonds. The notice of election stated that the proposed indebtedness to be incurred was $175,000, and set out the number and denomination of the bonds to be issued, which aggregated the sum of $167,000. The subsequent ordinance limited the amount to $166,500. The court held that the variance was immaterial and that it did not invalidate the bonds since the total amount of the bonds issued was less than the proposed indebtedness and the taxpayers were therefore not prejudiced or aggrieved.

[2] Assuming, as was said in City of San Diego v. Millan, supra, that "the proceedings leading up to the issuance of municipal bonds create a relation between the city and its taxpayers which is in the nature of a contractual relation between parties," a departure from the statements of the ordinance calling for the election, which is not in conflict with the statute, will nevertheless not invalidate the bonds "unless the defect complained of would result in an increased burden on the taxpayers." City of Crescent City v. Griffin, supra [31 Cal.App.2d 133, 87 P.2d 418]. In the case last cited it is said that if it resulted in no increased burden "it would be disregarded." In support of the preceding statement, the case of Town of Martinez v. Johnson, supra, is cited. In the present case it does not appear that an added burden would be placed on the taxpayers by the failure to state in that ordinance calling for the election what amount of the proposed indebtedness would be paid during the first and second years after the bonds were issued. The statute does not require the notice of election to so state. The electors were informed, as the law requires, of the purpose and amount of indebtedness, and that the maximum rate of interest would not exceed 6% per annum payable semiannually. The ordinance specifically

fixed the amount of indebtedness at $200,000, and the rate of interest at 3½% per annum to be paid semiannually. The form of ballots supplied to the voters contained all of that information. We are unable to perceive how the taxpayers could have been prejudiced by the use of the language complained of.

We conclude that the bonds in the present case were not invalid on account of the omission in the notice of election to specifically provide for payments of principal sums thereof in the first and second years after the issuance of the bonds for the reason that the taxpayers and electors were not misled thereby to their prejudice since the statute does not require such statement to be made in the notice of election and the burden upon them was not thereby increased.

It is therefore ordered that the peremptory writ of mandate issue directing the clerk of the City of Redding to countersign and issue the bonds as prayed for.

ADAMS, P. J., and PEEK, J., concur.

28 Cal.2d 450

## PEOPLE v. GORY.

Cr. 4701.

Supreme Court of California, in Bank.

June 25, 1946.

1. Criminal law ⇐21

The statute providing that in every crime or public offense there must exist a union or joint operation of act and intent, does not mean that a positive, willful intent to violate the law is an essential ingredient of every offense, and does not require proof of specific intent in order to justify a conviction if a specific intent is not made an ingredient of the statutory offense. Pen.Code, § 20.

2. Criminal law ⇐21

The intentional doing of an act expressly prohibited by statute constitutes the offense denounced by the law regardless of good motive or ignorance of criminal character of the act. Pen.Code, § 20.

3. Poisons ⇐4

While mere outright possession of a narcotic is sufficient to constitute statutory offense of unlawful possession of narcotic without regard for scienter or specific intent to violate the law as would follow from evidence establishing defendant's knowledge of the contraband character of the property, knowledge in relation to defendant's awareness of the presence of the object is a basic element of the offense. Health and Safety Code, § 11160.

4. Poisons ⇐4

The word "possession" in statute forbidding the possession of a narcotic means an immediate and exclusive possession under the dominion and control of defendant, and is physical control with the intent to exercise control, and a defendant having such control must have knowledge of the presence of the narcotic, and such knowledge must precede the intent to exercise, or the exercise of, such control. Health and Safety Code, § 11160.

See Words and Phrases, Permanent Edition, for all other definitions of "Possession".

5. Criminal law ⇐819

In prosecution for possession of marijuana, an instruction requiring finding of guilty knowledge and a guilty intent on part of defendant to sustain his conviction was properly withdrawn from jury as an improper matter for consideration. Health and Safety Code, § 11160.

6. Poisons ⇐9

Where principal fact relied upon in prosecution for possession of marijuana was the finding of marijuana in unlocked box belonging to defendant who denied having knowledge of presence of marijuana in the box, trial court must submit to jury, on proper instructions, the question as to whether defendant had knowledge of the presence of the marijuana. Health and Safety Code, § 11160.

7. Poisons ⇐9

The finding of marijuana among defendant's effects will support an inference, but not a conclusive presumption, that the marijuana was among defendant's effects with defendant's knowledge. Health and Safety Code, § 11160.

8. Criminal law ⇐819

In prosecution for possession of marijuana which was found in defendant's unlocked box to which others had access and which defendant denied knowing was in the box, error in reading to and withdrawing from jury an instruction that defendant must have knowingly had the marijuana in his possession, was not cured by instruction that possession of narcotic means an immediate and exclusive possession under dominion and control of defendant. Health and Safety Code, § 11160.

9. Criminal law ⇐819

In prosecution for possession of marijuana which was found in defendant's unlocked box to which others had access and which defendant denied knowing was in the box, error in reading to and withdrawing from jury an instruction that defendant must have knowingly had the marijuana in his possession, was not cured by instruction correlating defendant's guilt with willfully having marijuana in his

possession. Pen.Code, § 7, subds. 1, 5; Health and Safety Code, § 11160.

10. Criminal law ⇐1173(2)
Poisons ⇐9

In prosecution against prisoner at prison farm for possession of marijuana found in unlocked box in which each prisoner kept small personal effects and which was kept on floor at head of prisoner's bed in bunkhouse in which some 30 prisoners lived, the reading and withdrawal of instruction that prisoner, who stated that he had never before seen the marijuana, must have knowingly had the marijuana in his possession, was prejudicial error, since knowledge of the presence of the marijuana in the box was an essential element of the offense. Health and Safety Code, § 11160.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Morris Gory was charged with the unlawful possession of marijuana. From the judgment of conviction and from an order denying a new trial, he appeals.

Judgment and order reversed.

Prior opinion, see 163 P.2d 762.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Everett W. Mattoon, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

SPENCE, Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of (1) violating section 4573 of the Penal Code by unlawfully bringing marijuana into a prison farm; and (2) violating section 11160 of the Health and Safety Code in that he did, on or about June 2, 1944, "willfully, unlawfully and feloniously have in his possession flowering tops and leaves of Indian Hemp (cannabis sativa)," commonly called marijuana. It was also charged that defendant had suffered a prior felony conviction, grand theft. Defendant pleaded not guilty to the two offenses charged, but admitted the prior conviction. The cause proceeded to trial before a jury; Count I of the information was dismissed upon motion of defendant; and defendant was found guilty on Count II as charged. From the judgment of conviction entered upon this verdict and from an order denying his motion for a new trial, defendant prosecutes this appeal. He contends that the evidence was insufficient to support the verdict and he specifies error in the matter of the instructions. A review of the record convinces us that the evidence was sufficient but we are further convinced that the failure of the court to instruct the jury fully and clearly resulted in such prejudice as to require a reversal.

There is practically no conflict in the testimony. At the time of the alleged possession of marijuana, defendant was a prisoner at the Los Angeles County Honor Farm near Castaic. He shared living quarters with some thirty odd prisoners in one of the camp's bunkhouses, to which he had been assigned in April, 1944. As part of the equipment issued to each prisoner, defendant received a metal box—18 inches long, 12 inches wide, 8 inches deep—in which he kept his toilet articles and small personal effects. There was no way of locking these boxes, each of which bore a number corresponding to the bed number of the space occupied by the particular prisoner. Each prisoner's box was placed on the floor near the head of his bed. During the day when the prisoners were engaged in their duties on the farm, one man was left in charge of the bunkhouse to "keep the inmates from monkeying with other people's property."

About 9:30 p. m. on June 2, 1944, Officer Gunderson and several accompanying officers entered the bunkhouse. While his associates searched the boxes of other prisoners in the bunkhouse, Officer Gunderson went to defendant's bed—on which defendant was lying—picked up the metal box bearing the number of defendant's bed, opened the box and found marijuana "scattered from the top down to the bottom * * * just loose in the box." Said of-

ficer took off defendant's clothes and examined them, turning the pockets "wrong side out," but found no marijuana either on his person or in his clothes. Deputy Sheriff Huber, who was present at the time, testified at the trial that he asked defendant what he knew about this marijuana, stating: "This is your marijuana; where did you get it?" and that defendant did not answer. In his own testimony at the trial, defendant admitted that the material which the officers identified as marijuana was taken from his box, but stated that he had never seen it before the officers removed it from the box.

With the evidence so presented at the trial, defendant challenges the propriety of the trial Court's action in reading, rereading, and then expressly withdrawing from the jury's consideration the following instructions, hereinafter designated "instruction 12" and "instruction 13."

Instruction 12: "In order for defendant to have in his possession the objects charged in the information, you must be convinced by the evidence and beyond a reasonable doubt that he *knowingly* had such objects in his possession. The meaning of the word 'possession' includes the exercise of dominion and control over the thing possessed."

Instruction 13: "Even if you find from the evidence beyond a reasonable doubt that the defendant had in his possession, flowering tops of Indian Hemp or locoweed, before you can find the defendant guilty of possessing the same, you must also be convinced beyond a reasonable doubt that the defendant had a *guilty knowledge* of the character of said flowering tops of Indian Hemp and possessed a *guilty intent.* If you find that the defendant was innocent of the *knowledge of the character* of the flowering tops of Indian Hemp or did not have a *guilty knowledge* of possessing said flowering tops of Indian Hemp, then you will find the defendant not guilty and must acquit him."

The italicized language emphasizes the import of the instructions as argued by defendant; that is, instruction 12 directed to "knowledge" of the existence of the object as prerequisite to the "dominion and control" necessary to constitute possession; and instruction 13 directed to "knowledge" of the character of the object as being a prohibited poison.

[1, 2] So far as pertinent to defendant's argument, section 20 of the Penal Code provides that "In every crime or public offense there must exist a union, or joint operation of act and intent * * *." But this does not mean that a positive, wilful intent to violate the law is an essential ingredient of every offense. Sometimes an act is expressly prohibited by statute, in which case the *intentional doing of the act,* regardless of good motive or ignorance of its criminal character, constitutes the offense denounced by law. Instances illustrating this principle may be found in statutes enacted for the protection of public morals, public health, and the public peace and safety. People v. McClennegen, 195 Cal. 445, 469, 234 P. 91, and cases there cited. If a specific intent is not made an ingredient of the statutory offense, it is not necessary to prove such specific intent in order to justify a conviction. People v. Dillon, 119 Cal. 1, 11, 248 P. 230. Speaking to this point, the court in People v. Sweeney, 66 Cal.App.2d 855, 153 P.2d 371, a case concerning violation of the same code section here involved, said at page 859 of 66 Cal.App.2d, at page 372 of 153 P.2d: "Neither intent nor knowledge is an element of the offense herein charged. The mere possession, except as authorized by the provisions of the Health and Safety Code, is a violation of the act. The statute defining the offense charged against appellant does not declare that either intent or knowledge is an ingredient thereof. It provides that the mere possession of the narcotic named in the information shall subject the possessor to the penalties prescribed therein. It is only where, from the language or effects of the penal law, a purpose to require the existence of such intent can be discovered that such an intent need be shown. In the case of People v. O'Brien, 96 Cal. 171, 176, 31 P. 45, there is contained an exhaustive discussion of the law of criminal pleading applying to cases of the character of the one with which we are concerned." See, also, People v. Le Baron, 92 Cal.App. 550, 568, 268 P. 651, 269 P. 476;

People v. Randolph, 133 Cal.App. 192, 196, 23 P.2d 777; and People v. Johnson, 66 Cal.App.2d 164, 165, 152 P.2d 331. Although in a prosecution for the unlawful possession of narcotics it has been said that "Guilty knowledge and intent to violate the law may be shown by the facts and circumstances of the case, including the conduct of the defendant and any false or misleading statements which he may make to the arresting officers or others with relation to the material facts" People v. Gibson, 64 Cal.App.2d 537, 539, 149 P.2d 25, 26, such observation was made in a case where defendant sought to justify or explain his admitted possession of the drugs with full knowledge of their character. It was obviously not intended to indicate thereby that "guilty knowledge and intent to violate the law" were essential elements requiring proof in every prosecution for possession.

[3, 4] While it thus appears that "mere possession, except as authorized" is sufficient to constitute the statutory offense in question, without regard for *scienter* or specific intent to violate the law as would follow from evidence establishing defendant's *knowledge of the contraband character* of the property, the law makes the matter of knowledge in relation to *defendant's awareness of the presence* of the object a basic element of the offense of possession. It has been repeatedly held that the term "possession" as used in the State Poison Act (now embraced in the Health and Safety Code) means an "immediate and exclusive possession and one under the dominion and control of defendant." People v. Herbert, 59 Cal.App. 158, 159, 210 P. 276, 277; People v. Sinclair, 129 Cal.App. 320, 322, 19 P.2d 23. Thus it was said in People v. Noland, 61 Cal.App.2d 364, 366, 143 P.2d 86, 87: "A person has 'possession' of a chattel who has physical control with the intent to exercise such control, or, having had such physical control, has not abandoned it and no other person has obtained possession. (Restatement Torts, section 216.)" But knowledge of the *existence* of the object is essential to "physical control thereof with the intent to exercise such control" and such knowledge must necessarily precede the intent to exercise, or the exercise of, such control. People v. Gallagher, 12 Cal.App.2d 434, 436, 55 P.2d 889; People v. Bassett, 68 Cal.App.2d 241, 247, 156 P.2d 457. The materiality of such issue as a matter of defense has been recognized in numerous instances by our appellate courts. Thus, in People v. Randolph, 133 Cal.App. 192, 23 P.2d 777, the effect of the defendant's denial of "having any knowledge of [the] presence" of "four bindles of morphine * * * found sewed in the lining of [his] coat" was discussed at page 196 of 133 Cal.App., at page 778 of 23 P.2d: "The act makes it unlawful for any person to have in his possession any opium, excepting upon the written order or prescription of a physician, dentist, or veterinary sergeon, licensed to practice in this state. * * * Such defense [lack of knowledge of the presence of the morphine] merely created a conflict with the prima facie case made out by the people showing that such morphine was in [defendant's] possession. Neither intent nor knowledge is an element of this offense. The mere possession is a violation of the act [citing authority]. The only perfect defense is a valid prescription under the act. Any other defense is for the consideration of the judge or jury, as the case may be; * * *." See, also, People v. Charley Quong, 5 Cal.App. 2d 137, 139, 42 P.2d 386; People v. Gin Shue, 58 Cal.App.2d 625, 628, 137 P.2d 742; and People v. Sweeney, 66 Cal.App.2d 855, 859, 860, 153 P.2d 371.

The distinction which must be drawn, from a reading of the foregoing authorities, is the distinction between (1) *knowledge of the character of the object and the unlawfulness of possession thereof* as embraced within the concept of a specific intent to violate the law, and (2) *knowledge of the presence of the object* as embraced within the concept of "physical control with the intent to exercise such control," which constitutes the "possession" denounced by the statute. It is "knowledge" in the first sense which is mentioned in the authorities as being immaterial but "knowledge" in the second sense is the essence of the offense.

[5] In line with these authorities, it plainly appears in this case that instruction 13, as above quoted, in requiring the finding

of a "guilty knowledge" and a "guilty intent" on the part of defendant to sustain his conviction, was properly withdrawn from the jury as an improper matter for consideration.

But instruction 12, as above quoted, in its predication of a finding of guilt upon defendant's *"knowingly"* having "in his possession the objects charged in the information," should have been given to the jury. "The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission." Pen.Code, § 7, subd. 5; People v. McClennegen, 195 Cal. 445, 469, 234 P. 91. Thus instruction 12 invoked the element of knowledge in the sense of defendant's *awareness of the presence* of the marijuana in the box given him for the storage of his personal effects at the prison farm and so presented to the jury an issue of fact determinative of defendant's guilt or innocence of the possession prohibited by statute.

[6, 7] The importance of proper instructions on the question of defendant's possession of the forbidden property is readily apparent from the record in this case. Matters tending to establish defendant's guilt are the fact that the marijuana was found in his box and the circumstance of his silence in the face of Officer Huber's accusation in the camp's bunkhouse. (8 Cal.Jur. 103, and cases there cited.) Matters tending to establish defendant's innocence are the fact that the box was unlocked, showing that the marijuana conceivably could have been placed there by some one other than defendant, and defendant's denial at the trial that he had ever seen the "stuff" prior to its discovery by the officers. Thus, this may be said to be a "close case" on the record before us. It is readily distinguishable from those cases where the evidence includes express admissions and statements made by defendant with respect to the possession of narcotics, which supplied the final link in the chain of circumstances connecting defendant with the offense charged against him. People v. Gallagher, 12 Cal. App.2d 434, 436, 55 P.2d 889; People v. Rose, 26 Cal.App.2d 513, 517, 79 P.2d 737; People v. Oliver, 66 Cal.App.2d 431, 432, 152 P.2d 329; People v. Sweeney, 66 Cal. App.2d 855, 858, 153 P.2d 371; People v. Bassett, 68 Cal.App.2d 241, 248, 156 P.2d 457. Likewise distinguishable are those cases where the required possession of drugs was shown by testimony that the defendant threw the drug out of the window, or otherwise disposed of it upon the approach of the arresting officers, and that it was later returned and identified as having been in the custody and under the control of defendant prior to his arrest. People v. Belli, 127 Cal.App. 269, 270, 271, 15 P.2d 809; People v. Rodrigues, 25 Cal. App.2d 393, 394, 77 P.2d 503; People v. Terrazas, 42 Cal.App.2d 281, 282, 108 P.2d 680; People v. Johnson, 66 Cal.App.2d 164, 165, 152 P.2d 331. Here the principal fact relied upon by the prosecution is the finding of marijuana in defendant's unlocked box and because of the denial by defendant of knowledge of its presence there, it was the duty of the trial court, on proper instructions, to submit to the jury the question as to whether defendant had knowledge of the presence of the marijuana. People v. Gin Shue, 58 Cal.App.2d 625, 628, 137 P.2d 742. To fail to instruct on that point might well have misled the jury into believing either that knowledge was not essential or that any object found among defendant's personal effects was conclusively presumed to be there of his own knowledge. The error which would be involved in an express declaration to that effect is obvious, for knowledge is essential and though the finding of an object among defendant's effects would support an inference, it would not give rise to a conclusive presumption that the object was there with defendant's knowledge.

[8, 9] Nor under the facts in evidence does it appear, as contended by the prosecution, that the trial court's giving of two other instructions, hereinafter designated "instruction 9" and "instruction 15," satisfied the requirements of the law on this determinative issue of defendant's knowl-

edge of the presence of the marijuana found in his box.

Instruction 9: "Possession of narcotics as charged in the information means an immediate and exclusive possession and that such narcotics were under the dominion and control of the defendant."

Instruction 15: "If you believe beyond a reasonable doubt that the defendant, on or about the 2d day of June, 1944, at and in the County of Los Angeles, State of California, did wilfully, unlawfully and feloniously have in his possession flowering tops and leaves of Indian Hemp (marijuana), as charged in the information, you should find the defendant guilty as charged."

Instruction 9 properly defines the term "possession," but it makes no reference to the element of knowledge in the sense required for a finding of guilt of the statutory offense involved, and it is questionable whether from mere connotation of the definition itself an inference of the necessity for such finding would arise. This latter consideration becomes more apparent in view of the fact that instruction 9 states the same legal proposition declared in instruction 12, which was withdrawn: "'possession' includes the exercise of dominion and control over the thing possessed." In withdrawing instruction 12 the court specifically directed the jury to disregard the principles stated in that instruction, and after such remark, instruction 9 was not reread to the jury. This action could not have had any effect other than to detract greatly from the force of instruction 9 and any attendant implications which might normally arise therefrom. Nor was the situation clarified to an appreciable extent by instruction 15 in its correlation of defendant's guilt with "wilfully" having "in his possession" marijuana.

Our code provides that "the word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, * * *." (Pen.Code, § 7, subd. 1.) While thus the word "wilfully" invokes the element of knowledge in the sense here required, the word was not defined in the instructions to the jury. This fact is material in view of the court's withdrawal of instruction 12, directed to the same element of knowledge in requiring that defendant must "knowingly" have had "in his possession the objects charged in the information" in order to be found guilty. (Pen.Code, § 7, subd. 5.) In this confusion in the submission of the essential issue of fact to the jury for consideration in the determination of defendant's guilt, it is doubtful, to say the least, whether the jury would infer from the word "wilfully" the element of knowledge in the required sense.

[10] It may be possible to argue that taking the instructions as a whole, they were sufficient to have informed the jury in a general roundabout way that before defendant could be convicted of the statutory offense of the possession of marijuana, the evidence must show his *knowledge of the presence* of said property in his box; but since knowledge, in that limited sense, is an essential element of the offense, he was entitled under the circumstances to a specific instruction, such as the requested instruction 12, to clarify the situation.

It therefore follows that the reading, rereading, and subsequent withdrawal of the requested instruction 12 constituted error and we are convinced, under the state of the evidence presented on this essential element of knowledge, that such error must be treated as prejudicial.

The judgment and the order denying defendant's motion for a new trial are reversed.

GIBSON, C. J., and SHENK, EDMONDS, and TRAYNOR, JJ., concur.

SCHAUER, Justice.

I concur in the judgment and agree that it was prejudicial error to fail to give (to withdraw) instruction number 12. I do not agree to the implication, if there be such, that mere conscious possession of an object, not knowing its true character (as, for example, possession of marijuana believed in good faith to be ordinary tobacco), any more than conscious possession of

an object lawful in itself but within which, unknown to the possessor, contraband is concealed, constitutes a criminal act.

CARTER, J., concurs.




28 Cal.2d 435

## BEELER v. AMERICAN TRUST CO.

Sac. 5719.

Supreme Court of California, in Bank.
June 25, 1946.

1. Interest ⇐39(2)

Where conveyance in form of deed absolute was declared to be an equitable mortgage and judgment fixed amount of indebtedness and the amount of taxes advanced by mortgagee, modification on appeal by substituting increased figure of tax due, determined by adding amount advanced since judgment and stating that entire amount should bear legal interest from date of entry of decree, related back to date of original entry.

2. Judgment ⇐564(1)

Judgment declaring conveyance in form of deed absolute to be an equitable mortgage was a "final judgment" and was not "interlocutory" by reason of provision for possible future foreclosure proceedings in satisfaction of judgment, and provision for allowance of interest on debtor's indebtedness and the amount of taxes advanced by mortgagee could not be attacked on appeal from judgment of foreclosure. Code Civ.Proc. § 1908.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment" and "Interlocutory Judgment".

3. Interest ⇐53

An appeal does not stop the running of interest and to obtain such result the obligor must make a sufficient tender.

4. Interest ⇐53

An appeal from judgment declaring conveyance in form of deed absolute to be an equitable mortgage and fixing amount of principal and advanced taxes with interest did not stop the running of interest where appellant made no claim that a tender or offer of payment was made after entry of judgment or pending appeal but merely assumed that tender would have been rejected if made.

5. Interest ⇐50

On a contract claim where an obligee demands more than is later found by the court to be owing under the agreement, the obligor is nevertheless required to make a tender or offer of payment in order to stop the running of interest on the obligation as adjudicated.

6. Mortgages ⇐460

In mortgage foreclosure proceeding, mortgagor in order to stop interest had burden of showing circumstances of alleged waiver of tender of payment of amount of debt. Civ.Code, § 1495.

7. Interest ⇐53
Tender ⇐16(1)

A tender is not necessary where conduct or declarations of vendee are such as to show that it would be unavailing, but an appeal is not classifiable as a declaration of position on the same basis to constitute a waiver of interest on a judgment as provided by law, nor does the appeal dispense with the formality of tender to stop the interest running on the adjudicated obligation. Code Civ.Proc. § 1033.

8. Mortgages ⇐489

Advances for taxes by bank which was equitable mortgagee, made to protect its own interest, were part of indebtedness secured by mortgage bearing interest, even if not mentioned in decree of foreclosure. Code Civ.Proc. § 1033.

9. Interest ⇐22(1)

Where judgment declaring a conveyance in form of deed absolute to be an equitable mortgage, provided for payment to mortgagee of any advancement made for taxes by mortgagee and allowed legal interest for advances made prior to trial, interest was allowable under the judgment for tax advances made after trial and during pendency of appeal from time of payment,

notwithstanding judgment did not expressly provide for payment of interest.

SCHAUER, J., dissenting.

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Appeal from Superior Court, Tehama County; Herbert S. Gans, Judge.

Action by C. W. Beeler against American Trust Company to have a deed absolute in form declared an equitable mortgage, wherein defendant filed a cross-complaint. From decree of foreclosure on application for foreclosure made pursuant to judgment declaring a deed a mortgage, C. W. Beeler appeals.

Affirmed.

Oliver J. Carter, of Redding, and Dudley G. McGregor, of Paradise, for appellant.

Brobeck, Phleger & Harrison and M. B. Plant, all of San Francisco, for respondent.

SPENCE, Justice.

This is an appeal from a decree of foreclosure and sale made as the outgrowth of previous litigation between the parties. Beeler v. American Trust Co., 24 Cal.2d 1, 147 P.2d 583. The propriety of the allowance of interest on the obligation established by the prior judgment is the sole point here in issue.

As appears from the findings in this case, judgment in the original action was entered on November 6, 1939, whereby a deed absolute was declared to be an equitable mortgage of certain real property; plaintiff's indebtedness to defendant was fixed at the sum of $60,000, plus the sum of $477.88 for taxes advanced, the former sum to bear interest at the rate of 5 per cent per annum and the latter sum to bear interest at the rate of 7 per cent per annum from the date of judgment; and provision was made that if plaintiff should fail to pay such sums and interest within 60 days from the date upon which the judgment became final, defendant might apply for a decree of foreclosure and sale. On appeal by defendant, this court modified the original judgment to allow defendant the additional sum of $430, making a total of $907.88, for taxes advanced. As so modified the judgment was affirmed on April 3, 1944, and the remittitur was filed on May 6, 1944. Meanwhile defendant, during the pendency of the appeal, made additional advances for taxes, reimbursement for which was secured under the terms of the judgment declaring plaintiff's right to a conveyance upon satisfaction of the indebtedness constituting a lien against the property. Plaintiff failed to make the payments within the 60 days from the date the judgment became final. Defendant thereafter applied for and obtained on November 14, 1944, after due hearing, the decree of foreclosure and sale from which this appeal is taken.

Appellant objects to the decree's schedule of his interest indebtedness which was computed on the following basis: $60,000 as the sum of the principal obligation, plus interest at 5 per cent per annum, and $907.88 as tax advance, plus interest at 7 per cent per annum, both amounts accruing interest from the date of the judgment, November 6, 1939; and additional sums for taxes advanced since the judgment, with interest from the date of payment at the rate of 7 per cent per annum; in all, making a total of $81,490.99, after deduction of certain undisputed credits in favor of appellant, as the amount secured by the mortgage and bearing interest at the rate of 7 per cent per annum from date of said decree. It is appellant's position that said sums under the original judgment should not bear interest until the date that judgment became final—May 3, 1944. Neither the record nor the applicable law supports appellant's position.

[1] The original judgment as rendered and modified on appeal provided expressly for interest from its date of entry on the respective sums of $60,000 and $907.88, as above stated. This court's previous consideration of the propriety of interest accrual with reference to the adjudicated mortgage indebtedness of $60,000 was directed solely to such allowance from the date such amount became due under the parties' agreement, and the trial court's finding, under the accredited evidence, that a rejected tender of payment prior to such due date stopped the running of interest on the obligation, was affirmed. Beeler v.

American Trust Co., supra, 24 Cal.2d 28, 29, 147 P.2d 583. By such decision the provisions for interest as carried in the original judgment were in nowise disturbed. On the contrary, in affirming said judgment, this court limited the modification to the single point of substituting the increased figure for the tax advance (24 Cal.2d 29, 147 P.2d 583) and in connection with such right of reimbursement, expressly stated that said amount of $907.88 should bear "legal interest * * * from the date of entry of the decree." 24 Cal.2d 27, 147 P.2d 597. The modification, of course, related back to the date of the original entry of the judgment. Barnhart v. Edwards, 128 Cal. 572, 575, 61 P. 176.

[2] Appellant concedes that the only offer of payment made was that prior to the institution of the original litigation. Its full effect was determined in the resulting judgment, and accordingly the interest accrual was expressly related to the date of entry of such adjudication. Said judgment is now final, and its provisions for allowance of interest are not open to attack on this appeal. Code Civ.Proc., § 1908. Contrary to appellant's claim, it was in no sense an interlocutory decree by reason of provision for possible future foreclosure proceedings in satisfaction of the judgment. Rather it "was a complete and final determination of the rights of the parties" then in controversy and it became "none the less so because it reserved for future consideration [an] independent branch of the case." Perry v. West Coast Bond & Mortgage Co., 136 Cal.App. 557, 559, 29 P. 2d 279, 280.

[3-5] Appellant next argues that regardless of the terms of the original judgment, the appeal therefrom operated of itself to stop the interest from running until the obligation became due under decision of this court—Beeler v. American Trust Co., supra, 24 Cal.2d 1, 147 P.2d 583. In this connection he asserts that during the pendency of the appeal, defendant bank persisted in its claim of absolute ownership of the property and refused to recognize his rights under the terms of the adjudicated mortgage; that it therefore would have been futile for him to have offered payment as prescribed in the judgment; and that these circumstances will not support a claim of interest on the indebtedness prior to the date of finality of decision, May 3, 1944. But the law is otherwise. An appeal does not stop the running of interest, and to obtain such result the obligor must make a sufficient tender. Ferrea v. Tubbs, 125 Cal. 687, 692, 58 P. 308. Appellant makes no claim that a tender or offer of payment was made after the entry of judgment or pending the appeal, but merely assumes that it would have been rejected if made. In such assumption, appellant indulges in pure speculation as to a claim which could easily have been demonstrated as a matter of fact. The only way in which appellant could have avoided or terminated his liability to pay interest during pendency of the appeal was to have made an actual tender. Western Lithograph Co. v. Vanomar Producers, 62 Cal. App. 644, 648, 217 P. 534. Otherwise, analogous considerations would require that in any case in which the proper amount of a money judgment might be at issue on appeal, a tender of the amount admitted to be owing would be unnecessary because it presumably would be rejected and the running of interest should therefore automatically be stopped until the decision becomes final upon appellate review. The impropriety of such position has been considered in those cases where a money judgment on appeal is reduced in amount, and the judgment in its modified form nevertheless bears interest from the date of the original entry—not from the date of modification. Barnhart v. Edwards, supra, 128 Cal. 572, 575, 61 P. 176; Niles Sand, Gravel & Rock Co. v. Muir, 55 Cal.App. 539, 541, 203 P. 1009. And even on a contract claim where an obligee demands more than is later found by the court to be owing under the parties' agreement, the obligor is nevertheless required to make a tender or offer of payment in order to stop the running of interest on the obligation as adjudicated. Western Lithograph Co. v. Vanomar Producers, supra, 62 Cal.App. 644, 648, 217 P. 534.

[6, 7] Moreover, the trial court, in rendering the decree of foreclosure with its interest calculations here under attack, did

not infer from the facts before it that the mere appeal from the former judgment established that a tender of payment would have been futile and constituted a waiver of a claim of interest on the adjudicated obligation pending appellate review. Appellant, in answer to the foreclosure application, did not make any specific allegation as to the futility or waiver of tender, but all his allegations which might be regarded as bearing upon such contention were found to be untrue. Thus, the trial court found against appellant on his claim of ability and willingness to pay in connection with his allegation that "since November 6, 1939 (the date of the original judgment) defendant * * * has continuously refused to accept the indebtedness due"—essential considerations in substantiating an offer of payment. Civ.Code, § 1495. The burden, of course, was upon appellant to plead and prove the circumstances of waiver. Caspar Lumber Co. v. Stowell, 37 Cal.App.2d 58, 63, 98 P.2d 744. Under the circumstances, the trial court's resolving of the issue in its finding that interest was owing on the adjudicated indebtedness in accordance with the terms of the original judgment is binding on this appeal. Northwestern P. C. Co. v. Atlantic P. C. Co., 174 Cal. 308, 312, 163 P. 47. While the rule that "a tender is not necessary where the conduct or declarations of the vendee are such as to show that it would be unavailing" (Hoppin v. Munsey, 185 Cal. 678, 685, 198 P. 398, 401) is true as a general principle of contract law in establishing the futility of an offer of performance, an appeal is not classifiable as a declaration of position on the same basis to constitute a waiver of interest on a judgment as provided by law (Code Civ. Proc. § 1033) nor does it dispense with the formality of tender to stop the interest running on the adjudicated obligation. Ferrea v. Tubbs, 125 Cal. 687, 692, 58 P. 308.

[8, 9] Appellant's final point of challenge to the foreclosure decree relates to its provision for the allowance of interest on respondent's advances for taxes from the respective dates of payment. As quoted in the findings, the original judgment provided that "plaintiff, within sixty days from and after the date this judgment becomes final, shall pay to defendant the said sums and interest above found to be due, together with any advances made by defendant for taxes, if any, subsequent to the trial." The advances for taxes made prior to the trial—$907.88, as above noted—expressly carried "legal interest * * * from the date of entry of the decree." Beeler v. American Trust Co., supra, 24 Cal.2d 1, 27, 147 P.2d 583, 597. Respondent on the same basis would be entitled to reimbursement for subsequent advances for taxes during the pendency of the appeal, and a reasonable interpretation of the original judgment with reference to that point would so indicate regardless of its failure to provide expressly for the accrual of interest. In fact, even without mention at all in the judgment, respondent's advances for taxes to protect its own interest would have become part of the indebtedness secured by the mortgage. Civ.Code, § 2876; Weinreich v. Hensley, 121 Cal. 647, 656, 54 P. 254; McMillan v. O'Brien, 219 Cal. 775, 780, 29 P.2d 183, 91 A.L.R. 383; Diehl v. Hanrahan, 68 Cal.App.2d 32, 37, 155 P.2d 853. And such advances, in the absence of express agreement or provision to the contrary, bear interest at the legal rate from date of payment. Semi-Tropic S. Ass'n v. Johnson, 163 Cal. 639, 642, 126 P. 488.

The decree of foreclosure provides for interest payments in strict accord with the terms of the original judgment as considered in this court's prior opinion (Beeler v. American Trust Co., supra, 24 Cal.2d 1, 147 P.2d 583), and accordingly, the decree is affirmed.

GIBSON, C. J., SHENK, EDMONDS, and TRAYNOR, JJ., and DOOLING, J. pro. tem., concurred.

SCHAUER, Justice.

I dissent. In this appeal from a decree of foreclosure exception is taken to the judgment only insofar as it charges the plaintiff with interest on the debt due the defendant for a period during which the defendant failed and refused to comply with the judgment and by its conduct precluded or excused the plaintiff from complying therewith.

The essential facts and the controlling law herein were finally adjudicated in the basic case of Beeler v. American Trust Co. (1944), 24 Cal.2d 1, 147 P.2d 583, and are no longer subject to dispute. In 1937 plaintiff and defendant entered into an agreement whereby plaintiff conveyed to defendant a large parcel of land found by the trial court to be worth "in excess of $135,000," as security for the payment of a debt of $60,000. The conveyance was in the form of a deed absolute and was made in that form at defendant's request so that its formal records would present the appearance that it was the owner of the property rather than reflect the true fact that it was carrying a loan thereon (see opinion on former appeal, page 24 of 24 Cal.2d, page 596 of 147 P.2d). The yearly rental value of the property undisputedly was "in excess of $7,500" but the defendant bank purportedly "leased" the property back to plaintiff for a yearly rental of $3,000 (agreed upon as being in fact 5 per cent per annum interest on the debt of $60,000) payable semiannually. A policy of title insurance was procured by defendant showing itself as owner but expressly excepting "any rights of C. W. Beeler who is in possession."

It is further judicially determined by final judgment that on June 30, 1938, at the defendant bank's place of business "the plaintiff offered to pay his indebtedness in good faith, and was ready, willing and able to do so; * * * that this offer was made to Mr. Kennedy, vice-president of the bank; that said Kennedy refused that offer without specifying any objection to its form, and refused to deal with the plaintiff in the matter in any way, but demanded that the plaintiff vacate the property within thirty days; that by virtue of its said officer's actions the defendant bank waived objection to the mode of the offer *and waived tender or other offer; that such offer of performance suspended the running of interest upon the indebtedness.*" (Italics added; page 28 of 24 Cal.2d, page 598 of 147 P.2d.) This court further held (page 29 of 24 Cal.2d, page 598 of 147 P.2d) that "the trial court was warranted in concluding that any further action by the plaintiff in this respect [by way of tender of payment] would have met with like rebuff by the bank, and that a valid offer having once been made and refused, *the indebtedness ceased to bear interest as of that date.*"

After the bank's refusal to accept payment of the debt, its disavowal of its contract and its meretricious assertion of absolute ownership of plaintiff's property, plaintiff brought the action to have the deed declared an equitable mortgage and in his complaint reiterated and continued his offer to pay the debt due and demanded that defendant reconvey the land. Defendant answered and denied that any debt was due it, denied that it held the land as security, asserted that it was the absolute owner of the land and refused to reconvey. The trial court found in favor of plaintiff on substantially all issues and on November 6, 1939, rendered judgment establishing the debt in the amount alleged by plaintiff and requiring that upon payment thereof defendant reconvey the land to plaintiff. Defendant still persisted in its refusal to reconvey the land to plaintiff and continued its denial that any debt was due it and its refusal to accept payment thereof by appealing from the judgment.

By the appeal defendant succeeded in postponing its own compliance with the judgment for nearly four and one-half years. During all of that time it maintained exactly the position which it had asserted on June 20, 1938, and plaintiff, likewise, during all of that time, maintained the position he had asserted on and prior to June 20, 1938. It will be remembered that it has been finally adjudicated that on June 20, 1938, plaintiff in good faith offered to pay the entire indebtedness and that he was ready, able and willing so to do; that defendant bank (page 29 of 24 Cal.2d, page 598 of 147 P.2d) "declined absolutely to negotiate with the plaintiff in the matter and * * * refused to consider the proposition that the plaintiff had the right to protect his interest in the property involved"; and that "any further action by the plaintiff in this respect [by way of tender] would have met with like rebuff by the bank, and that a valid of-

fer having once been made and refused, the indebtedness ceased to bear interest as of that date." Defendant's appeal from the judgment is conclusive proof that it refused to accept the judgment; i. e., conclusive proof that it did not renounce or abandon the position which it asserted on June 20, 1938, and which position stopped the accrual of interest. Yet defendant now seeks to profit from its own wrong by charging the plaintiff with interest on the entire debt for all of the period during which it refused and failed to comply with the judgment. It is, of course, obvious that defendant's appeal precluded plaintiff from enforcing the judgment.

Defendant's argument is based on certain language in the basic judgment which it seeks to have us construe as an adjudication in futuro that in the event defendant appealed from the judgment and delayed plaintiff's enforcement thereof, and, as a correlative, his compliance therewith, plaintiff should be liable to defendant for interest on the debt during the delay occasioned by defendant. If the theory of the majority opinion in this regard is sound then it would have availed plaintiff nothing to have repeated his prior offer of payment. If such judgment finally adjudicated that plaintiff is liable for interest from the date of the judgment until paid then an offer to pay it the day it was rendered would avail nothing more than the offer of June 20, 1938. The language of the judgment which defendant singles out to rely upon, is as follows (paragraph III): "That there is now due, owing and unpaid from said plaintiff * * * to said defendant * * * the sum of $60,000.00 * * * which sum shall bear interest at the rate of five per cent per annum, payable semi-annually from the date hereof until paid, and there is also due, owing and unpaid from said plaintiff to said defendant the sum of $477.88, constituting taxes paid by said defendant on said real property subsequent to the execution of said deed; that said sum of $477.88 shall bear interest at the rate of seven percent per annum from the date hereof until paid; that defendant * * * shall have a first lien upon the * * * real property to secure the payment to it of the sums and amounts hereinabove specified, together with interest thereon as provided herein, until said sums and amounts and the interest thereon as provided herein are paid."

And (paragraph V): "That plaintiff within sixty days from and after the date this judgment becomes final, shall pay to defendant the said sums and interest above found to be due, together with any advances made by defendant for taxes, if any, subsequent to the trial; and when so done defendant shall reconvey said property to plaintiff free and clear of all encumbrances made, done or suffered by defendant; that in case plaintiff fails to make such payment within the time specified herein then defendant may apply * * * for the usual decree in foreclosure and sale. * * *"

The difficulty with defendant's position is that it in effect necessarily ignores part of the judgment, part of the conclusions of law which are law of the case, and part of the findings of fact which are res judicata. The nature of the basic action must be borne in mind. It was not a suit by defendant bank to collect a debt or to foreclose a mortgage. It was a suit commenced by plaintiff to accomplish the following objects: (1) To judicially establish his ownership of the land; (2) to establish that there was a debt which he owed and for which he had conveyed the land as security; (3) to compel the defendant to accept payment of the debt which payment plaintiff in good faith had on June 20, 1938, offered to defendant; (4) to compel the defendant, upon payment of the debt, to reconvey the title of the land to plaintiff. Defendant resisted each and all of these objects. After trial the court found in plaintiff's favor on all the issues of fact and the whole purpose of the judgment was to accomplish plaintiff's objects, which objects included not only the protection and enforcement of plaintiff's rights but all proper protection of the defendant's actual (but by it disavowed) interest as a lien-holder. It is therefore important to view and construe the judgment as a whole.

Paragraph I of the judgment decrees "that the above named plaintiff * * * is the owner of, in possession of and entitled to the possession of" the real property "subject, however, to a mortgage to defendant." Paragraph II specifically declares "that the deed executed by said plaintiff * * * conveying the title of the * * * real property, was executed and delivered for the purpose of securing an indebtedness of $60,000.00 owing by said plaintiff to said defendant, together with interest thereon at the rate of five per cent per annum, payable semiannually; that said deed constituted and now constitutes a mortgage on said real property as security for said indebtedness." Then follows paragraph III previously quoted, on which, as detached from its surroundings and the findings and conclusions on which it is based, defendant principally relies. Paragraph IV prescribes "That *upon the payment to defendant* of the sums and amounts hereinabove in paragraph III specified, together with interest thereon as provided therein, *said defendant shall reconvey* the real property * * * to said plaintiff." (Italics added.) Paragraph V is hereinabove quoted. Paragraph VI adjudges that defendant "has no right, title, estate or interest in or to said real property other than a mortgage thereon to secure the payment to it of the indebtedness hereinabove found to be due, owing and unpaid from said plaintiff * * * to said defendant."

Furthermore, in construing the judgment, it is necessary to consider the findings of fact and the conclusions of law on which it is based. It will be remembered that the court found specifically that on June 20, 1938, before the action was commenced by plaintiff, he offered "in good faith," and "was then and there ready, able and willing" to pay "all of said indebtedness then remaining unpaid" and "that said offer of performance on the part of said plaintiff suspended the running of interest upon the said indebtedness of $60,000.00 from the date that the same was made on or about June 20, 1938, until the date of the entry of the judgment or decree in this action." The last quoted finding is more properly a conclusion of law. *It is law of the case not open to dispute.* And if that irrefragable proposition be accepted it must follow, as will be shown, that defendant is not entitled to collect interest from plaintiff for the period after the entry of judgment during which defendant itself refused to comply with the judgment and by its action precluded and excused plaintiff from compliance therewith and enforcement thereof.

It is apparent that there has been confusion both in the trial court and in this court between interest on the *debt* and interest on the *judgment.* The conclusions of law and the judgment of the trial court very properly determined that plaintiff's offer to pay and defendant's refusal thereof suspended the running of interest "until the date of the entry of the judgment or decree in this action." Whether interest ran thereafter is a question controlled by law, not by the judgment. The trial court on November 6, 1939, was rendering a judgment on the basis of facts and issues as they then, and had theretofore, existed. It did not assume, on November 6, 1939, to look into the future and find that defendant would refuse to accept or comply with the judgment and would instead appeal from it, and would by its conduct preclude or excuse plaintiff from complying with it, for four and one-half years, and on that clairsentient finding adjudicate that defendant was nevertheless entitled to recover interest from plaintiff for that period.

The controlling point is that the court found the facts from which it followed as a matter of law that the accrual of interest *on the debt* stopped. It is res judicata that plaintiff offered to pay his debt and, as said in our opinion on the prior appeal (at page 29 of 24 Cal.2d, at page 598 of 147 P.2d), "the trial court was warranted in concluding that any further action by the plaintiff in this respect [tender of payment] would have met with like rebuff by the bank, and that a valid offer having once been made and refused, the indebtedness ceased to bear interest." The debt having "ceased to bear interest" by reason of the offer by plaintiff and the position

taken by defendant the accrual of interest could be revived only by a renouncement or abandonment of his position by one party or the other. Neither at any time did alter his position. In view of such findings and conclusions of law (and, as well, the statutory law) the judgment could not properly provide for interest *on the debt* as such. If and when a money judgment was rendered and became operative such *judgment* would bear interest at the rate of 7 per cent per annum by virtue of the statute (Stats.1919, p. lxxxii; 2 Deering's Gen.Laws, 1944, Act 3757, § 1) but not by virtue of any express direction of the judgment. If defendant had accepted the judgment as rendered it would have thereby renounced or abandoned the position which precluded interest from accruing, and from then on it would have been proper, as a matter of law, to have charged plaintiff with interest at the rate of 7 per cent per annum *on the judgment* until the debt was paid. But the defendant did not accept the judgment as rendered, or otherwise renounce or abandon the position, which as a matter of law, kept the interest on the debt and on the judgment from accruing. On the contrary it appealed from the judgment and at all times concerned, until the matter had been finally adjudicated in this court, persisted in maintaining exactly the position which it had taken on June 20, 1938. It is law of the case as well as law of the state that such position precluded the accrual of interest.

Obviously the various provisions of the judgment in the basic action were in a sense interdependent; each of the provisions was a condition concurrent to the others. The defendant could not be required to convey the colorable title of the land to plaintiff without payment of the debt; but, likewise, the plaintiff was under no obligation whatsoever to pay the debt or to make any further offer to pay it, until either the judgment became final or defendant renounced or abandoned the position which it had taken on June 20, 1938, and had thereafter continuously maintained. It is res judicata that plaintiff made the offer; it is res judicata that defendant refused such offer; it is res judicata "that any further action by the plaintiff in this respect would have met with like rebuff by the bank"; it is law of the case and of the state that "the indebtedness ceased to bear interest." It cannot be successfully challenged that it was as a matter of law utterly impossible for the defendant to, at the same time, prosecute its appeal and accept payment of the mortgage debt. (Mt. Shasta Power Corp. v. Dennis (1924), 66 Cal.App. 186, 191, 225 P. 877.)

It is noted that the trial court in the instant proceeding found that it was *untrue* "That on and since November 6, 1939, defendant and cross-complainant has continuously refused to accept the indebtedness due from said plaintiff to said defendant." That finding cannot be sustained. The converse is indisputably established. Our own records disclose, and the record on this appeal also shows, that defendant appealed from the judgment of November 6, 1939, and that on such appeal it maintained and continued exactly the position which it took on June 20, 1938, and which position, it is res judicata, constituted a refusal to accept the indebtedness due from the plaintiff.

Even if we could hold that the findings of fact and conclusions of law in the basic case, coupled with defendant's appeal from the judgment therein, do not conclusively resolve the issues on this appeal in favor of the plaintiff we should be bound to reach the same result by following well established law. Defendant seeks, in this regard, to sustain the trial court's allowance of interest by suggesting that plaintiff should have made another tender of payment of the debt after rendition of the basic case judgment and defendant's appeal therefrom. Such contention cannot be sustained. The majority opinion herein, itself, states that "A tender is not necessary where the conduct or declarations of the vendee [or, in this instance, the defendant] are such as to show that it would be unavailing." (Hoppin v. Munsey (1921), 185 Cal. 678, 685, 198 P. 398; Cowan v. Tremble (1931), 111 Cal.App. 458, 465, 296 P. 91; Ratterree L. Co. v. Security F. Nat. Bank (1938), 26 Cal.App.2d 652, 658,

80 P.2d 102; see, also, Civ.Code, §§ 1440, 1512, 1515.) Here, as previously shown, the maintenance of the appeal was as a matter of law of the case and as law of the state utterly inconsistent with acceptance of payment of the mortgage debt or the judgment.

The majority opinion refers to a modification (by consent of plaintiff) in this court of the basic judgment in respect to an item of taxes paid and states that "The modification, of course, related back to the date of the original entry of the judgment. Barnhart v. Edwards, 128 Cal. 572, 575, 61 P. 176." In the cited case, Barnhart v. Edwards, plaintiff had brought an action for the foreclosure of a mortgage given to plaintiff by one Vancil, in the form of an absolute deed, but by way of security for the payment of certain claims and advances by the plaintiff. Vancil then conveyed the property to a third person, Davis, who, with Vancil's administrator (Edwards), was named as a defendant in the action. Plaintiff recovered judgment directing a sale of the mortgaged property to satisfy the plaintiff's claim, which was determined to be $7,668. Defendant Davis, alone, appealed, and the appeal was subsequently dismissed for reasons not material here. (Barnhart v. Edwards (1896), 111 Cal. 428, 44 P. 160.) Thereafter, as stated in the cited case (at pages 573, 574 of 128 Cal. at page 176 of 61 P.), "Upon an appeal from the order denying a new trial, this court made an order, December 28, 1896, directing the superior court to deduct certain items from the amount which it found due to the plaintiff * * * and to make a corresponding amendment of its conclusions of law, and added: 'The order denying a new trial will thereupon be affirmed. Judgment will then be entered in accordance with the findings thus corrected.' After receiving the remittitur containing this direction, the superior court, upon motion of the respondent herein [Vancil's administrator], made an order September 3, 1897, correcting its finding of fact by deducting [the amount directed by this court] * * * and amended its conclusion of law. * * * On the same day the court caused to be entered a 'corrected judgment and decree,' * * * and decreed a sale of the mortgaged premises, and that out of the proceeds of said sale the sheriff pay to the plaintiff the [original sum found to be due, less the deductions ordered by this court] * * * 'with interest thereon * * * from the date of this decree.'" Upon an appeal by plaintiff from such "corrected judgment" of September 8, 1897, this court held that he was entitled to interest from the date that the superior court made its "decision"; i. e., the date it filed its original findings of fact—March 16, 1895. (Page 575 of 128 Cal., 61 P. 176.) It is to be noted, however, that the appeals discussed in the cited case were prosecuted by one or the other of the obligors, and that the obligee—the plaintiff—at no time repudiated the transaction or falsely asserted that he, and not the defendants, was the owner of the property and that no sums were owing him. On the contrary, the plaintiff at all times diligently sought to recover the sums the court found to be owing to him. In contrast are the facts of the case at bar where the plaintiff had to bring an action to compel the defendant to accept the money which the plaintiff had offered to pay. Consequently the cited case is not authority for the quoted proposition as it is sought to be applied to the facts now before us.

Further support for plaintiff's contention that he may properly be charged with interest only from the date the judgment became final is found in Brooks v. Fidelity Sav. & Loan Ass'n (1942), 54 Cal.App.2d 130, 135, 128 P.2d 711. There plaintiffs had, pursuant to an agreement found by the court to be valid and binding, tendered to defendants $10,000 as full satisfaction of a deed of trust held by defendants upon plaintiffs' property. Defendants rejected the tender and proceeded to foreclose the trust deed and take possession of the property. In the meantime, plaintiffs sued for specific performance of the described agreement, and subsequently recovered judgment. On appeal by defendant, it was held that the trial court had correctly refused to charge plaintiffs with interest upon the $10,000 and that plaintiffs were

entitled to recover the property upon payment of the $10,000, with no interest whatsoever.

In Lockhart v. J. H. McDougall Co. (1923), 190 Cal. 308, 212 P. 1, this court, upon appeal by defendant, upheld in plaintiff's favor a determination that a deed in form absolute given by plaintiff to defendant was in reality a mortgage. There, as here, plaintiff, prior to the bringing of suit, had tendered to defendant the amount of the indebtedness and the tender had been refused by defendant. *The trial court had allowed defendant no interest whatsoever on the principal sum of $15,000, although more than five years had elapsed between the date such sum was due defendant and the date of the tender by plaintiff.* This court modified the judgment "by including * * * interest upon [such sum during such five-year period] * * * the total amount of the judgment so ascertained to bear interest from the date of the original judgment." (Pages 315, 316 of 190 Cal., page 4 of 212 P.) No authority is cited in support of the allowance of interest from the date of the original judgment, rather than from the date such judgment became final, and such allowance appears to me to be contrary to both justice and the rule in such cases as previously declared by this court in Wadleigh v. Phelps (1906), 149 Cal. 627, 645, 646, 87 P. 93.

In the Wadleigh case, as in the case at bar, defendant appealed from a judgment decreeing that a deed in form absolute delivered by plaintiffs to defendant was intended as a mortgage to secure certain sums found due from plaintiffs to defendant. Before plaintiffs commenced their action they had tendered to defendant the amount owing, and defendant had rejected the tender. The trial court refused to allow interest accruing subsequent to the date of the tender, or subsequent to the date of finality of the judgment. The judgment was affirmed in all respects, except as to the matter of interest accruing after the judgment became final. On that point this court declared (pages 645, 646 of 149 Cal., page 101 of 87 P.): "Defendant is undoubtedly entitled to legal interest upon the amount adjudged due her, less the costs awarded plaintiffs, *from the time the judgment becomes final* to such time as the plaintiffs, under the judgment, tender her such amount, or in the event that they fail to make such tender, until the foreclosure sale ordered had in that event has been had." (Italics added.)

It seems to me that if we are to recognize the adjudicated facts, accept the law of the case, and follow the law of California, we must modify the decree of foreclosure herein by allowing interest to defendant only from the date the basic judgment became final.




28 Cal.2d 347

## ANHEUSER-BUSCH, Inc., v. STARLEY.

L. A. 19479.

Supreme Court of California, in Bank.

June 18, 1946.

**1. Damages ⇐59**
**Payment ⇐52**

Where one suffers personal injury or property damage because of the wrongful act of another, an action against the other for damages suffered is not precluded nor amount of damages reduced by the receipt of payment for loss from a source wholly independent of the wrongdoer.

**2. Payment ⇐52**

A shipper of personalty by common carrier, though having been reimbursed by carrier for damages to personalty as result of collision between carrier's truck and motorist's automobile, could recover from motorist for the damage. Civ.Code, § 2194.

**3. Judgment ⇐615**

Where shipper of personalty by common carrier, after having been reimbursed by carrier for damages to personalty as result of collision between carrier's truck and motorist's automobile, obtained judgment against motorist, carrier would not be

entitled to recover from motorist for the same damage. Civ.Code, § 2194.

**4. Automobiles ⇐226(1)**

Where shipper of personalty by common carrier is reimbursed by carrier for damages to personalty as result of collision between carrier's truck and motorist's automobile, and shipper then brings action for the same damage against motorist, motorist is entitled to set up contributory negligence, if any, of carrier as a defense to the action. Civ.Code, § 2194.

**5. Parties ⇐6(1)**

The purpose of the real party in interest statute is to save a defendant, against whom a judgment may be obtained, from further harassment at the hands of other claimants to the same demand, or to prevent a claimant from making a simulated transfer and thus defeat any just counterclaim or set-off. Code Civ.Proc. § 367.

**6. Parties ⇐6(2)**

Where plaintiff shows such title that a judgment satisfied by defendant will protect defendant from future annoyance or loss, and defendant can urge any defenses he could make against the real owner, the action is being prosecuted in the name of the "real party in interest." Code Civ. Proc. § 367.

See Words and Phrases, Permanent Edition, for all other definitions of "Real Parties in Interest".

**7. Automobiles ⇐234**

A shipper of personalty by common carrier, though having been reimbursed by carrier for damages to personalty as result of collision between carrier's truck and motorist's automobile, was "real party in interest" and entitled to maintain action against motorist for same damages. Code Civ.Proc. § 367.

TRAYNOR, J., dissenting.

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Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Anheuser-Busch, Inc., against Maud M. Starley to recover for damages to shipment of goods in collision between a truck of a common carrier and defendant's automobile. From a judgment in favor of the defendant on a directed verdict, the plaintiff appeals.

Judgment reversed.

Prior opinion see 160 P.2d 29.

Elbert E. Hensley and John H. Klenke, both of Los Angeles, for appellant.

Sigurd E. Murphy, of Los Angeles, George F. Finucane, Jr., of Santa Maria, and Francis D. Thornton, of Los Angeles, for respondent.

Plaintiff appeals from a judgment for defendant entered on a directed verdict.

Denver-Chicago Trucking Company, hereinafter referred to as carrier, was engaged as a common carrier, in the transportation by truck of personal property owned by plaintiff. In the course thereof defendant's car collided with the carrier's truck containing the property, resulting in a partial destruction of the property. Prior to the commencement of this action the carrier paid plaintiff's claim for the damage to the property presumably under the law providing: "Unless the consignor accompanies the freight and retains exclusive control thereof, an inland common carrier of property is liable, from the time that he accepts until he relieves himself from liability pursuant to sections two thousand one hundred and eighteen to two thousand one hundred and twenty-two, for the loss or injury thereof from any cause whatever, except: 1. An inherent defect, vice, or weakness, or a spontaneous action, of the property itself; 2. The act of a public enemy of the United States, or of this state; 3. The act of the law; or, 4. Any irresistible superhuman cause." Civ.Code, § 2194. Evidence was adduced that the claim was paid without reference to any negligence or tortious conduct on the part of the carrier. No release was given to the carrier by plaintiff.

In the instant action plaintiff seeks to recover damages to its property flowing from the collision, asserting that defendant's negligence was the cause of it. Defendant's motion for a directed verdict was granted solely upon the ground that plaintiff had been fully compensated for its loss by the carrier and that it was not a proper party plaintiff in this action.

[1, 2] Where a person suffers personal injury or property damage by reason of the wrongful act of another, an action against the wrongdoer for the damages suffered is not precluded nor is the amount of the damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer. See Peri v. Los Angeles Junction Ry., 22 Cal. 2d 111, 137 P.2d 441; White v. The Mary Ann, 6 Cal. 462, 65 Am.Dec. 523; Lebet v. Cappobiacho, 38 Cal.App.Supp.2d 771, 102 P.2d 1109; Inglewood Park Mausoleum Co. v. Ferguson, 9 Cal.App.2d 217, 49 P.2d 305; Loggie v. Interstate Transit Co., 108 Cal.App. 165, 291 P. 618; Clark v. Burns Hammam Baths, 71 Cal.App. 571, 236 P. 152; 18 A.L.R. 678; Roth v. Chatlos, 97 Conn. 282, 116 A. 332, 22 A.L.R. 1558; Jeffords v. Florence County, 165 S.C. 15, 162 S.E. 574, 81 A.L.R. 320; 15 Am.Jur., Damages, §§ 198–202; 25 C.J.S., Damages, § 99. The rule has been applied where the independent source is pension systems or charity. The most typical case is where the person suffering the damage has procured insurance protecting him against the loss, to which the wrongdoer did not contribute in procuring, and his insurer pays him for the loss suffered. In the insurance cases its application is not prevented by the circumstance that the insurer is subrogated to the rights of the insured person suffering the damage as against the tort feasor. See White v. The Mary Ann, supra; Lebet v. Cappobiacho, supra; Clark v. Burns Hammam Baths, supra; 15 Am.Jur., Damages, § 201. The analogy between that rule and the instant case is close.

The liability of the carrier to the owner for damage to property in transit under the contract to transport is practically absolute. The few exceptions are stated in the statutory law. Civ.Code, § 2194, above quoted. His liability is that of a limited insurer whether it be said to be contractual (the statute forming part of the contract), statutory or in tort. See Franklin v. Southern Pac. Co., 203 Cal. 680, 265 P. 936, 59 A.L.R. 118; Michalitschke Bros. & Co. v. Wells, Fargo & Co., 118 Cal. 683, 50 P. 847; Scammon v. Wells, Fargo & Co., 84 Cal. 311, 24 P. 284; Bohannan v. Hammond, 42 Cal. 227; American Fruit Distributors v. Hines, 55 Cal.App. 377, 203 P. 821. The recovery of the loss by the owner from the carrier comes from a source wholly independent of the tort feasor whose negligence caused the loss. Therefore under this rule plaintiff's action is not barred unless there are some other factors which compel it.

[3] It is suggested that if plaintiff-shipper is permitted to recover from defendant tort feasor, the latter might be subsequently subjected to a like recovery by the carrier. This the law will not permit. We may look at the law of bailments for an analogy. Assuming the carrier would have an action against the tort feasor, and treating it as a bailee for the full value of the property destroyed by the tort feasor, a previous recovery by the shipper from the tort feasor would be a bar to such action except to the extent the action was for damage to the special interest in the property of the carrier-bailee, and, conversely, recovery from the tort feasor by the carrier-bailee of the full value of the property would be a bar to a subsequent action by the shipper-bailor except to the extent the action was for injury special to the bailor. Baggett v. McCormack, 73 Miss. 552, 19 So. 89, 55 Am.St.Rep. 554; Central R. Co. of New Jersey v. Bayway Refining Co., 81 N.J.L. 456, 79 A. 292, Ann.Cas. 1912D, 77; Illinois Cent. R. Co. v. Sims, 77 Miss. 325, 27 So. 527, 49 L.R.A. 322; Terry v. Pennsylvania R. Co., 5 W.W. Harr. 1, 35 Del. 1, 156 A. 787; Masterson v. International & G. N. Ry. Co., Tex. Civ.App., 55 S.W.2d 577; 34 C.J. 850, 851; 6 Am.Jur., Bailments, § 358. We are speaking here of actions against the tort feasor as distinguished from payment for the loss between the shipper and the carrier. If the carrier would have such an action by reason of the principle of subrogation, the result is the same. At least where the carrier-subrogee has notice of the action by the shipper-subrogor against the wrongdoer the satisfaction of a judgment obtained against the wrongdoer by the subrogor is a bar to an action by the subrogee against the tort feasor. Lebet v. Cappobiacho, 38 Cal.App.Supp.2d 771, 102 P.2d 1109; Kidd v. Hillman, 14 Cal.App.

2d 507, 58 P.2d 662; Illinois Cent. R. Co. v. Hicklin, 131 Ky. 624, 115 S.W. 752, 23 L.R.A.,N.S., 870; Fidelity Ins. Co. v. Atlantic Coast Line R. Co., 165 N.C. 136, 80 S.E. 1069; Moltz v. Sherwood Bros., 116 Pa.Super. 231, 176 A. 842; 140 A. L.R. 1241. The theory is that there are no longer any rights in the subrogor to which the subrogee may be subrogated.

The contention that the payment for the loss by the carrier to the plaintiff is a discharge of one joint tort feasor which discharges the other cannot be sustained. We have seen that the undisputed evidence shows that the payment was not based on any tortious liability. The carrier's liability was absolute and not dependent upon any fault on its part. It was a discharge of a liability independent of any tort liability and not arising from the same basis as the liability of defendant which is based on her tortious conduct, negligence.

[4] A difficult question is presented when we come to the issue of whether or not defendant tort feasor may rely upon the defense of the contributory negligence of the carrier in an action by the plaintiff, shipper-owner. If the carrier was bringing the action against the tort feasor after having paid the shipper-owner the loss suffered by it, contributory negligence of the carrier would be a good defense. (Rest., Restitution, § 94.) From that premise it is argued that if the shipper is permitted to recover in an action by it from the wrongdoer without being required to meet the defense of contributory negligence of the carrier, the latter will wholly avoid meeting that issue to its unjust advantage by recovery from the shipper after the latter has recovered from the defendant tort feasor. It has been held that the contributory negligence of the carrier may not be imputed to the shipper in the latter's action against the tort feasor for his wrongful destruction of the goods, or in other words, that contributory negligence of the carrier is no defense in such an action. Bower v. Union Pac. R. Co., 106 Kan. 404, 188 P. 420. But in a case where the carrier has paid the shipper-owner the loss suffered, we believe the more just rule to be that contributory negligence of the carrier is a defense. Otherwise the tort feasor would be deprived of his defense of contributory negligence which he would have against the carrier. The latter should not be enabled to escape that defense by the method above mentioned. If the defense were not allowed, it might be said that the carrier, because of its contributory negligence could not recover from the shipper after it had paid the shipper and the latter had recovered from the tort feasor. That would permit double recovery by the shipper which is not favored.

[5-7] The foregoing discussion also answers the contention that plaintiff shipper is not the real party in interest. The general test of such a party is: "It [Code of Civ.Proc., sec. 367] is to prevent a defendant, against whom a judgment may be obtained, from further harassment or vexation at the hands of other claimants to the same demand. It is to prevent a claimant from making a simulated transfer, and thus defeating any just counterclaim or setoff which defendant would have to the demand if pressed by the real owner. But where the plaintiff shows such a title as that a judgment upon it satisfied by defendant will protect him from future annoyance or loss, and where, as against the party suing, defendant can urge any defenses he could make against the real owner, then there is an end of the defendant's concern, and with it of his right to object; for, so far as he is interested, the action is being prosecuted in the name of the real party in interest." Giselman v. Starr, 106 Cal. 651, 657, 40 P.2d 8, 10. As we have seen, such protection is afforded in the case at bar.

The judgment is reversed.

SHENK, EDMONDS, SCHAUER, and SPENCE, JJ., concur.

TRAYNOR, Justice.

I dissent. In my opinion plaintiff's action is barred on the ground that plaintiff has been fully compensated by the carrier for the injury to its goods and would be unjustly enriched by a double recovery.

"When the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages." Lovejoy v. Murray, 3 Wall. (U.S.) 1, 17, 18 L.Ed. 129; Miller v. Beck, 108 Iowa 575, 79 N.W. 344; The Beaconsfield, 158 U.S. 303, 307, 15 S.Ct. 860, 39 L.Ed. 993; Le Blond Schacht Truck Co. v. Farm Bureau Mut. Auto. Ins. Co., 34 Ohio App. 478, 171 N.E. 414; Hart v. Western R. R. Corp., 13 Metc. 99, 54 Mass. 99, 105, 46 Am.Dec. 719. Whether the persons who are responsible to the plaintiff have acted jointly or separately is immaterial, for the controlling questions are whether the loss for which they are responsible is identical and whether the payment by one of them has fully compensated the plaintiff. As this court stated with respect to an injury for which several persons were responsible: "Whether it was caused by their joint or several acts is immaterial. It would be subordinating substance to mere form to say that these two actions do not, under the circumstances, rest upon one and the same cause. This being so, and it appearing that plaintiff had been once compensated for the injury suffered, the court below was right in denying her a second award of damages for the same act." Butler v. Ashworth, 110 Cal. 614, 620, 43 P. 4, 5, 386. "Where the bar accrues in favor of some of the wrongdoers by reason of what has been received from * * * one or more others * * * the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction * * *." Dawson v. Schloss, 93 Cal. 194, 199, 29 P. 31, 32; Tompkins v. Clay Street R. R. Co., 66 Cal. 163, 166, 4 P. 1165; Urton v. Price, 57 Cal. 270, 272.

Since the rule against double recovery is aimed at preventing unjust enrichment, it is not only immaterial whether plaintiff has one or several causes of action against tort feasors, but whether one of his causes of action is based on contract and the other on tort, whether the one requires proof of negligence and the other does not. The decisive consideration in barring an action seeking double recovery is that plaintiff shall not recover twice for his loss by taking advantage of the fortuitous circumstance that more than one person is responsible to him for that loss. Prosser, Torts, 1105–1107; see, also, Ash v. Mortensen, 24 Cal.2d 654, 657, 150 P.2d 876; Wheat v. Carter, 79 N.H. 150, 106 A. 602; Coleman v. Gulf Refining Co., 172 Ark. 428, 289 S.W. 2.

As a bailee the carrier had a right to bring an action for damages for the injury to the goods in its custody, even before it compensated the bailor for its loss. Armstrong v. Kubo & Co., 88 Cal.App. 331, 334, 263 P. 365; Bode v. Lee, 102 Cal. 583, 36 P. 936; Roberts v. Burr, 135 Cal. 156, 161, 67 P. 46; Whithworth v. Jones, 58 Cal. App. 492, 497, 209 P. 60; Burkett v. United States, 5 Cir., 71 F.2d 683; The Beaconsfield, 158 U.S. 303, 307, 15 S.Ct. 860, 39 L.Ed. 993; Juniata Acceptance Corp. v. Hoffman, 139 Pa.Super. 87, 11 A.2d 494; see Rest., Judgments, § 88(2); Holmes, The Common Law, 167 et seq. Damages for the injury to the goods, which it would recover as trustee for its bailor before it paid the bailor's damages, could be recovered by the carrier on its own account after it had satisfied the bailor. Since the carrier's damages, including its outlay to compensate its bailor, would determine its cause of action against defendant, it is clear that the carrier would have to deduct from its claim the amount it had received as a result of the sale of part of the goods that were salvaged as well as the value of the goods remaining in its hands. If plaintiff is entitled to bring the present action, however, it is difficult to see on what theory it would be required to deduct from its claim the proceeds of the sale of the salvaged goods or the value of the goods remaining in the hands of the carrier. The sale was made, not for the account of plaintiff, but for the account of the carrier who received the proceeds thereof, and the goods remaining in the hands of the carrier are no longer the plaintiff's since it has received from the carrier the full amount for which it could have sold the goods had they arrived safely at their destination. Moreover, if plaintiff could bring this action, it is not clear why, as the majority opinion

states, defendant could raise the defense of contributory negligence. It is settled that contributory negligence of the carrier is no defense in an action for damages to the goods of a shipper brought by the shipper against one who has injured the goods. Hornstein v. Kramer Bros., etc., Lines, 3 Cir., 133 F.2d 143, 147; see 2 Rest., Torts, § 489; Prosser, Torts, 425, and cases there cited. To hold that in the present action defendant is entitled to raise that defense because plaintiff is already fully compensated for its damages by the carrier would simply mean that plaintiff cannot bring an action for its own account and is merely suing as a trustee for the carrier. Plaintiff, however, has not brought this action as a trustee nor does it want to be treated as such, for it has taken the position that contributory negligence of the carrier cannot be set up against it on the ground that its cause of action is different from that of the carrier. Although plaintiff concedes that it has received full compensation for its loss from the carrier and has even turned over to the carrier what was received from the sale of the salvaged goods, it brings this action as if it were entitled in its own right to the damages it seeks from defendant. Plaintiff has offered no reasonable explanation why this action is brought by it rather than by the carrier. The conclusion seems inescapable that the purpose is to defeat legitimate defenses that defendant might have against the carrier.

It is contended that the rule against double recovery does not apply to this action on the grounds that plaintiff recovered from the carrier by virtue of its contract and that its claim thereunder is independent of any claim against defendant as a tort feasor. In support of this contention an analogy to an insurance contract is invoked. It is asserted that had plaintiff been compensated under an insurance contract it would not be barred from bringing an action against one who injured its goods, and that similarly it should not be barred because it has received compensation for its loss under a contract with a common carrier whose liability for the damages, like that of an insurer, does not depend on any fault of its own.

Certain insurance benefits are regarded as the proceeds of an investment rather than as an indemnity for damages. Thus it has been held that the proceeds of a life insurance contract made for a fixed sum rather than for the damages caused by the death of the insured are proceeds of an investment and can be received independently of the claim for damages against the person who caused the death of the insured. The same rule has been held applicable to accident insurance contracts. As to both kinds of insurance it has been stated: "Such a policy is an investment contract giving the owner or beneficiary an absolute right, independent of the right against any third party responsible for the injury covered by the policy." Gatzweiler v. Milwaukee Elec. Ry. & L. Co., 136 Wis. 34, 116 N.W. 633, 634, 18 L.R.A.,N.S., 211, 128 Am. St.Rep. 1057, 16 Ann.Cas. 633; Suttles v. Railway Maiil Ass'n, 156 App.Div. 435, 141 N.Y.S. 1024, 1026; see 18 A.L.R. 678; Shea v. Rettie, 287 Mass. 454, 192 N.E. 44, 95 A.L.R. 575; 29 Am.Jur. 1003, 1004. Hence in the case of life or accident insurance, the insurer, in the absence of a provision to the contrary in the insurance contract, has no right to be subrogated to the rights of the owner or beneficiary of the policy against the wrongdoer who caused the insured's death or injury. An insurer who fully compensates the insured, however, is subrogated to the rights of the insured against one who injured his property if the insurance was for the protection of the property of the insured, and was therefore an indemnity contract. See Vance, Insurance, 2d Ed., 668–681; 6 Appleman, Insurance, §§ 4051, 4052; 29 Am. Jur. 999–1001, 1003, 1004. In such cases subrogation is the means by which double recovery by the owner is prevented and the ultimate burden shifted to the wrongdoer where it belongs. Hart v. Western R. R. Corp., 13 Metc. 99, 54 Mass. 99, 105, 46 Am.Dec. 719. The wrongdoer must bear the ultimate burden of the injury and cannot escape liability because the owner is insured, for the insurance was not taken for the benefit of the wrongdoer but for that of the owner.

So long as there was no merger of law and equity procedure an insurance company

subrogated to the right of the insured could not bring an action at law but could only sue in equity when it availed itself of the rights of its insured against a third person. See cases collected, Harrington v. Central States Fire Insurance Co., 169 Okl. 255, 36 P.2d 738, 96 A.L.R. 864; Clark, Code Pleading, 109. The result was that the insured had to bring the action in his own name, and the defendant could not raise the defense that the insured was paid for his damages because the allowance of such a defense would, for procedural reasons, have defeated any recovery against the wrongdoer. Since courts have recognized that under modern procedure one who is subrogated to the rights of another can bring any action that the other could have brought, they have also recognized that when the insured is fully compensated for his property damages by an insurer, the latter may bring an action for the damages against a third person and that if the insured brings the action he can do so only as a trustee for the insurer. Harrington v. Central States Fire Ins. Co., 169 Okl. 255, 36 P.2d 738, 96 A.L.R. 859; Firemen's Ins. Co. of Newark, N. J. v. Bremner, 8 Cir., 25 F.2d 75, 76; see Offer v. Superior Court, 194 Cal. 114, 120, 228 P. 11; cases collected 96 A.L.R. 868, 869; 29 Am.Jur. 1016; 6 Appleman, Insurance, § 4097, p. 604; see, also, Lord & Taylor v. Yale & Towne Mfg. Co., 230 N.Y. 132, 141, 129 N.E. 346; Vahlsing, Inc. v. Hartford Fire Ins. Co., Tex.Civ.App., 108 S.W.2d 947; Clark, Code Pleading, 109, 110.

In the present case the defendant does not escape liability if plaintiff is barred from bringing this action, for defendant is liable to the carrier for any injury suffered by the carrier caused by defendant's negligence. Since the carrier has a cause of action of its own for all its damages the equitable doctrine of subrogation is not needed; the amount of the carrier's damages is simply increased by the fact that it was liable to plaintiff for the injury to plaintiff's goods and has compensated plaintiff therefor.

It appears, therefore, that if plaintiff is suing in its own right, it cannot recover compensatory damages for the wrong, for it has been fully compensated for all of its actual damages. If plaintiff is not suing in its own right, it has failed to bring itself within any justifiable exception to the requirement of modern pleading that an action must be maintained by the real party in interest. The only purpose the action can serve is somehow to defeat the defenses that the defendant may have against the carrier. This court should not lend its aid to the accomplishment of such a purpose.




28 Cal.2d 418

## HARRIS v. JOFFE.

L. A. 19554.

Supreme Court of California, in Bank.

June 25, 1946.

**1. Landlord and tenant ⇐169(6)**

In action by tenant for injuries sustained as result of fall in unlighted entrance with slippery uncovered floor, finding that landlord was negligent and that such negligence was the proximate cause of tenant's injury was supported by the evidence.

**2. Landlord and tenant ⇐164(4)**

Landlord of apartment building who failed to maintain light in entrance as required by ordinance and who had promised to remedy the situation, but failed to do so, was liable to tenant who suffered injury therefrom.

**3. Landlord and tenant ⇐164(1)**

The general rule that a landlord is not liable to a tenant for injuries due to the defective condition or faulty construction of the demised premises in absence of fraud, concealment or covenant is subject to the exception that when a portion of the premises is reserved by the landlord for use in common by himself and his tenants, or by different tenants, landlord must use ordinary care to keep that particular portion of the premises in safe condition.

**4. Landlord and tenant ⇐164(6)**

A landlord may not be charged with responsibility for a defective condition unless he has actual knowledge thereof or unless it

has existed for such a period of time as to justify conclusion that in the exercise of ordinary care he should have known of its existence within such time as would give him a reasonable opportunity to make repairs.

**5. Negligence ⇐10**

One test for determining the issue of negligence is whether a person of ordinary care should have foreseen or anticipated that someone might be injured by action or non-action.

**6. Appeal and error ⇐1008(1)**

It is ordinarily the function of the trial court to determine from the evidence whether a person has failed to use ordinary care.

**7. Negligence ⇐6**

The proper conduct of a reasonable person in a particular situation may be prescribed by statute or ordinance.

**8. Negligence ⇐6**

Conduct that falls below standard prescribed by statute or ordinance is negligence as a matter of law in the absence of excuse or justification.

**9. Landlord and tenant ⇐164(6)**

Landlord's knowledge of the condition of entrance at time of injury may be inferred from prior complaints of tenants.

**10. Landlord and tenant ⇐164(1)**

Landlord of apartment building had duty of using ordinary care to keep entrance in a safe condition.

**11. Appeal and error ⇐1010(1)**

In action by tenant for injuries sustained in unlighted slippery entrance to apartment building, findings of trial court for tenant were conclusive on appeal where supported by substantial evidence.

**12. Landlord and tenant ⇐164(4)**

Where it was undisputed that landlord of apartment building had failed to light entrance as required by ordinance, which resulted in tenant's injury, and no excuse or justification was shown, landlord was negligent as a matter of law.

**13. Landlord and tenant ⇐169(6)**

In action by tenant against apartment landlord for injuries sustained in slippery unlighted entrance, where there was testimony that entrance was dangerous because it was slippery and that there was no light, and tenant testified that she fell so fast she knew of no cause of her fall other than the condition of the floor, such evidence warranted inference that slippery unlighted entrance was the proximate cause of the injury.

**14. Landlord and tenant ⇐169(6)**

In action by tenant for injuries sustained from fall in slippery unlighted entrance to apartment building, finding that tenant was not guilty of contributory negligence was sustained by the evidence.

**15. Landlord and tenant ⇐167(7)**

Tenant's previous knowledge of defective condition of entrance to apartment building or tenant's failure to use rear exit would not show that tenant was contributorily negligent, particularly where there was no evidence showing the condition of the rear exit at the time of the injury.

**16. Appeal and error ⇐996**

A reviewing court is not authorized to substitute its deductions from the evidence for those of the trial court.

**17. Appeal and error ⇐996**

The rule that choice of a more dangerous method is ordinarily negligence and that inconvenience of a less dangerous method does not justify the choice of a dangerous method is not controlling unless defendant can show that no inference other than that of plaintiff's negligence can reasonably be drawn from the facts.

SCHAUER, J., dissenting.

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Appeal from Superior Court, Los Angeles County; Roy v. Rhodes, Judge.

Action by Sophye Harris against Rosamond Joffe for injuries sustained when plaintiff slipped and fell while walking through the entrance to the apartment house in which she was a tenant. From a judgment for plaintiff, the defendant appeals.

Judgment affirmed.

Prior opinion, 161 P.2d 694.

C. A. Pinkham, of Los Angeles, for appellant.

Samuel De Groot, of Los Angeles, for respondent.

EDMONDS, Justice.

Sophye Harris slipped and fell while walking through the entrance way to the apartment house in which she was a tenant. The appeal from the judgment in her favor presents for decision questions concerning the respective duties of the parties in connection with the maintenance and use of that part of the building.

The facts are undisputed. At the time of the accident, Mrs. Harris was leaving the building by means of the front entrance. A corridor, four or five feet wide, and finished with tile or composition material, extended from the door to the sidewalk, a distance of about 10 feet. Four feet from the door, there were two steps, each six inches in height, by which one descended to the sidewalk level. The corridor was under the care and control of Rosamond Joffe, the owner of the property. It is described in the record as the "vestibule," the "lobby" and the "entrance."

Mrs. Harris testified that either during rain or when the lawn was sprinkled, water tracked into the corridor made the floor very slippery. Also, she said, the electric light was "on and off most of the time." Because of these conditions, she considered that the corridor was dangerous.

Upon several occasions, prior to the night of the accident, Mrs. Harris and another tenant had notified Mrs. Joffe that the light in the vestibule was not burning. Complaint was also made that the floor was dangerous because of the lack of a covering.

These conversations extended over a period of several months. The last time Mrs. Harris brought the matter to the attention of the owner was about a week prior to the date of the accident. Her daughter slipped while walking through the vestibule and almost fell down. Mrs. Harris remarked to the owner about this incident and was assured that the condition would be corrected. "There was a light put in," said Mrs. Harris, "but it wasn't in very long." It was "on and off continuously, mostly off," she said, and no floor covering was provided.

Another tenant testified that she also complained to the owner about the condition of the vestibule. This was less than a month before the accident to Mrs. Harris, "sometime in November." This tenant told the owner that her husband almost "fell down on account of not having a light and a mat." And although Mrs. Joffe said she would "take care of it," nothing was done. This tenant testified further that "the lights are on and off," and when it rained, or when the gardener used water, the vestibule was slippery. She said that other tenants with whom she talked were also aware of the condition.

About 8 o'clock in the evening, Mrs. Harris, accompanied by her husband and nephew, was leaving the building. She was not in a hurry and was walking in the ordinary manner. Upon opening the door leading into the vestibule, she noticed that the light was out and that "it was drizzling a little, it was wet." She testified that she didn't know how long it had been raining because she had been in her apartment "from early in the evening." In describing the condition of the vestibule at that time she said: "There wasn't any lighting at all; * * * it was too dark to see anything." In response to the question: "Did you go back to Mrs. Joffe's apartment and tell her about it then?" Mrs. Harris replied: "She wasn't home." No one else was in charge of the apartments, nor did she know how the light was operated.

Concerning the happening of the accident, Mrs. Harris stated that "the corridor as we stepped out was rather slick" from being wet "and I slipped and fell clear down the steps." There was no covering on the floor. But in answer to the question as to whether anything except the slippery condition caused her to fall, she replied: "No, it happened so fast." Mrs. Harris landed with her right foot curled under her, sustaining a fractured bone in her right foot.

The testimony of Mrs. Joffe shows that in the middle of the vestibule there was a one bulb electric light fixture hanging from

the ceiling. This light was controlled by an electric clock located in the basement. So far as she knew, the light was burning at the time Mrs. Harris was injured. She said that there was only one entrance in the front of the building and that it was used by all the tenants, unless "they are coming from the garage." But the record includes no evidence concerning the condition of the other entrance.

Following the presentation of this evidence, the trial court ruled in favor of Mrs. Harris upon the issues of negligence, proximate cause, contributory negligence and unavoidable accident. The court found that the property owner "illegally and unlawfully maintained said vestibule, in that said vestibule was dark and unlighted and said floor of said vestibule was slippery and without any covering. That on said day at said hour and for sometime previous thereto, it was raining and that the floor of said vestibule was slippery on account of said rain." Upon the previous complaints of the tenants, said the court, Mrs. Joffe stated "that she would have the vestibule light turned on, but notwithstanding such statement she failed to do so."

As pleaded and found by the court, at the time the accident occurred, the municipal code of the city of Los Angeles provided: "Every person conducting or managing any * * * apartment house shall, from sunset to sunrise of each day, light every hallway, corridor and stairway thereof so as to enable all persons to readily find, distinguish and use such means and ways of exit therefrom." § 57.47. Admittedly, Mrs. Joffe's building was an "apartment house" within the meaning of this code section.

The appellant contends that the evidence, taken as a whole, fails to show any negligence on her part proximately contributing to the injuries of Mrs. Harris. The entire record, she says, is utterly devoid of any evidence indicating, or from which it may be inferred, that if the conditions, as found by the court, in fact existed, she had any notice of them on the particular night in question, or that they had existed for such a length of time as to put her upon notice. For these reasons, it is said, the trial court erred in denying a judgment of nonsuit and refusing to grant a new trial.

The owner of an apartment house, the argument continues, is not compelled, at his peril, to maintain a constant watch to make certain that the lights are on at all times; the duty in this regard is to use ordinary care to see that the premises are in a reasonably safe condition. Also, the court may take judicial notice of the fact that electric lights and electrical devices are uncertain in operation.

And, contends appellant, conceding for the purpose of argument only that she was negligent, the evidence shows that the accident to Mrs. Harris was the result of her own contributory negligence. With full knowledge of the conditions of which she complained, Mrs. Harris remained upon the premises and thus assumed the risks attendant thereon. The danger was an open and obvious one and was as well known to her as to the appellant; with such knowledge she failed to exercise ordinary care for her own safety and protection. Under the circumstances, Mrs. Harris should have used the rear exit. It is not the law of this state, the appellant concludes, that the violation of a statute or ordinance in and of itself permits recovery where contributory negligence on the part of the person claiming to have been injured caused the accident.

[1, 2] There was substantial evidence to support the conclusions of the trial court that the property owner was negligent and that such negligence was the proximate cause of injury, replies the tenant. And the landlord is liable for damages, not only because of the failure to maintain the light at the time of the accident, but by reason of her neglect to remedy the situation when it was called to her attention on many previous occasions.

Upon the issue of contributory negligence, although conceding the rule to be that her contributory negligence would bar a recovery notwithstanding negligence of the owner, the burden of proof as to that defense was upon the owner, says Mrs. Harris. The evidence in that regard presented a question for the trial court, and

the finding in her favor is not without support in the record. Finally, Mrs. Harris asserts, knowledge of a dangerous condition and the continued use of premises notwithstanding such knowledge, does not always make one guilty of contributory negligence.

[3, 4] The general rule that a landlord is not liable to a tenant for injuries due to the defective condition or faulty construction of the demised premises in the absence of fraud, concealment or covenant, is subject to exception. When a portion of the premises is reserved by the landlord for use in common by himself and his tenants, or by different tenants, a duty is imposed upon the property owner to use ordinary care to keep that particular portion of the premises in a safe condition. Bock v. Hamilton Square Baptist Church, 219 Cal. 284, 287, 26 P.2d 7; Dorfer v. Delucchi, 61 Cal.App. 2d 63, 64, 141 P.2d 905; Turner v. Lischner, 52 Cal.App.2d 273, 277, 126 P.2d 156; Reiman v. Moore, 42 Cal.App.2d 130, 136, 108 P.2d 452; Kossine v. Styliano, 40 Cal.App. 2d 721, 723, 105 P.2d 952; Ellis v. McNeese, 109 Cal.App. 667, 670, 293 P. 854. But a landlord may not be charged with responsibility for a defective condition unless he had actual knowledge of the condition, or it has existed for such a period of time as to justify conclusion that, in the exercise of ordinary care, he should have known of its existence within such time as would give him a reasonable opportunity to make repairs. Mondine v. Sarlin, 11 Cal.2d 593, 597, 81 P.2d 903; McKellar v. Pendergast, 68 Cal.App.2d 485, 491, 156 P.2d 950; Owen v. Beauchamp, 66 Cal.App.2d 750, 752, 152 P.2d 756; Van Wye v. Robbins, 48 Cal.App.2d 660, 662, 120 P.2d 507; Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 599, 111 P.2d 346; Kossine v. Styliano, supra, 40 Cal. App.2d at page 724, 105 P.2d 952.

[5-8] One test for determining the issue of negligence is whether a person of ordinary prudence should have foreseen or anticipated that someone might be injured by his action or nonaction. Terrell v. Key System, 69 Cal.App.2d 682, 686, 159 P.2d 704; Schwerin v. H. C. Capwell Co., 140 Cal.App. 1, 2, 34 P.2d 1050; Sweatman v. Los Angeles Gas & Elec. Corp., 101 Cal. App. 318, 322, 281 P. 677; see Rest., Torts, §§ 284, 289, 290, 291. And, ordinarily, it is the function of the trial court to determine from the evidence whether a person has failed to use ordinary care. Reiman v. Moore, supra; Kossine v. Styliano, supra. But the proper conduct of a reasonable person in a particular situation may be prescribed by statute or ordinance; conduct that falls below such standard, in the absence of excuse or justification, is negligence as a matter of law. Thomson v. Bayless, 24 Cal.2d 543, 150 P.2d 413; Johnson v. Griffith, 19 Cal.2d 176, 120 P.2d 6; Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675; Roxas v. Gogna, 41 Cal.App.2d 234, 106 P.2d 227; see Rest., Torts, § 286.

[9, 10] It was necessary for the tenants to use the vestibule since it was the only entrance from the front of the apartment house. It was at all times under the care and control of the owner. The vestibule became very slippery when wet. This condition brought about either by the cleaning of the vestibule or by tenants tracking water into the hallway, extended from August to December and, combined with the lack of proper lighting, was considered by the tenants to be dangerous. Complaints to Mrs. Joffe were made during a period of several months. Moreover, she was told of at least two instances of slipping. One attempt to rectify the lack of lighting is shown by the evidence, but the darkened condition continued most of the time and no mat was placed on the floor of the vestibule. Although there is no evidence that Mrs. Joffe had actual knowledge of the condition at the time of the injury, her constructive knowledge may be inferred from the prior complaints, and she had the affirmative duty of using ordinary care to keep the vestibule in a safe condition.

[11, 12] Under these circumstances, the determination of the trier of fact adverse to Mrs. Joffe is conclusive upon appeal for there is in the record substantial evidence which, with inferences deducible therefrom, amply support the findings in favor of the plaintiff. See Dorfer v. Delucchi, supra; Kossine v. Styliano, supra. Furthermore, since violation of the ordinance was un-

disputed and no excuse or justification was shown, Mrs. Joffe was negligent as a matter of law in failing to light the hallway.

[13] In response to the question as to whether she knew of any cause for her fall, other than the condition of the floor, Mrs. Harris replied: "No, it happened so fast." Both Mrs. Harris and another tenant stated that the vestibule was dangerous because it was slippery and there was no light. This is, at least, sufficient evidence from which it may be inferred that the negligence of Mrs. Joffe in maintaining a slippery and unlighted corridor was the proximate cause of injury (see Bock v. Hamilton Square Baptist Church, supra, 219 Cal. at page 288, 26 P.2d 7), and it may not reasonably be said that the trial court's finding in this regard is without support in the record. See Burtt v. Bank of California Nat. Ass'n, 211 Cal. 548, 551, 296 P. 68.

[14, 15] Turning to the question of contributory negligence, the finding of the trial court on this issue is also fully justified by the evidence. Previous knowledge of the defective condition is not, of itself, conclusive evidence that a plaintiff failed to exercise due care (Hughes v. Quackenbush, 1 Cal.App.2d 349, 356, 37 P.2d 99; Finch v. Willmott, 107 Cal.App. 662, 667, 290 P. 660), nor would failure to use the rear exit necessarily preclude recovery. Lagomarsino v. Market Street Ry. Co., 69 Cal.App. 2d 388, 392, 158 P.2d 982. Moreover, no evidence was introduced showing the condition of the rear entrance at the time of the accident.

[16] Mrs. Harris testified that she was not in any hurry when leaving the building and was walking in the ordinary manner. Upon opening the door leading onto the vestibule she noticed that it was "drizzling" and that there "wasn't any lighting at all." She didn't go back because the owner was not at home and no one else was in charge. Furthermore, she did not know how the light was operated. "It was too dark to see anything," Mrs Harris testified, and since she had notified Mrs. Joffe of the condition, she might reasonably have assumed that it had been partially corrected to the extent of a covering on the floor of the vestibule. Certainly it may not be said that a reasonable person could draw from this evidence only an inference pointing unerringly to the negligence of Mrs. Harris proximately contributing to her injury (see Flores v. Fitzgerald, 204 Cal. 374, 376, 268 P. 369), and a reviewing court is not authorized to substitute its deductions for those of the trial court.

The decisions particularly relied upon by the appellant are not contrary to this conclusion. Vosburgh v. Meda, 61 Cal.App.2d 396, 143 P.2d 41, 42, is factually similar to the present case. There a tenant tripped and fell on the stairway in a rooming house, but it was held that the trial court's finding upon the issue of contributory negligence was substantially supported by evidence concerning "the manner in which she was descending."

The appeal in Colburn v. Shuravlev, 24 Cal.App.2d 298, 74 P.2d 1060, was from a judgment of nonsuit. Plaintiff had removed a rug from its usual place in the hall and placed in on the living room rug for the purpose of cleaning. In hurrying to the door she tripped over the rug. She had notified defendant's manager of the defect in the rug and each time had received the promise that it would be repaired. But this case is distinguishable from the present one; the accident did not happen in the hallway under the care and control of the landlord, no evidence was introduced showing that the plaintiff was walking in an ordinary manner, and because she had evidently inspected the rug just prior to the accident, she could not reasonably assume that it had been repaired.

The evidence in Matherne v. Los Feliz Theatre, 53 Cal. App.2d 660, 128 P.2d 59, included no testimony that the owner knew of the slippery condition of the lobby where plaintiff slipped, or that the water had dripped for such a length of time that in the exercise of ordinary care, he should have known of the dangerous condition. Under such circumstances, there was no basis for a recovery by the plaintiff.

[17] The appellant quotes from Stricklin v. Rosemeyer, 61 Cal.App.2d 359, 362, 142 P.2d 953, 954, as follows: "One having a choice between methods of doing an act

which are equally available, who chooses the more dangerous of the methods, is ordinarily deemed negligent, in the absence of a showing of the existence of an emergency, sudden peril or other circumstance justifying such choice. The fact that the less dangerous method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly encountering the peril." But, as stated in the later case of Lagomarsino v. Market Street Ry. Co., supra, 69 Cal.App.2d at page 392, 158 P.2d at page 984, this rule is not controlling "unless defendants can show that no inference other than one of plaintiff's negligence can reasonably be drawn from the facts."

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

SCHAUER, Justice.

I dissent. In my view the opinion of the District Court of Appeal, prepared by Mr. Justice Doran and reported in 161 P.2d 694, properly disposes of the controlling issues. The judgment should be reversed.




28 Cal.2d 497

## LADY v. STATE BAR.

L.A. 19601.

Supreme Court of California, in Bank.

June 26, 1946.

Petition for Modification Denied July 24, 1946.

1. **Attorney and client** ⇐53(2)

Evidence did not warrant disciplinary action against attorney because of his alleged procurement of assignment of client's alimony claim to himself, or because of his destruction of an instrument allegedly in belief that it was relevant to his action predicated on the assignment and to allegedly conceal and suppress certain facts. Business and Professions Code, §§ 6103, 6106.

2. **Attorney and client** ⇐58

Attorney's destruction without permission of a document which was originally produced in response to a subpoena duces tecum and which might or might not have developed to be material evidence in the cause, and his subsequent failure to make a disclosure to court of what had taken place, was improper warranting a public reprimand.

3. **Attorney and client** ⇐46

Where attorney is guilty of improper conduct, the fact that no harm results and that no damage is done to any one from such conduct cannot avoid disciplinary action.

CARTER and EDMONDS, JJ., dissenting.

Proceeding on the petition of William Ellis Lady to review a recommendation of the State Bar of California for the suspension of petitioner from the practice of law for a period of three months.

Petitioner publicly reprimanded.

Philbrick McCoy, of Los Angeles, for petitioner.

Paul R. Hutchinson and Jerold E. Weil, both of Los Angeles, for respondent.

PER CURIAM.

The State Bar, by a notice to show cause, charged petitioner with professional misconduct violative of sections 6103 and 6106 of the State Bar Act, Business and Professions Code. The Board of Governors adopted with modifications the findings of the local administrative committee and recommended that petitioner be suspended from the practice of law for a period of three months. On this application for review he contends that the evidence is insufficient to support the findings and that no professional misconduct has been shown.

In 1941 petitioner, as substituted plaintiff, was prosecuting an action for accrued alimony which had been assigned to him by his client, Mrs. Dorothy Sunderland, shortly before her death in October, 1940. On June 27, 1941, petitioner was served with a subpoena duces tecum issued at the instance of the defendant in that action,

directing the petitioner to appear before a notary public for the taking of his deposition and to bring with him all instruments comprising the assignment to him of the claim upon which his cause of action was based. During the taking of the deposition on July 12, 1941, petitioner refused to answer certain questions. When asked if he had with him the assignment referred to in the subpoena, he exhibited and permitted opposing counsel to examine an original undated assignment executed by Mrs. Sunderland. He gave the notary a copy of this paper but refused to deliver the original, saying: "I don't intend to let the original assignment go into evidence today, and I intend to take it along to court at the time of trial."

The deposition was thereupon continued, and on July 16th an order was issued by the superior court directing the petitioner to show cause why he should not be required to answer the disputed questions. At a hearing on July 25th, the court fixed August 9th as the date for the resumption of the deposition and directed petitioner to answer at that time the questions asked before the notary. One of the questions concerned the execution of the undated assignment by Mrs. Sunderland. At the hearing on July 25th the court did not require a surrender of the assignment but permitted the petitioner to retain it upon his stipulation that he would permit defendant's counsel to have it examined by a handwriting expert.

When petitioner appeared for the resumption of his deposition on August 9th he failed to produce the undated assignment, but instead produced an assignment of almost identical wording dated September 23, 1940, and stated that it was the assignment upon which he relied as the basis of his cause of action. He said that upon his return to his office on July 12th, he had opened his files in the case and discovered that he had produced the wrong assignment; that he had commented on the fact to his associates; and that he had immediately destroyed the undated assignment to avoid any repetition of his error. In explanation of his failure to state these facts to the court at the hearing of July 25th, he claimed that he considered that the subject of that inquiry and of his stipulation was the assignment on which "he relied," which was the assignment dated September 23rd, and he therefore acted upon the assumption that it was unnecessary to mention his error to the court or to tell of his destruction of the undated assignment.

On August 12, 1941, the superior court issued an order requiring petitioner to show cause why he should not be punished for contempt for failing to surrender the undated assignment for inspection by a handwriting expert as he had agreed at the hearing of July 25th and for failing to disclose to the court at that hearing that he had therefore destroyed that instrument. In November, 1941, after the hearing, the order to show cause was discharged.

The main action thereafter proceeded to trial. Under a special defense urged by the defendant, the issue was litigated concerning petitioner's purpose and motive in procuring an assignment from his client. Findings favorable to petitioner were made on that and other issues, and in March, 1943, a judgment was entered directing that petitioner, as trustee, recover from defendant some $28,000 and costs and that the money should be paid to the administrator of Mrs. Sunderland's estate. Defendant appealed from the judgment. Proceedings were had for satisfaction of judgment and for a receivership. Finally, in November, 1944, the case was compromised by the payment to petitioner of $5,000, and the appeal was dismissed. During that same month the present proceeding was instituted. The record in that case was received in evidence in the present proceeding.

At the time it was suggested to Mrs. Sunderland that she should assign her cause of action to petitioner, she was suffering from a fatal malady, and with petitioner's help she had found refuge in a county institution. Petitioner claims that he was reluctant to accept an assignment from her until after the complaint against her former husband had been filed because he planned to initiate arrest and bail proceedings and wanted to avoid any personal

liability which might arise if such proceedings were improper or the husband's identity mistaken.

With respect to the dated assignment, the evidence shows without contradiction that it was executed by Mrs. Sunderland on September 23, 1940, a few hours after the filing of the complaint. With respect to the time of execution of the undated assignment, the evidence is uncertain.

Petitioner asserts that subsequent to September 23rd he forgot that he had taken an assignment, and that on October 6th, about ten days before Mrs. Sunderland's death, he secured an undated assignment from her. It is argued by the respondent that, after taking such care to procure the dated assignment within a few hours of the filing of the complaint, it is incredible that petitioner could have forgotten the incident and proceeded to take the undated assignment; that the circumstances indicate that petitioner took the undated assignment in August as a safeguard in case of his client's early demise; and that after the commencement of the action in his client's name, he directed the preparation of the dated instrument and had Mrs. Sunderland execute it, with intent to use it in procuring the substitution of himself for her as party plaintiff.

For some undisclosed reason a dictograph had been placed in the hospital room of Mrs. Sunderland, and the record contains a transcription by representatives of the district attorney's office of a purported conversation overheard on August 25, 1940, while petitioner and his secretary were visiting Mrs. Sunderland. The transcription bears a notation that the radio was "turned on very loud so only snatches of the conversation could be heard," and the reported items of conversation indicate that Mrs. Sunderland signed a compensation insurance claim and other papers at that time. The forms of signature mentioned in the conversation are said to indicate that one of the unidentified papers must have been the undated assignment. But petitioner denies that any assignment was executed on that day, and his secretary testified that she saw none signed although she did not remain in the room during the entire time of petitioner's visit.

The local administrative committee found that the undated assignment was executed by Mrs. Sunderland on August 25th. The board struck that date from the findings but adopted the committee's further finding that the undated assignment was the first assignment executed by Mrs. Sunderland. The board found that petitioner's assertion was untrue that subsequent to September 23rd he forgot that he had taken the dated assignment and procured the undated one; that it was untrue that Mrs. Sunderland requested petitioner to take an assignment prior to the commencement of suit and he refused; that on the contrary the petitioner suggested to Mrs. Sunderland that she assign to him and pursuant to that suggestion she executed and delivered to him the undated assignment. The court in the main case found on those issues in favor of the petitioner.

Further findings of the board are to the effect that the first and undated assignment was the only valid and effective assignment by Mrs. Sunderland of her claim to petitioner; that, as petitioner knew, it was the basis of his cause of action, and was the assignment referred to in the subpoena duces tecum and in the amended complaint; that petitioner did not destroy the instrument to avoid confusion or in the belief in good faith that it was not relevant or material to the issues in litigation and that the only relevant assignment was that of September 23d; that the instrument was destroyed by petitioner in the belief that it was material and relevant to the cause and for the purpose of defeating the ends of justice, and with intent and purpose to conceal and suppress the facts that it was a prior assignment. Here again the court in the contempt proceeding and the trial of the action impliedly found in favor of the petitioner on those contested issues.

It was also found by the board that at the court hearing of July 25th petitioner failed to maintain the respect due the court; that he used means not consistent with truth; that he deliberately mislead the judge by failing to disclose that he had theretofore destroyed the assignment exhibited by him when his deposition was being taken on July 12th, and in stipulating and allowing the order to be made to permit

defendant's counsel to have the assignment examined by a handwriting expert when he knew that he had already destroyed it.

The destruction of the undated assignment by the petitioner, his failure to disclose to the court on July 25th that he had destroyed it, and his stipulation to produce it when he knew that it had been destroyed were held by the board to be acts in violation of sections 6103 and 6106 of the State Bar Act, and to warrant the recommended discipline.

[1] A review of the record leads to the conclusion that the findings on the contested issues lack sufficient evidentiary support except the finding that the petitioner failed to disclose to the court on July 25th the fact that he had theretofore destroyed the assignment produced by him before the notary on July 12th and stipulated in court to thereafter produce an assignment for examination which he knew had been destroyed by him. The board must have recognized the insufficiency of the evidence on the charge that the undated assignment was executed on August 25th for it struck that date from the findings. With this date stricken the significance of the further finding to the effect that the undated assignment was executed prior to the dated one disappears in uncertainty and the record itself does not clear it up. With August 25th eliminated there is no finding whatsoever of the execution of the undated instrument at any specific time prior to September 23d. If petitioner's statement that it was executed about October 6th is discredited, then the record must be deemed devoid of any substantial proof of the actual time of its execution.

The finding that the assignment was given at petitioner's suggestion rather than at Mrs. Sunderland's request, even if deemed to be sufficiently supported, is immaterial in view of the fact that the record contains no showing that petitioner did not act for the best interests of his client and endeavor at all times to give effect to her plans and desires.

The findings of the board to the effect that the undated assignment was the only valid and effective assignment by Mrs. Sunderland of her claim to petitioner; that it was the basis of his cause of action; that it was the assignment referred to in the subpoena duces tecum; that it was destroyed by petitioner in the belief that it was relevant to the cause and for the purpose of defeating the ends of justice and concealing its priority, and the like, all stem from the major initial finding that the undated assignment was in fact a prior assignment. With that initial finding lacking in substantial evidentiary support, the findings which flow from it must fall. Moreover, as stated, the issues covered by these findings were involved both in the contempt proceeding and on trial of the case of Lady v. Sunderland.

While petitioner does not contend that either the discharge of the order to show cause in the contempt proceeding or the judgment in the main case is res adjudicata of the issues here, he points out that they constitute relevant, credible, and convincing proof, entitled to great weight as evidence of the facts thereby established, and raise a doubt as to his misconduct, which doubt should be resolved in his favor. In the main case the court not only made findings favorable to petitioner and gave judgment in his favor based upon the effectiveness of the assignment of September 23, 1940, but also expressly found that during the summer of 1940 Mrs. Sunderland requested petitioner to accept an assignment of her claim which petitioner refused to do until after the action was filed; that a draft of the assignment was prepared and discussed with Mrs. Sunderland before September 23, 1940, and that she was told that it would be given to her for execution immediately following the filing of suit in her name.

With the elimination of the findings above discussed, there remains to justify a disciplinary order only the finding bearing upon petitioner's failure to make a disclosure to the court at the hearing of July 25th of the fact that he had destroyed the assignment previously exhibited by him, and of his reason for so doing. On this point it is shown by petitioner's own testimony that he was not frank and truthful in his dealings with the court. He knew at the hearing of July 25th that the assignment which he had previously produced

was no longer in existence. Yet when the question arose of his response to interrogatory number 11 ("Q. Now I demand that you deliver to the notary the original of that assignment."), he admittedly made no explanation to the court of his destruction of the assignment and of the fact that another assignment existed, upon which he had decided to rely; instead he told the court that he "wanted to cooperate in every way. I told Judge Wilson that I had the original assignment upon which this action was based and that I would be more than glad to have anyone examine it * * * at any time they saw fit, whereupon the matter was ended and the Clerk made a notation in his minutes that it was stipulated that the assignment in question be examined by a handwriting expert during business hours."

[2, 3] The court and opposing counsel justifiably relied upon this statement as a stipulation to produce the previously exhibited assignment, for they could have no knowledge of the secret mental process by which petitioner used the word "assignment" to refer to a different document of which they knew nothing. It is true that, so far as is shown, no harm resulted from the substitution by petitioner of the dated for the undated assignment or from his failure to make a full disclosure to the court of the true situation. Even if the undated assignment was first executed, petitioner and Mrs. Sunderland were free to cancel it, and thereafter to enter into a new contract of assignment. The deception indulged on July 25th was not found to constitute a contempt of court nor did it affect the outcome of the case of Lady v. Sunderland. However, petitioner's destruction without permission of a document which was produced in response to a subpoena duces tecum and which might or might not have developed to be material evidence in the cause, and his subsequent failure to make a disclosure to the court of what had taken place, constituted conduct on the part of a member of the bar which cannot be condoned. The fact that no harm resulted and that no damage was done to any one from this conduct cannot avoid disciplinary action. Pickering v. State Bar, 24 Cal.2d 141, 145, 148 P.2d 1; Utz v. State Bar, 21 Cal.2d 100, 105, 130 P.2d 377.

It is our conclusion that under the circumstances petitioner should be disciplined by a public reprimand and this opinion shall constitute such reprimand.

CARTER, Justice (dissenting).

I dissent. In view of the fact that the trial court gave petitioner a "clean bill of health" on his conduct in the case of Lady v. Sunderland, I am disposed to accept its determination and vote for a dismissal of the disciplinary proceeding instituted by The State Bar against him. To hold otherwise would require us to give effect to a determination of The State Bar adverse to that of the superior court based upon the same factual situation. While it may be permissible for us to so decide, I am of the view that since the superior court is the tribunal created by the Constitution for the determination of issues of fact in judicial proceedings, its determination of such issues should be accepted by this court in preference to that of an administrative agency which is not invested with judicial power. The superior court in purging petitioner of contempt, in effect, determined that petitioner did not intend to deceive or mislead the court when he failed to disclose that he had destroyed the undated assignment. Since this is the only issue upon which the majority opinion predicates its conclusion that petitioner should be disciplined, I am compelled to dissent therefrom.

In my opinion the proceeding against the petitioner should be dismissed.

EDMONDS, Justice.

My associates state that the petitioner's destruction of a document and his subsequent failure to disclose such fact to the court justifies disciplinary action. The local administrative committee recommended that the petitioner be suspended from the practice of law for the period of one year, one member joining in the findings with the statement that, in his opinion, "a greater measure of discipline is required." The Board of Governors recommended suspension for three months. Considering

all of the circumstances of the case, in my opinion that conclusion, although characterized as too severe by one of the eleven governors voting, goes as far on the side of leniency as the evidence warrants if any discipline is to be imposed.




28 Cal.2d 357

## BALLARD v. PACIFIC GREYHOUND LINES.

L. A. 19598.

Supreme Court of California, in Bank.

June 18, 1946.

**1. Appeal and error ⇐977(3)**
**New trial ⇐6**

The granting of motion for new trial is within trial judge's discretion, the exercise of which will not be interfered with by an appellate court unless an abuse of discretion clearly appears.

**2. Appeal and error ⇐854(6), 933(1)**

All presumptions are in favor of order granting new trial, which will be affirmed if sustainable on any ground.

**3. New trial ⇐71**

The trial court in considering motion for new trial is not bound by a conflict in the evidence and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party.

**4. New trial ⇐71**

Where opposing inferences are deducible from uncontradicted probative facts, trial court may draw inferences opposed to the inferences accepted by the jury, and may thus resolve the conflicting inferences in favor of party moving for new trial.

**5. Appeal and error ⇐1015(1)**

An appellate court will reverse trial court's order granting a new trial for insufficiency of evidence to sustain verdict only where it can be said as matter of law that there is no substantial evidence to support a contrary verdict.

**6. Witnesses ⇐219(5)**

In personal injury action, exclusion of testimony of physician and surgeon who practiced psychiatry and to whom plaintiff submitted herself for examination, was error, notwithstanding that plaintiff did not consent to physician's testimony and that statute provides that a physician cannot testify without patient's consent as to information acquired in attending patient, where statute further provides that person bringing personal injury action is thereby deemed to have consented to admission of material testimony of physician who has treated such person. Code Civ.Proc. § 1881.

**7. Appeal and error ⇐716**

On appeal from order granting new trial for insufficiency of evidence, trial court's remarks at time of granting the new trial were pertinent to discern the respects in which the trial court deemed the verdict unjustified or unsupported.

**8. New trial ⇐71**

On motion for new trial for insufficiency of evidence in personal injury action, trial court can weigh the conflicting evidence and inferences on all the issues, including the question of the extent of the plaintiff's injuries, and can judge the credibility of the witnesses.

**9. New trial ⇐70**

On motion for new trial in personal injury action, the ground of insufficiency of evidence to justify verdict extends to quantum of the injuries as well as to the issues relating to the defendant's liability.

**10. Appeal and error ⇐933(4)**

A trial court specifying insufficiency of evidence as ground for granting motion for new trial would be deemed to have made an examination into the evidence on all of the factual issues.

**11. Appeal and error ⇐854(6)**

The statement of grounds of order granting new trial does not preclude reviewing court from considering the entire record on appeal from the order, and the review is not restricted to a consideration of the grounds mentioned in the order, and

the reviewing court must consider the entire record upon which the order was based to discover whether there was any error which would have justified the trial court in making the order, and if so, the order will be sustained although the grounds urged on the motion for new trial, with the exception of ground of insufficiency of the evidence, were not specified in the order. Code Civ.Proc. § 657.

**12. Appeal and error ⇐854(6)**

On appeal from order granting new trial, reviewing court cannot consider the ground of insufficiency of the evidence to justify the verdict unless such ground is stated in the order granting the new trial. Code Civ.Proc. § 657.

**13. Appeal and error ⇐933(4)**

Where insufficiency of evidence to justify the verdict is specified in order as the ground for granting motion for new trial, the reviewing court can conclude that the trial court was justified in granting the motion on the ground that the verdict was excessive if the record warrants such conclusion. Code Civ.Proc. § 657.

**14. New trial ⇐41(2)**

A trial court concluding that erroneous exclusion of testimony of physician examining plaintiff suing for personal injuries, resulted adversely to defendant on issue of extent of plaintiff's injuries, could grant the motion of defendant for a new trial, even though the amount of the verdict did not appear so grossly disproportionate to any reasonable view of the evidence as to raise a presumption that the verdict was based upon passion or prejudice. Code Civ.Proc. § 657.

**15. Appeal and error ⇐933(1)**

All intendments are to be indulged in by a reviewing court in support of action of trial court in passing on a motion for a new trial, and trial court's action will not be disturbed if the question of its propriety is open to debate.

**16. New trial ⇐70**

The granting of defendant bus company's motion for new trial after verdict in favor of passenger on ground of insufficiency of evidence was not abuse of discretion, where trial court concluded that erroneous exclusion of testimony of physician examining passenger resulted adversely to bus company on issue of extent of passenger's injuries, and evidence of physical facts on issue of negligence of bus driver was subject to opposing inferences, and issue of negligence was not one of law alone, and any conflict on such issue was not the sole reason for granting the motion. Code Civ.Proc. § 657.

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Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Mabel Ballard against the Pacific Greyhound Lines for injuries sustained by plaintiff when defendant's bus, in which plaintiff was a paid passenger, collided with an automoble parked on the highway. From an order granting defendant's motion for new trial after jury had returned a verdict in favor of plaintiff, the plaintiff appeals.

Order affirmed.

Prior opinion, see 163 P.2d 77.

Wm. J. McNichols and Josiah Coombs, both of Los Angeles, for appellant.

Bryce P. Gibbs and Kenneth K. Scott, both of Los Angeles, and Cooley, Crowley & Supple and Cooley, Crowley, Gaither & Dana, all of San Francisco, for respondent.

SHENK, Justice.

The plaintiff had a jury's verdict of $10,000 in an action for personal injuries claimed to have been suffered when a Pacific Greyhound bus on which she was a paid passenger overturned after striking an automobile parked on the road. The trial court granted the defendant's motion for a new trial. The order specified that it was granted on the ground of the insufficiency of the evidence to justify the verdict. The plaintiff appealed.

The bus was being operated by the defendant's employee Hobert on Highway 101 between San Francisco and San Luis Obispo. Hobert had been employed as driver by the defendant for about nine months prior to the accident and was familiar with the route. According to his testimony on

behalf of the defendant, Hobert was driving the bus south from Salinas on the morning of January 3, 1943, in fair weather. At 6:30, about an hour out of Salinas, the bus was rolling at a speed of 35 miles per hour with the lights on. As it rounded a long right curve with a slight up-grade, Hobart observed 100 feet ahead a car without lights parked at an angle on the right side of the road with the left wheels on the pavement and the left rear wheel jutting into "the middle of the roadway." The paved portion of the highway consisted of two lanes, each ten feet wide. There was no other traffic ahead or behind the bus. Because of the angle of the lights of the bus at the curve Hobert did not see the parked car until he "was too close"; he "cut to miss it, but not enough, and * * * clipped the corner of the car, knocking it off the highway." He did not attempt to use the brakes until after the collision, when he realized that both the steering gear and the air line to the brakes had been broken. The bus went out of control, climbed the embankment on the right and overturned.

[1-5] This court has recently reiterated the settled rule that the granting of a motion for a new trial rests within the discretion of the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears. All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. Mazzotta v. Los Angeles R. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party. In re Estate of Green, 25 Cal.2d 535, 542, 154 P.2d 692; Hames v. Rust, 14 Cal.2d 119, 124, 92 P.2d 1010. The only conflict may be the opposing inferences deducible from uncontradicted probative facts. In such case the trial court may draw inferences opposed to those accepted by the jury, and may thus resolve the conflicting inferences in favor of the moving party, for "It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court." Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689, 690; Malloway v. Hughes, 125 Cal.App. 573, 580, 13 P.2d 1062.

The plaintiff contends that the evidence shows as a matter of law that the defendant's driver was negligent; therefore that the court abused its discretion in granting a new trial. The contention assumes that the negligence of the driver was the only question before the trial court on the motion. The defendant had made the motion on all of the statutory grounds.

The plaintiff is a woman 59 years of age whose normal weight is 225 pounds. She was asleep at the time of the accident. The impact forced her head through a window and a piece of glass pierced her right ear lobe. The glass was removed when medical aid was rendered at San Luis Obispo. Later in Los Angeles stitches were used on the lacerated ear lobe and X-ray photographs were taken which revealed no dislocations or other bony pathology. The evidence is that the plaintiff sustained some concussion, bleeding at the nose for a period following the accident, pain and impairment to the hearing in the right ear, pain down the spine, across the shoulders, down the back, across the hips and down the right thigh. There had been strain in the ligaments of one ankle. The plaintiff complained of continuous pain, and of dizzy spells during which she would "just go over," the last one having been about a week or two prior to the trial when she was in the house alone; that such spells had occurred frequently while she was alone in the house, when, afraid of falling, she would proceed to the bathroom on hands and knees. Other than the lacerated ear lobe, ligamentous and muscle sprains to the spine and ankle, the plaintiff's injuries were entirely subjective. The degree of impairment of hearing and of any permanency in the disabilities disclosed was in conflict. It also appeared that the plaintiff while in her home had sustained burns in January, 1941, and since that time had not returned to her previous employment as janitress in a bank.

After the accident the plaintiff made frequent trips to doctors. At first the trips were daily, and then two or three times a week for a period of six months. She had been examined and treated by other doctors and specialists in addition to her attending physician, Dr. Robert S. Ward. The plaintiff was discharged by him on June 23, 1943. Thereafter she continued to consult and take treatments from others, and made three additional visits to Dr. Ward. In April, 1943, prior to discharging her, Dr. Ward sent her to a Dr. Gerty, a physician and surgeon, who practiced psychiatry at Pasadena. Although the plaintiff submitted to examination by Dr. Alvin Gerty, she maintained at the trial that she went to him "by mistake," under the belief that she was being sent to a specialist who was to examine the bones in her head.

Dr. Alvin Gerty was called as a witness by the defendant. After giving qualifying evidence, he testified that at Dr. Ward's request he examined the plaintiff pursuant to an appointment made by her and that he gave her information and advice. The plaintiff invoked section 1881 of the Code of Civil Procedure providing that a licensed physician "can not, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient * * *." The defendant sought application of the proviso of the section which reads, "that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify * * *." On the plaintiff's refusal to give her consent to the further examination of the witness, the latter was excused by the court from testifying concerning his examination of the plaintiff and the advice given to her.

[6, 7] The parties do not contend that the ruling was not error. Phillips v. Powell, 210 Cal. 39, 42, 290 P. 441. A supplemental transcript was filed by the plaintiff containing a portion only of the proceedings on the motion for new trial. It shows that at the time of granting the motion the trial court conceded error in its ruling excluding the testimony of Dr. Gerty. The entire record on the hearing of the motion is not before us. It includes only the remarks of the court and counsel concerning the error committted in excluding Dr. Gerty's testimony. The remarks of the court at the time of granting the motion, as shown by the portion of the record submitted, may be pertinent to discern the respects in which the court deemed the verdict unjustified or unsupported. Krebs v. Los Angeles Ry. Corp., 7 Cal.2d 549, 61 P.2d 931.

[8-10] It was the province of the trial court on the motion to weigh the conflicting evidence and inferences on all the issues, including the question of the extent of the plaintiff's injuries, and to judge the credibility of the witnesses. The ground of insufficiency of the evidence to justify the verdict extends to the quantum of the injuries, as well as to the issues relating to the defendant's liability. See Phillips v. Powell, supra, 210 Cal. 39, 42, 290 P. 441. It is necessarily inclusive, and the specification by the court of the ground of insufficiency indicates an examination into the evidence on all of the factual issues.

[11-13] It has long been the settled rule in this state that the statement of the ground of the order granting a new trial does not preclude the reviewing court from considering the entire record on the appeal from the order. The review is not restricted to a consideration of the ground mentioned in the order. In fact it is the duty of the court on appeal to consider the entire record upon which the order was based to discover whether there is any error which would have justified the trial court in making the order, and if so the order will be sustained although the grounds urged on the motion (with the exception of the ground of insufficiency of the evidence) were not specified in the order. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 129, 138 P. 712; Weisser v. Southern Pacific R. Co., 148 Cal. 426, 428, 83 P. 439, 7 Ann.Cas. 639; Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L.R.A. 124; Scott v. Renz, 67 Cal.App.2d 428, 432,

154 P.2d 738. Since 1919 the reviewing court may not consider the ground of insufficiency of the evidence to justify the verdict unless it is stated in the order. Code Civ.Proc. § 657. And where that ground is specified in the order there is no doubt that the reviewing court may conclude that the trial court was justified in granting the motion on the ground that the verdict was excessive, if the record warrants that conclusion. Phillips v. Powell, supra, 210 Cal. 39, 42, 290 P. 441.

[14-16] Disregarding for the moment the state of the record on the issue of the defendant's negligence, it becomes apparent from the evidence on the issue of plaintiff's injuries that the trial court felt that the excluded testimony of Dr. Gerty might have affected the jury's determination as to the extent of the injuries and the amount of damages. The prejudicial effect of the error is material in arriving at the determination of the question whether the court abused its discretion in granting a new trial. The court might have concluded that the error resulted adversely to the moving party on the issue of the extent of the plaintiff's injuries. In this connection it is not necessary that the amount of the verdict appear so grossly disproportionate to any reasonable view of the evidence as to raise a presumption that it was based upon passion or prejudice. The intendments are the same to the end that the order will not be disturbed if the question of its propriety be open to debate. Koyer v. McComber, 12 Cal.2d 175, 182, 82 P.2d 941.

Furthermore, it may not be said that the evidence of the physical facts on the issue of negligence was not subject to opposing inferences. As stated in Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 451, at page 456, 168 P. 1033, at page 1035: "It is not within the province of this court on appeal to say which of two opposing inferences, both within the bounds of reason, should have been taken by the trial court. Conflicting inferences, if reasonable, stand upon the same plane as conflicting evidence. * * * In considering the evidence upon such motion that court has power to draw inferences from the evidence opposed to those which were drawn by it upon the trial [here by the jury], provided they are not unreasonable." The record before us does not require a holding that the issue of negligence was one of law alone. See Casey v. Gritsch, 1 Cal.App.2d 206, 36 P.2d 696. In any event it does not appear that any conflict on that issue was the sole reason for the granting of the motion for new trial. There was therefore no abuse of discretion in granting the motion.

The order is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.




28 Cal.2d 389

## SWEELEY v. SWEELEY.

L. A. 19320.

Supreme Court of California, In Bank.

June 21, 1946.

Rehearing Denied July 18, 1946.

1. Divorce ⇐214(3), 226

On the wife's application for an award of temporary support and suit money, there must be a prima facie showing of the existence of the marriage, the needs of the wife, and the ability of the husband to pay. Civ.Code, § 137.

2. Divorce ⇐215

The circumstances of the parties, including the property which each possesses, their respective incomes and earning abilities, as well as their needs, are to be considered in determining necessity and amount of temporary alimony. Civ.Code, § 137.

3. Divorce ⇐209, 211, 221, 223

The object of the codal provision granting court discretionary power to require husband to pay as alimony any money necessary to enable wife to support herself when a divorce action is pending and to prosecute or defend the action, is to enable the wife to properly present her cause of action or defense and, if she can do this,

because she has a sufficient separate estate, or has custody and management of a sufficient portion of the community property, the court would not exercise a proper discretion in directing the husband to defray her expenses in the action. Civ.Code, § 137.

4. Divorce ⇐212, 224

Court may award temporary alimony and suit money where wife has property which produces no income and which is of a value comparatively slight in the light of the husband's circumstances, rather than require the wife to exhaust her capital in order to live and to prosecute or defend the divorce action. Civ.Code, § 137.

5. Divorce ⇐211, 223, 286

Trial court has a substantial range of discretion in determining whether support and suit money pendente lite are necessary for wife and the amount found necessary will not be disturbed on appeal unless an abuse of discretion clearly appears.

6. Divorce ⇐211

Where wife had temporary control of $5,800 cash and some furniture, all of which was husband's separate property, order requiring husband to pay wife $225 for support of herself and child from husband's monthly net income of $460.45, and at same time leaving wife in possession of the $5,800 which wife could use for any desired purpose, was disproportionate to the needs and assets of the parties and was an abuse of discretion. Civ.Code, § 137.

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Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Merle E. Sweeley against Ruth M. Sweeley for a divorce. From an order directing plaintiff to pay defendant a specified sum monthly for the support of herself and the parties' minor child pending trial, plaintiff appeals.

Order reversed.

Prior opinion, see 163 P.2d 469.

E. O. Leake and J. J. Leake, both of Los Angeles, for appellant.

Zagon, Aaron & Sandler, Ray Sandler and Robert Kingsley, all of Los Angeles, for respondent.

SCHAUER, Justice.

Plaintiff husband appeals from an order which directs him to pay $225 monthly for the support of defendant wife and the minor child of the parties pending litigation of an action for divorce instituted by plaintiff. The order also awards custody of the child to defendant and provides that "Both parties are restrained from disposing of any *community* property, real or personal, or cash pending trial, except that defendant may pay her own counsel fees out of the community funds and plaintiff may make deposits and withdrawals in the normal course of business and for his normal living expenses." (Italics added.) A comparatively substantial part of the property acquired by the parties during their marriage consists of cash and furniture which are in the possession and under the control of the wife in Illinois and which, upon the record before us, appear to be the *separate property of the husband.* This property, therefore, is not covered by the order appealed from. For the reasons hereinafter delineated such order must be reversed.

[1] The general principles which govern the propriety of an award of temporary support and suit money are well established. Section 137 of the Civil Code provides that "When an action for divorce is pending, the court may, *in its discretion,* require the husband * * * to pay as alimony any money *necessary* to enable the wife * * * to support herself and her children * * * or to prosecute or defend the action." (Italics added.) On the wife's application for such an award there must be a prima facie showing of three things: The existence of the marriage, the needs of the wife, and the ability of the husband to pay. (Locke Paddon v. Locke Paddon (1924), 194 Cal. 73, 81, 227 P. 715; Arnold v. Arnold (1932), 215 Cal. 613, 615, 12 P.2d 435; 1 Cal.Jur. § 14, p. 958.)

[2, 3] The circumstances of the parties, including the property which each possesses, their respective incomes and earning abilities, as well as their needs, are to be considered in determining the necessity and amout of temporary alimony. (Falk v. Falk (1941), 48 Cal.App.2d 780, 788, 120 P.2d 724;

Howton v. Howton (1942), 51 Cal.App.2d 323, 325, 124 P.2d 837; 1 Cal.Jur. §§ 30–32, pp. 977–980.) As stated in Mudd v. Mudd (1893), 98 Cal. 320, 322, 33 P. 114, 115, the object of section 137 of the Civil Code "is to enable the wife to properly present her cause of action or defense to the court, and, if she can do this, either by reason of the fact that she has a sufficient separate estate, or has the custody and management of a sufficient portion of the community property, the court would not exercise a proper discretion in directing the husband to defray her expenses in the action." To the same effect is Turner v. Turner (1889), 80 Cal. 141, 144, 22 P. 72

[4] But the wife's possession of property is only one circumstance to be considered in determining the necessity of the award; the court may award temporary alimony and suit money where the wife has property which produces no income and which is of a value comparatively small in the light of the husband's circumstances, rather than require the wife to exhaust her capital in order to live and to prosecute or defend the divorce action. (Westphal v. Westphal (1932), 122 Cal.App. 379, 10 P.2d 119, and cases there digested; 1 Cal.Jur. § 21, p. 968.)

The following evidence relevant to determination of the necessity of the award was before the trial court in this case: Prior to their separation in June, 1942, plaintiff and defendant lived in Chicago, Illinois, in a home which, with its furnishings, was purchased with plaintiff's earnings. Plaintiff is a physician and surgeon. During the time he lived in Chicago with defendant he earned from $17,000 to $20,000 yearly. In December, 1942, plaintiff left Chicago. He established residence in California and in October, 1943, started to practice here. In October, 1944, he instituted this action for divorce on the ground of extreme cruelty.

The wife and the minor child of the parties (a boy 9 years old) continue to reside in Chicago. Prior to the commencement of this action the wife sold first the home and then a portion of the furnishings. She deposited the proceeds of the sales, $7,223, in an Illinois bank in her name. She used part of this sum for necessary expenses. Fifty-eight hundred dollars remains on deposit in her name in Illinois. The unsold furniture is stored in Chicago under her name. Illinois is not a community property state. (II Vernier, American Family Laws, pp. 219, 239; III id., p. 353.) Obviously since the $5,800 and the furniture are the transmutation of the husband's earnings in Illinois they cannot be community property. (In re Estate of Thornton (1934), 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343.) Nothing to the contrary appearing we must assume, for the purpose of this appeal only, that they are separate property of the husband, who has given the wife temporary possession and control thereof. Defendant assertedly has no income except what she receives from plaintiff, no property except an automobile, and is physically unable to work. According to her affidavit the necessary monthly expenses of defendant and the child are $359.50.

Plaintiff's total business, cash and charge, during the eleven months immediately preceding the hearing was $16,596; his total cash receipts were $10,872; his total business expenses were $5,807. His average monthly net cash receipts were, therefore, $460.45. His assets consist of professional equipment of a value of about $2,000, an automobile, about $100 cash, accounts receivable in an amount which does not exactly appear, an insurance policy of $25,000 face amount on which he pays premiums of $101 monthly, and his interest in the bank accounts and furniture in Illinois. According to his affidavit his necessary monthly expenses are $331.

From the testimony of the husband the trial court was justified in concluding that plaintiff himself was not entirely certain whether the better course pending trial of the divorce action would be to preserve the $5,800 of which the wife has possession intact for the benefit of the child or to require defendant to use it for the support of herself and the child. Plaintiff's testimony in this regard is as follows: "Q. Now, Doctor, isn't it a fact that you told Mrs. Sweeley, or her attorney, that this money that she got from the house, that it could be set aside for the boy? A. That was talked, but never was anything done

about it. * * * No agreement was ever made on that. * * * I didn't say she could keep it, I said it should be set aside for him and without her having anything to do with it. * * * Q. You are willing that your wife may use so much of this money on hand as may be necessary * * * for support at the present time? A. Yes. Q. You would rather have her do that than set it aside for the boy? * * * A. It should be set aside for him. Q. And if that is done, then you will have to contribute to her support, will you not? A. Pardon me, she has already used part of this, and I would rather make provision for the care of my son later on than to set aside what might be left of the original amount at the present time." The only testimony of defendant wife in this connection is as follows: "Q. Did you ever have any discussion with Dr. Sweeley about this money, that is, the proceeds of the house, as to what was to be done with it? * * * A. I did not directly, no. Q. Was it ever discussed in your presence? A. Not in my presence."

At the close of the hearing the trial court informally stated (but the order actually entered in writing in the minutes, hereinabove quoted, is materially different from this statement), "Both parties are restrained from disposing of any of the property, either real or personal or community, in their possession, pending the time of trial, with the following exceptions: The defendant is directed to pay reasonable attorneys' fees to her own counsel out of the funds in her possession. The plaintiff may make deposits and withdrawals in the normal course of business and for his living expenses out of the funds in his possession." From this informal oral statement it would appear that the trial court was then of the tentative view that the $5,800 should be preserved, except for payment of the wife's counsel fees necessary to her defense of the action. The contentions of the parties on this appeal seem to be based on the assumption that the effective order as entered coincides with such tentative oral statement. But the order actually entered and appealed from is not to that effect. It restrains defendant from disposing *only of community property* "except that defendant may pay her own counsel fees out of the community funds." So far as the record shows, defendant has no community funds. The effect of the order is to require plaintiff to pay $225 monthly for the support of defendant and the child out of his monthly net cash receipts of $460.45 (he is restrained from resorting to his relatively meagre community assets other than cash income) and at the same time to leave defendant in possession and control of $5,800 which, so far as appears, is or was the separate property of plaintiff and which defendant is left free to use for any purpose she chooses.

[5, 6] It is true that the trial court has a substantial range of discretion in determining whether support and suit money pendente lite are necessary and that the amount found necessary will not be disturbed on appeal unless an abuse of discretion clearly appears (Comey v. Comey (1937), 8 Cal.2d 453, 66 P.2d 148; Falk v. Falk (1941), supra, 48 Cal.App.2d 780, 788, 120 P.2d 724; 1 Cal.Jur. § 19, p. 964) but where, as here, it does clearly appear that the trial court, either from a misapprehension of the effect of its order (as seems probable), or otherwise, requires payments which are not shown to be necessary and which, in view of all the circumstances, including the substantial amount of cash in the possession and control of defendant, are manifestly disproportionate to the needs and assets of the respective parties, the order cannot be sustained as an exercise of sound judicial discretion. (Gossman v. Gossman (1942), 52 Cal.App.2d 184, 194, 195, 126 P.2d 178.)

For the reasons stated the order appealed from is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

## MONROE v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

L. A. 19622.

Supreme Court of California, in Bank.

June 25, 1946.

Rehearing Denied July 24, 1946.

1. Husband and wife ⇐299(1)

A separate maintenance decree does not end the marriage, and therefore does not end the obligation to support, but only regulates the extent of that support. Civ. Code, § 155.

2. Husband and wife ⇐299(3)

A decree of separate maintenance can be modified on a showing of changed circumstances for a period for which support is granted, the amount thereof, or for a period not covered by original decree. Civ. Code, § 137.

3. Divorce ⇐234, 245(1)
Husband and wife ⇐299(3)

Where a divorce has been granted and the marital relation has ceased to exist, the court's jurisdiction over matters of support is exhausted, unless court has reserved it in an authorized manner, but in an action for separate maintenance, a court does not need to reserve jurisdiction to modify at the time it renders decree of separate maintenance, since its jurisdiction continues as long as the marital relationship continues. Civ.Code, §§ 137, 139, 155.

4. Husband and wife ⇐299(1)

In an action for separate maintenance, a court may give the wife an allowance for a limited period only. Civ.Code, § 155.

5. Husband and wife ⇐299(3)

A superior court which had ordered husband to pay wife a separate maintenance of $250 a month for 27 months, without expressly reserving jurisdiction to make further orders as to wife's support, had jurisdiction though decree had become final, to pass on wife's application for further allowance for support on ground that circumstances on which decree was based had materially changed. Civ.Code, §§ 137, 155.

CARTER and SCHAUER, JJ., dissenting.

Proceeding for writ of prohibition by Edwin Rue Monroe, petitioner, against the Superior Court of Los Angeles County and John Beardsley, Judge thereof, respondents, to restrain respondents from modifying a decree for separate maintenance.

Writ denied.

Prior opinion, 163 P.2d 460.

Reynolds & Painter and Louis Miller, all of Los Angeles, for petitioner.

J. H. O'Connor, County Counsel, Douglas De Coster, Deputy County Counsel, and Hahn, Ross & Goldstone, all of Los Angeles, for respondents.

TRAYNOR, Justice.

A decree of separate maintenance ordered petitioner to pay his wife, for 27 months, $250 per month for her support and $50 per month for the support of their child. The decree provided that at the end of that period the payments for the support of the child should be increased to $100 per month. The court expressly reserved jurisdiction to make further orders regarding the support of the child, but made no such reservation as to the support of the wife. Petitioner complied with the decree. After the expiration of the 27 months petitioner's wife applied for a modification of the decree and a further allowance for her support, alleging that the circumstances upon which the decree was based had materially changed. Petitioner seeks a writ of prohibition to restrain respondent court from proceeding in the matter on the ground that it lacks jurisdiction to modify the decree.

A writ of prohibition can issue in this case only if, despite changed circumstances, the trial court lacks jurisdiction to grant petitioner's wife a further allowance for her support. Hence, the question is not what changes in circumstances would justify the court in modifying its decree, assuming that it has the power to do so, but whether it has that power, assuming a sufficient change in circumstances.

[1, 2] The right to support arises out of the marriage relationship. Civ.Code, § 155. A separate maintenance decree does not end the marriage, and therefore does not

end the obligation to support; it only regulates the extent of that support. It is settled that a decree of separate maintenance can be modified upon a showing of changed circumstances. Civ.Code, § 137; O'Toole v. O'Toole, 215 Cal. 441, 443, 10 P.2d 461; Smith v. Smith, 113 Cal. 268, 271, 45 P. 332; Booth v. Booth, 100 Cal.App. 28, 32, 279 P. 458; Parker v. Parker, 74 Cal.App. 646, 654, 241 P. 581, and cases cited in 42 C.J.S., Husband and Wife, § 626, Note 62. This rule is applicable to the period for which support is granted as well as to the amount thereof. Just as it may become necessary to increase the amount of support for a period of special needs, so it may become necessary to grant support for a period not covered by the original decree.

Petitioner contends that section 137 of the Civil Code, which authorizes the court to modify its orders in a separate maintenance action, should be given a construction comparable to that of section 139 with respect to alimony in the case of a divorce. He relies upon Long v. Long, 17 Cal.2d 409, 110 P.2d 383, and Tolle v. Superior Court, 10 Cal.2d 95, 73 P.2d 607, which held that the court has no power to modify a decree of divorce by granting a wife support after the decree has become final and the period has elapsed during which payments were to be made, unless the court reserved the power to do so. In Tolle v. Superior Court, supra, and Long v. Long, supra, the parties were no longer husband and wife when the attempt was made to have the court modify its decree. In contrast, section 137 presupposes that the parties remain married.

[3] When a divorce has been granted and the marital relation has ceased to exist, the jurisdiction that the court had over matters of support is exhausted unless the court has reserved it in an authorized manner. In the present case, however, there was no need for the court to reserve jurisdiction at the time it rendered its decree, for its jurisdiction would continue as long as the marital relationship continued. The order that gave a 27-month allowance to petitioner's wife did not give the court any jurisdiction over that allowance that it would not otherwise have had. Nor did it deprive the court of any jurisdiction that it otherwise would have had, for the court cannot divest itself of such jurisdiction while the parties remain married. So long as they are married, the court cannot refuse to consider whether the husband should be required to support his wife, for it not only has the power to grant an allowance to the wife for her support, but it may also have the duty to do so under certain circumstances. In Baumgarten v. Baumgarten, 107 N.J.Eq. 274, 151 A. 606, the wife was awarded $5,000 in a lump sum for her separate maintenance in a decree that went even farther than the one in the present case, since it expressly stated that payment of that sum would permanently discharge the husband's obligation. Two years later the court nevertheless held that upon a showing of changed circumstances the wife would be entitled to a further allowance for her support. "The court cannot divest itself of the authority and the duty to make such further orders touching the support and maintenance of the wife as may be just and equitable. The order of March 21, 1928, should be interpreted to mean that the payment of the gross sum of $5,000 should satisfy the claims of the complainant against the defendant for maintenance only until equity and justice require the payment of additional sums." 107 N.J. Eq. 274, 280, 151 A. 606, 609.

[4, 5] Since the court has power under certain circumstances to deny any maintenance to the wife, it may give her an allowance for a limited period only. The court determined in the present case that given the circumstances in which the parties found themselves when the decree was rendered, petitioner's wife should be given an allowance for 27 months only. When the decree was rendered, petitioner's wife apparently had no objection to losing her allowance at the end of the 27 months, for she did not appeal from the decree. She does not now contend, however, that the court should then have given her an allowance for a longer period. She merely contends that circumstances have so changed

that the court should now give her another allowance. In Binkow v. Binkow, 298 Mich. 609, 299 N.W. 734, the trial court granted separate maintenance to the wife for a period of two years. After that period elapsed the wife sought a further allowance for her support. The Supreme Court of Michigan denied her such allowance on the ground that she had made no showing of changed circumstances. The court may similarly conclude in the present case that petitioner's wife is not entitled to the modification that she seeks. Petitioner cannot prevent the court, however, from passing upon that question.

Petitioner contends that Erkenbrach v. Erkenbrach, 96 N.Y. 456, and Koehl v. Koehl, 92 Misc. 579, 156 N.Y.S. 234, support his position. Those cases are distinguishable, however, for they are concerned only with a question of statutory construction, and the statute involved, unlike section 137 of the Civil Code, did not allow the decree to be modified under any circumstances. Moreover, those cases involved decrees of limited divorce, whereas the present case is one of separate maintenance. It is not necessary to determine here in what respects an action for separate maintenance differs from actions for limited divorce, divorce from bed and board or judicial separation, as they are variously known (see 3 Nelson, Divorce and Annulment, 2d Ed., 1945, § 32.05) for, as it exists in California, it differs from them in one respect that makes the New York cases inapplicable. A limited divorce places the relationship of the parties beyond the reach of either of them alone. They are still married in the sense that neither may remarry, but they are no longer married in the sense that either can give the other the choice of resuming the marital relation or being guilty of desertion. As between themselves the parties are in the same position as they are after a decree of absolute divorce. The California law makes no provision for such limited divorces. It was expressly so held in McMullin v. McMullin, 123 Cal. 653, 56 P. 554, and although Grant v. Grant, 68 Cal.App. 23, 228 P. 412, contains a dictum to the contrary, the question was definitely settled in Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351. In that case the husband obtained a Nevada divorce some ten years after his wife had secured a decree of separate maintenance in this state. The husband then moved to stop his payments under that decree. The wife countered with an attack upon the divorce and the contention that the maintenance decree had established that not she but her husband was at fault. This court held that, although that decree established she was the innocent party when it was rendered, her attack upon the divorce must fail, for the evidence disclosed that the husband may have made a subsequent offer in good faith to fulfill his marital obligations and that she may thereafter have given him a cause of action for divorce. It is clear that had the decree that she secured been a decree of limited divorce, a subsequent offer to resume marital relations could have no effect, at least not until it was accepted.

Petitioner's application for a writ of prohibition is denied and the alternative writ heretofore issued is discharged.

GIBSON, C. J., and SHENK, EDMONDS, and SPENCE, JJ., concurred.

CARTER Justice.

I dissent. This proceeding in prohibition tests the question whether a trial court has jurisdiction to enter in a separate maintenance action a decree which finally and conclusively adjusts the property rights of the spouses and is not subject to modification upon a showing of changed circumstances.

Here the trial court entered a decree of separate maintenance which contains no reservation of jurisdiction as to property rights or otherwise, and which purports to be a final decree and to fully and forever settle the reciprocal rights and obligations of the parties. It makes provision for support of a minor child; it awards to the wife as her sole and separate property the family home, with all furniture, furnishings, and equipment therein; it awards to her the specific amount of $250 a month to be paid by the husband for twenty-seven

months commencing on a specified date, and certain insurance which is to be kept in force by the husband for her benefit and that of the child; it awards the husband, as his sole and separate property, a certain automobile, bank funds, tax bonds, and war savings bonds.

Were such a decree entered in a divorce action, it would be final and the writ of prohibition would lie to restrain a hearing in modification proceedings. Tolle v. Superior Court, 10 Cal.2d 95, 73 P.2d 607. See, also, Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1, and review of authority therein; Long v. Long, 17 Cal.2d 409, 110 P.2d 383; McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257; Harlan v. Harlan, 154 Cal. 341, 98 P. 32; White v. White, 130 Cal. 597, 62 P. 1062, 80 Am.St.Rep. 150; McKay v. McKay, 125 Cal. 65, 57 P. 677; O'Brien v. O'Brien, 124 Cal. 422, 57 P. 225; Greer v. Greer, 31 Cal.App.2d 39, 87 P.2d 388. The same would be true if the parties, under similar circumstances, had voluntarily entered into a property settlement agreement which was fair and equitable at the time it was made. See 13 Cal.Jur. §§ 45, 46, pp. 846, 847. The "utmost freedom of contract respecting property exists in California between husband and wife." 13 Cal.Jur. § 45, p. 847; Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 719, 103 P. 190; Civ.Code, §§ 158, 159. It is contended, however, that in the case of a separate maintenance decree, a different rule applies, and that such a decree is always subject to modification upon a showing of changed circumstances. Many general statements of this rule may be cited. 42 C.J.S., Husband and Wife, §§ 626, 627, pp. 270 et seq.; 27 Am.Jur. § 428, p. 33; 3 Nelson on Divorce and Annulment, 2d Ed., § 32.44, p. 414; 71 A.L.R. 724; Gilcrease v. Gilcrease, 186 Okl. 451, 98 P.2d 906, 127 A.L.R. 741.

In California section 137 of the Civil Code provides that "The court, in granting the husband or wife permanent support and maintenance of himself or herself, * * * shall make the same disposition of the community property and of the homestead, if any, as would have been made if the marriage had been dissolved * * *. The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court."

A similar section with respect to divorce (Civ.Code, § 139) provides that "Where a divorce is granted for an offense of the husband, the court may compel him to * * * make such suitable allowance to the wife for her support, during her life or for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects."

Since the latter section has been construed to permit the entry in a divorce action of a final adjudication of property rights (cases above cited), it would seem by analogy that section 137 should be subjected to a similar construction. No California case has been found which expressly holds otherwise, but there are a number of cases in which modifications have been approved, and in them, as well as in the California text (1 Cal.Jur. § 87, pp. 1037, 1038), there are general statements to the effect that separate maintenance decrees may be modified upon a proper showing. In none of these cases is the question directly presented or is it expressly declared that the court lacks *jurisdiction* to enter a final decree, which is not subject to modification, in a separate maintenance suit.

In O'Toole v. O'Toole, 215 Cal. 441, 10 P.2d 461, a monthly allowance was decreed "until the further order of court," and under this reservation of jurisdiction, proceedings were entertained for the purpose of determining whether changed circumstances warranted a modification. Booth v. Booth, 100 Cal.App. 28, 279 P. 458, is an appeal from an original decree, as is Parker v. Parker, 74 Cal.App. 646, 241 P. 581. In Smith v. Smith, 113 Cal. 268, 45 P. 332, a modification was denied.

One theory advanced in support of the position that the court is powerless to make a final adjudication in a separate maintenance suit is that responsibility for support

of the wife rests upon the husband so long as the marital status endures and, as a matter of public policy, no termination of her allowance should be countenanced which might leave her indigent and dependent upon the state for support. This theory, however, ignores entirely the rights of husband and wife who have separated, to settle their property rights and obligations by contract. Furthermore, so far as the possibility of a helpless spouse being thrown upon the state for support is concerned, there is little difference between termination of an allowance by final decree of separate maintenance and termination by final decree of divorce. In both cases the right to support arose out of the marriage obligation (Civ.Code, § 155), and is enforcible to the full extent of that obligation as adjudicated by the court.

In other words, the right to support is not measured by the continuance of the marital status. It is but an incident of that status and may be settled or litigated independent of it. The view that so long as the parties are married, the court is powerless to finally adjudicate the right to support, gives rise to the correlative view that once the marriage has been severed by divorce, the right to support ceases even though it may not have been litigated in the divorce proceeding. The evil and injustice which result from adherence to this view under present social conditions are shown in the dissenting opinion of Mr. Justice Schauer in the recent case of Crouch v. Crouch, 28 Cal.2d 243, 169 P.2d 897, in which I concurred. See, also, concurring opinion in DeYoung v. DeYoung, 27 Cal.2d 521, 527, 165 P.2d 457. The only logical conclusions, in my opinion, is that the right to support, which is an incident to the marriage relation, may be litigated finally and conclusively either during the existence of the marriage or after it has been severed; that sections 137 and 139 of the Civil Code are analogous and should be similarly construed; that under such a construction, the decree here involved must be held to be final; and that writ of prohibition will lie.

SCHAUER, J., concurred.

75 Cal.App.2d 246

## PEOPLE v. WOODS.

Cr. 2401.

District Court of Appeal, First District, Division 1, California.
July 3, 1946.

1. Criminal law ⇐1130(6)

It is improper to raise new points in closing brief.

2. Rape ⇐36

In prosecution for assault with intent to commit rape, intent of assault may be determined from inferences drawn from facts and circumstances.

3. Criminal law ⇐254

A finding of intent to commit rape, implied in trial court's pronouncement of defendant's guilt of assault with intent to commit rape, is the same as jury's finding.

4. Criminal law ⇐1159(4)

An appellate court does not reweigh credibility of witnesses' testimony, unless it involves purely law question. Code Civ. Proc. §§ 1847, 2061.

5. Criminal law ⇐260(11)

Appraisal of weight of evidence is exclusively province of trial court when jury is waived.

6. Criminal law ⇐558

The trier of facts, determining that witness' uncontradicted testimony is false, is not required to accept it as true.

7. Criminal law ⇐260(11), 1159(4)

The jury, or trial court, when jury is waived, is exclusive judge of witnesses' credibility and value and effect of evidence presented, regardless of appellate court members' individual opinions as to credibility and weight of evidence. Code Civ.Proc. §§ 1847, 2061.

8. Criminal law ⇐553

In prosecution for assault with intent to commit rape, trial court was authorized to reject defendant's version of affair, accept complaining witness' testimony and other evidence of prosecution as true, and

draw inference of defendant's guilt therefrom. Code Civ.Proc. §§ 1847, 2061.

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Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Willie Woods was convicted of assault with intent to commit rape, and he appeals.

Affirmed.

Alexander Mooslin, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., Carl W. Wynkoop, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Edmund J. Dunning, Deputy Dist. Atty., both of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment of conviction of defendant of an assault with intent to commit rape as charged in the information. The defendant was tried by the court sitting without a jury. No motion for a new trial was presented.

In the early morning hours of August 27, 1945, the complainant was "running down the street from taking my girl friend home. * * * All at once I heard a fast click of heels behind me, and I was grabbed from behind" and turned around. "Well, I said 'No.' And he said 'Yes.' And then he hit me in the eye and threw me down. * * * Then he was on top of me, and he told me if I screamed once more, he'd cut me to pieces." Several times defendant reached for his pocket, pulled the complainant's dress up and made remarks, from which the trial court was justified in drawing an inference that the assault was with intent to commit rape. About this time complainant's boy friend appeared on the scene whereupon defendant jumped up and ran away. The boy friend did not follow, but complainant explained that she told the boy friend to leave him alone; "he had a knife." At a later date the complainant recognized the defendant on the street and his arrest followed. There is some evidence that complainant and her boy friend had been celebrating complainant's birthday in inns, restaurants and bars during the evening. Complainant testified that she was not drunk but "high all through the night."

[1] No errors of law are raised and none have been discovered in the reading of the transcript. In the opening brief the appeal is based upon the insufficiency of the evidence generally. In appellant's reply brief two new points are urged, namely, that there is no evidence that the complaining witness was not the wife of appellant, and that there was no intent proved in relation to the purpose of the assault. In the closing brief appellant states: "Assuming that all of the testimony as set forth in the Reporter's Transcript be true, what crime was involved? Answer: Simple assault at the most." Although it is improper to raise new points in a closing brief, in view of the general claim of the insufficiency of the evidence in the opening brief, the entire transcript has been examined. The evidence shows that defendant testified that he was married, the father of a child and the expectant father of another. Defendant's wife was not living in defendant's home, but "with her mother for her condition," and during the trial the wife was in the court room.

[2-8] The intent of the assault may be determined from the inferences that may be drawn from facts and circumstances. The implied finding of intent contained in the pronouncement of guilt by the court is the same as a jury's finding. People v. Robinson, 49 Cal.App.2d 576, 122 P.2d 77. An appellate court does not reweigh the credibility of witnesses' testimony unless it involves a question purely of law. Code Civ. Proc. §§ 1847, 2061. Appraising the weight of the evidence is exclusively the province of the trial court. People v. Sarazzawski, 27 Cal.2d 7, 15, 161 P.2d 934. The trier of the facts is not required to accept the testimony of a witness as true though it stands uncontradicted where the trier of the facts determines that such testimony is false. Van Der Veer v. Winegard, 41 Cal. App.2d 518, 107 P.2d 97. Irrespective of the individual opinion of the members of an appellate court relative to the credibility and weight of the evidence, the jury, or as in this case the trial court, when a jury is

waived, is the exclusive judge of the credibility of witnesses (Code Civ.Proc. § 1847) and of the value and effect of the evidence presented. (Code Civ.Proc. § 2061.) It necessarily follows that the trial court in this case was authorized, if it conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject appellant's version of the affair and accept as true the testimony of the complaining witness and the other evidence of the prosecution, and therefrom to draw an inference of appellant's guilt." People v. Robinson, supra, 49 Cal.App.2d at page 579, 122 P.2d at page 79.

The judgment is affirmed.

PETERS, P. J., and SCHOTTKY, Justice pro tem., concur.




75 Cal.App.2d 206

## TITENSOR v. TITENSOR.

Civ. 15185.

District Court of Appeal, Second District, Division 1, California.

July 1, 1946.

1. Divorce ⇐172

Under the rule that parties can litigate to judgment the same thing but once, after a divorce suit has terminated in favor of either plaintiff or defendant, no second suit can be brought to try anew anything within scope of first one, whether in fact it was considered therein or not.

2. Divorce ⇐172

Whether prior judgment in a domestic relations action constitutes a bar to a subsequent suit does not depend upon difference in relief sought in two actions, but upon whether the same matter put in issue in second action between the same parties was actually in issue in the first and adjudicated.

3. Divorce ⇐124

Testimony, in support of wife's cross-complaint filed in husband's action for divorce, that witnesses had observed husband under the influence of liquor "a great many times" and "on sundry occasions", was not sufficient to authorize an inference that such act occurred after entry of judgment in wife's prior action for divorce against husband, and therefore was not adjudicated.

4. Divorce ⇐172

Where record disclosed that acts of cruelty alleged in wife's cross-complaint and testified to at the trial were adjudicated in wife's prior action for divorce in which a judgment was entered for husband, husband's defense of res judicata should have been sustained.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Frederick Earl Titensor against Jane Titensor for divorce, wherein defendant cross-complained. From a judgment awarding an interlocutory decree of divorce to defendant on the cross-complaint and denying a divorce to plaintiff, plaintiff appeals.

Reversed.

Perry F. Backus, of Los Angeles, for appellant.

Mildred Gilmore, of Los Angeles, for respondent.

YORK, Presiding Justice.

Plaintiff husband filed the instant action for divorce on February 26, 1945, grounded on the desertion of defendant wife as of November 23, 1943. Among other things the complaint herein alleges that on November 30, 1943, defendant wife "wrongfully" commenced an action for divorce against said plaintiff on the ground of cruelty, being suit numbered D-249,656 (hereinafter referred to as the first action); that on or about December 8, 1944, the trial court rendered its judgment in said first action denying a divorce to said wife, which judgment has never been ap-

pealed from, vacated, modified or set aside, and is now final; that in said first action the court found that the wife separated from the husband about November 23, 1943, and from then up to and including November 23, 1944, she remained so separated from said husband, against his will and without his consent.

In her answer filed herein, defendant denied that she "wrongfully" commenced the first action; admitted that it was commenced and tried, and alleged that all the facts were not placed before the court as to the alleged cruelty of said husband. Thereafter, having obtained leave therefor, defendant wife filed her cross-complaint herein, in which she alleged a course of cruel treatment inflicted upon her by plaintiff husband during the year 1943, as a result of which, coupled with his repeated threats against her life, she left the family home on November 23, 1943; that by such conduct, plaintiff deserted defendant, "still continues to desert and abandon her, and to live apart from her without just cause and without her consent." To his answer to said cross-complaint, plaintiff husband attached, as Exhibit A, a copy of the findings of fact and conclusions of law made in the first action, and pleaded the judgment rendered therein as res judicata to the matters alleged in the said cross-complaint.

The trial court found herein that "plaintiff and cross-defendant inflicted upon defendant and cross-complainant a course of cruelty; that he drank excessively; that when under the influence of alcohol he became abusive and made threats against her life, and further that he drank to such an extent that he was arrested for driving an automobile while under the influence of alcohol in the City of Glendale; that because of such course of conduct defendant and cross-complainant was forced to leave the family home."

From that portion of the judgment which was thereafter entered awarding an interlocutory decree of divorce to defendant and cross-complainant and denying a divorce to him, plaintiff prosecutes this appeal.

It is here urged (1) that the decree in the first action is res judicata and a bar to respondent's cross-complaint charging cruelty in the instant action; (2) that the findings do not support the judgment.

The court in the first action found substantially as follows: That wife separated from husband four times prior to November 23, 1943, after each of which they became reconciled, resumed marital relations and condoned past offenses of either or both; that on November 23, 1943, wife again separated from husband and has remained separate and apart from him ever since, against his will and without his consent, and without any just or sufficient cause or reason; that husband did not periodically or at all, become intoxicated, nor did he become intoxicated and remain so for one or two days or at all; that husband did not on December 4, 1938, or at any time, violently strike wife or assault her, either as alleged in her amended complaint or otherwise; that any arguments or quarrels had by the parties were caused as much by wife as by husband; that husband was not at any time sullen or morose, and did not refuse to communicate with wife, as alleged, but that wife was the cause of any disagreements between them, if any; that husband did not use vile or profane language toward wife, nor did he use abusive language to or toward her, as alleged; that husband did not at any time request or urge wife to obtain a divorce, has not wanted and does not now wish a divorce from his wife; that husband has been a good provider for his wife and child at all times and has provided all the common necessaries of life, as well as many luxuries in accordance with the station in life of said parties; that wife offered no legal proof that husband was arrested and prosecuted for drunk driving, "and therefore the Court finds said allegations of her amended complaint to be untrue"; that if wife called police officers to prevent husband from abusing or striking her, as alleged, the said acts, if any, were thereafter forgiven and condoned by wife, and said "condonation has never been revoked either by the subsequent acts of" husband or by the wife; that no act

or acts of husband have caused wife mental anguish or suffering, nor have any act or acts of husband caused her to become sick in mind or body; that wife has incurred no bills for services of physicians or doctors since the marriage of said parties because of any wrongful act or acts on the part of husband; that wife voluntarily relinquished her rights in the community property of the parties, leaving the same in the control of husband, who is entitled to the management and control thereof; that wife has heretofore received sufficient moneys from husband for attorneys' fees; that each of the parties is a fit person to have the care and custody of the minor child, but because of the tender age of said child, wife shall have care and custody, with the right of reasonable visitation on the part of husband.

From said findings the court concluded: "that a divorce be denied to plaintiff (wife) and that judgment be for the defendant (husband) in accord with the foregoing findings of fact."

In connection with his first point, appellant urges that it was improper to admit evidence of any act or acts of cruelty charged against him which occurred prior to November 30, 1943, the date on which the complaint in the first action was filed, because such matters were adjudicated in the first action.

[1, 2] It is settled "that parties can litigate to judgment the same thing but once. The consequence whereof is that after a divorce suit has terminated in favor of either the plaintiff or the defendant, no second suit can be brought to try anew anything within the scope of the first one, whether in fact it was considered therein or not. Likewise, where an issue as to a cause of divorce is determined in a maintenance suit, it cannot be relitigated in a subsequent action for divorce. Thus, where, in an action by a wife for a divorce on the ground of cruelty because of her husband's alleged intimacy with another man, the court finds the alleged charge to be untrue and gives judgment against her, such judgment is res judicata and bars her from pleading the same alleged misconduct in justification of her abandonment of her husband, in his subsequent action for divorce on the ground of desertion. (Civille v. Civille, 22 Cal.App. 707 [136 P. 503].) * * * Whether or not such prior judgment constitutes a bar to a subsequent suit does not depend upon the difference in relief sought in the two actions, but upon the question whether the same matter put in issue in the second suit between the same parties was actually in issue in the first and adjudicated." 9 Cal. Jur. 751, sec. 104, and cases there cited.

In Minnich v. Minnich, 127 Cal.App. 1, 5, 15 P.2d 804, 806, it is stated: "The defense of res judicata was alleged in the answer to the complaint in appellant's action for separate maintenance, but upon her motion was stricken therefrom. The former judgment was, however, admitted in evidence in respondent's action for divorce on the ground of desertion. Appellant had denied the alleged desertion, and averred acts of cruelty by respondent as justification for leaving him. The alleged acts occurred before the entry of the judgment mentioned which determined these allegations to be untrue. Such an adjudication was conclusive between the parties when the same facts came again in issue although the same was not pleaded. (Citing authorities.)"

Respondent argues that since the parties were still married after the entry of the judgment in the first action, the trial court herein "drew an inference from the testimony that some of the acts of cruelty occurred" after the complaint in the first case was filed and after the rendition of the judgment therein; hence such acts were not within the issues of the former case.

In this regard, mention is made (1) of the act of appellant locking respondent out of the home on March 6, 1944 (during the pendency of the first action), as to which the pleadings and findings in the first action are silent; (2) as to the alleged intoxication of appellant regarding which respondent testified that this occurred on November 23, 1943, and on sundry occasions; that this testimony was corroborated by respondent's mother, who, in answer to the question, "During the time

they were married can you tell us about how many times you saw him under the influence of liquor?" testified, "No, I couldn't, Miss Gilmore, but a great many."

Respondent testified that several months after she left the family home she returned "to get the baby's crib, and the lock had been changed"; that thereafter she had a conversation with appellant with respect thereto, and "asked him if I could have a key so I could get the crib. He said, 'No, ma'am, if you want anything, ask me, and I will leave it in the garage for you"; that she made no further attempt to get into the home. On cross-examination, respondent testified that she was in the Conciliation Court on May 23, 1944; that the appellant asked her to come back to him. In answer to the question, "So his locking you out wasn't any part of your remaining away from him?" she replied, "No, it wasn't." With respect to her allegation in her answer to the complaint herein that "all the facts were not placed before the Court" in the first action, respondent was asked:

"What is it that was not before the Court? Before Judge Willis. A. Well, the fact that I said I was going to get a divorce when I left him. That wasn't brought out.

"Q. Is that the only fact? A. I can't recall them all right now.

"Q. Can you recall anything that you omitted to place before Judge Willis? A. I don't believe I can. * * *

"Q. In everything you have testified so far, you testified to in Judge Willis' court, didn't you? A. Not that I recall, everything.

"Q. Well, what didn't you? * * * A. Let it go that I testified to the same thing in Judge Willis' court.

"Q. That you have testified to here? A. Yes."

[3] Except for the episode of the changed lock, which occurred during the pendency of the first action, the testimony adduced at the instant trial, when any dates were mentioned at all, referred to the married life of the parties prior to the rendition of the judgment in the first action. While it is true that some of the witnesses testifying on behalf of respondent were uncertain as to how many times and upon what dates they observed appellant under the influence of liquor, stating that "it was a great many times," and "on sundry occasions," such evidence is not sufficient upon which to base an inference that such acts occurred after the judgment in the first case was rendered and therefore not adjudicated thereby.

[4] A careful examination of the record before this court discloses that the acts of cruelty alleged in the cross-complaint and testified to at the trial were adjudicated in the first action, and that appellant's defense of res judicata should have been sustained.

For the reasons stated, the judgment is reversed.

DORAN and WHITE, JJ., concur.




75 Cal.App.2d 292

**DE ARYAN v. CITY OF SAN DIEGO et al.**

**Civ. 3602.**

District Court of Appeal, Fourth District, California.

July 9, 1946.

**1. Automobiles ⇐5(3)**

The regulation of parking and control of traffic may justify a fee system intended to hasten the departure of parked vehicles in congested areas, as well as to defray the cost of installation and supervision.

**2. Automobiles ⇐7**

Evidence failed to establish violations of laws in connection with parking meters which had been installed in certain sections by defendant city in that receipts from the meters were greatly in excess of costs for which such receipts could be lawfully expended under ordinance permitting use of money received from parking meters

only for general traffic regulations in the areas in which meters were installed.

3. Automobiles ⊜7

Evidence failed to establish violations of law in connection with parking meters which were installed in certain sections by defendant city in that meters were calculated to deceive public in that they did not correctly indicate the parking time which will be allowed for particular payments.

Appeal from Superior Court, San Diego County; Ernest D. Wagner, Judge.

Action by C. Leon DeAryan against City of San Diego and others to correct certain alleged abuses and violations of law in connection with parking meters which had been installed in certain sections by defendant city. From a judgment for defendants, the plaintiff appeals.

Affirmed.

C. Leon DeAryan, in Pro. Per.

J. F. DuPaul, City Atty., and Bertrand L. Comparet, Deputy City Atty., both of San Diego, for respondents

BARNARD, Presiding Justice.

The plaintiff brought this action to correct certain alleged abuses and violations of law in connection with parking meters which had been installed in certain sections by the defendant city.

The complaint, after setting out the ordinances under which the parking meters were installed, alleged on information and belief that several thousand dollars a year is being collected from these meters beyond the amount necessary to meet the expenditures provided for in section 15 of the ordinance, which requires such receipts to be placed in a special fund and paid out only for certain purposes; that the city is operating the meters at a profit; that the profit for the fiscal year 1942–1943 was about $43,000, which amount was turned into the general fund; that the profit for the fiscal year 1943–44, during which the action was filed, would be approximately $120,000 and would be so used; that the ordinance is being wrongfully administered and the funds produced from the meters are being applied to uses and purposes other than those permitted by the ordinance; and that the parking meters are so constructed that they do not deliver the amount of parking time indicated by the schedules of parking charges attached to them, with the result that there is an unlawful exaction of contributions for parking services which are not delivered. The prayer is for an order directing the city to rectify the abuses and violations of law alleged, or prohibiting the city from operating the meters for the collection of taxes in violation of the ordinance, and prohibiting the city from using "parking meters which are not mechanically constructed to deliver the parking time as announced and advertised."

The answer denied the material allegations of the complaint and alleged that the cost of administration of the ordinances and the expenditures authorized by them have exceeded the amounts received from the parking meters, and that there is nothing on any of the parking meters which is deceptive or which states or indicates that one is entitled to an amount of parking time which is not delivered.

At the trial, there was evidence of the amounts received by the city from the operation of these parking meters during three fiscal years, but no evidence was received as to the costs and expenditures during those three years. Evidence was received as to the estimated receipts and estimated costs for the fiscal year 1944–45, during which year the trial took place. The court found that these ordinances were passed in good faith for the purpose of regulating traffic and the parking of vehicles in the public streets within certain zones, and not for the purpose of collecting a tax for revenue purposes; that the requirement of a fee from persons parking vehicles adjacent to the parking meters was and is for the purpose of defraying the cost of such regulation; that it was and is impossible to determine in advance the exact cost of regulation of said traffic and parking of vehicles, and impossible to determine in advance the receipts from the meters during any future period with sufficient accuracy to permit a reduction in the fee charged, even if it were mechan-

ically possible to rebuild the meters so this could be done; that the meters cannot be adjusted to that end; that such a change could only be accomplished by substituting new and different parts in the mechanism of the meters; that there is no evidence that such new and different parts are obtainable; that the estimated amounts of receipts from the meters for the fiscal year 1944–45 is $240,000; that the estimated costs for the regulation of traffic and the parking of vehicles in said parking meter zones for the fiscal year 1944–45, "the only year for which proof was submitted," are certain named amounts for the operation of parking meters and the regulation of traffic and parking, for the services of the treasurer's department, traffic engineer, public works department, police department, and for certain named depreciation, these amounts making a total estimated cost for that year of $198,980.35; that the city also incurs and pays additional costs each year in connection with the city prosecutor's office, the municipal courts, the city manager's department, the city auditor's department, the city purchasing department, and for depreciation on buildings and fixtures not covered in the enumerated items; that all of these services are to some extent used in the regulation of said traffic and parking; that some portion of the cost of these agencies and items is properly chargeable as a cost of the regulation of traffic and the parking of vehicles within the parking meter zones; and that the exact amount of such additional costs was not proved. It was further found that in certain zones, where two-hour parking is permitted, the parking meters are so constructed that they may be made to register up to one hour by depositing a five-cent coin or by depositing five one-cent coins; that each one-cent coin deposited for that first hour will give twelve minutes of parking; that by the depositing of an additional five-cent coin the meters will register two hours of parking time, but that these two-hour type meters cannot be made to register any time in excess of one hour by the deposit of any number of one-cent coins; and that there is clearly displayed upon each meter a metal plate containing directions, as follows:

"2 hour parking
"12 minutes—1¢
"24 minutes—2¢
"36 minutes—3¢
"48 minutes—4¢
"60 minutes—5¢ or 1 nickel
"2 hours—2 nickels."

(On one type of 2-hour parking meter in use the last line of these directions reads: "120 minutes 2 nickels.") As conclusions of law, it was found that no money has been or is being unlawfully exacted from any person by reason of the installation and use of these parking meters, and that no money which has been received by the city from that source has been or is being improperly or unlawfully used or expended. Judgment was entered in favor of the defendants and the plaintiff has appealed.

No attack is here made upon the legality of the ordinances here in question, as a part of the regulation of traffic, and the only points raised by the appellant are that the receipts from these parking meters are greatly in excess of the costs for which such receipts may lawfully be expended, under the ordinance, and that the meters themselves do not sufficiently indicate the parking time which will be permitted in return for various amounts deposited, with the result that the public is deceived and defrauded by being induced to deposit some coins for which they get nothing. While not clearly expressed, the contention seems to be that the court's findings with respect to these two matters are not supported by the evidence.

[1, 2] With respect to the first point, the only specific contention is that an excessive charge for depreciation on automotive equipment used by the police department in connection with parking meter enforcement appears in that part of the estimated expenditures which was itemized. This is based on the fact that the chief of police testified that the estimated depreciation on motorized equipment used in connection with enforcing the parking meter ordinance was $7,200 a year, and that the estimated depreciation on all motorized equipment used by the police force was from $25,000 to $27,000 a year. While this seems proportionately large there was no

evidence to the contrary. Moreover, that matter was a comparatively small part of the cost and expenditures even as far as they were itemized.

Section 15 of the ordinance in question, as amended, provides that receipts from this source may be used not only in defraying the expenses of installation, operation and control of such parking spaces and parking meters, but also those incurred in the control of traffic which may affect or be affected by the parking of vehicles in the parking meter zones thus created, including those incurred in connection with painting lines and signs, maintaining mechanical traffic signals and other expenses of regulating traffic and enforcing traffic regulations with respect to all traffic which may affect or be affected by the parking of vehicles in parking meter zones. This ordinance permits the use of the money thus received for general traffic regulation and control in the areas in question, all of which is a part of the problem involved and designed to be benefited by the ordinance. This is one entire problem in the congested areas and business districts which are affected by the ordinance and, as the evidence indicates, there are many matters of expense incident to the problem as a whole, aside from those directly connected with the operation of the meters, which were not segregated and itemized in such figures and records as were produced in evidence. Moreover, such figures as were produced were only estimates. A reasonable variance must necessarily be allowed in such cases, so long as the object of the ordinance is the regulation of traffic and not the raising of revenue, and as long as any possible surplus or profit is both incidental and not disproportionate to the cost and scope of the regulation thus carried into effect. It has been held that such regulation of parking and control of traffic may well justify a fee system intended and calculated to hasten the departure of parked vehicles in congested areas, as well as to defray the cost of installation and supervision. In re Opinion of the Justices, 297 Mass. 559, 8 N.E.2d 179; Bowers v. City of Muskegon, 305 Mich. 676, 9 N.W.2d 889. In view of the general situation and the nature of the evidence in the record it cannot be held that the court's findings in this regard are without support, since the appellant failed to meet the burden of proof resting upon him.

[3] The other contention, that these meters are calculated to deceive the public in that they do not correctly indicate the parking time which will be allowed for particular payments, cannot be sustained. The argument is that since the statement on the meters informs the public that parking privileges during the first hour may be obtained by depositing one cent for each twelve minutes desired, a motorist would be likely to assume that, in zones where two-hour parking is permitted and where he intends to remain more than one hour and not as much as two hours, he could also secure extensions beyond the first-hour period by continuing to deposit one cent for each twelve minutes desired. Nothing on the meters informs the public to that effect and the directions plainly state that a second hour will cost five cents, with nothing to suggest or indicate that additional time over the first hour is offered except the full period of one hour. No period less than an hour is offered, after the first hour, and the objection seems to be that the statements on the meters mean exactly what they say. The periods of time offered are stated with their prices and no necessity appears for also stating other periods of time which are not offered. Moreover, the policy of not offering shorter periods during the second hour is consistent with the general purpose and design of the ordinance to hasten the departure of parked cars in congested areas, and to offer parking opportunities to as many different people as possible. Nothing appears either in law or in the evidence to invalidate the findings of the court in this respect.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

75 Cal.App.2d 138

## FURNISS v. FURNISS.

Civ. 15141.

District Court of Appeal, Second District, Division 1, California.

June 26, 1946.

1. Divorce ⇐245(1)

The trial court's power to modify alimony provisions of an interlocutory decree of divorce is derived from statute, and the only successful attack upon such an order when the only claim is that award is too high or too low, must be based upon a clear showing of an abuse of discretion. Civ.Code, §§ 137, 139.

2. Divorce ⇐286

An abuse of discretion with respect to an application to modify alimony provisions of an interlocutory decree of divorce is never presumed and must be affirmatively established. Civ.Code, §§ 137, 139.

3. Divorce ⇐286

Appellant's contention that trial court abused its discretion in rejecting his evidence on a motion to reduce award of alimony and in believing conflicting testimony of respondent on such motion presented nothing for review. Civ.Code, §§ 137, 139.

4. Appeal and error ⇐946

An appellate court is never justified in substituting its discretion for that of trial court and its power is limited to determination of whether there has been such an abuse of discretion that it has resulted in a miscarriage of justice. Const. art. 6, § 4½.

5. Divorce ⇐245(3)

Evidence failed to show an abuse of discretion in trial court's order denying husband's motion to reduce alimony award. Civ.Code, §§ 137, 139.

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Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Nannette Furniss against Lawrence Furniss for divorce, wherein plaintiff secured an interlocutory decree which included an alimony award which was subsequently reduced. From an order denying a motion to further reduce alimony, defendant appeals.

Affirmed.

Wm. E. Cornell and Bernard Brennan, both of Los Angeles, for appellant.

Hugh E. Macbeth and Eva M. Mack, both of Los Angeles, for respondent.

YORK, Presiding Justice.

The interlocutory decree of divorce entered herein on December 17, 1923, ordered defendant husband to pay $20 per week to plaintiff wife for her support and maintenance. By an order entered July 18, 1927, such payment was reduced to $12 per week. Thereafter, a contempt proceeding brought by plaintiff against defendant was discharged, and on August 7, 1944, upon hearing of an order to show cause re modification, the previous order was modified "to provide that defendant shall pay the sum of $10.00 per week for the support of plaintiff."

The instant appeal is prosecuted by defendant from an order dated February 27, 1945, by which the trial court refused to modify the order of August 7, 1944, and reduce the alimony award; appellant urging that "the evidence establishes that the court abused its sound discretion" in its refusal to modify such order.

The affidavit of appellant made in support of his motion to reduce the award, shows net weekly earnings of $51.69, and expenditures of $96.84 per week, the latter including, in addition to the $10 payment of alimony, $12 medical expense for his present wife and $9.10 payment on an automobile; and avers that "since said order of August 7, 1944, defendant's wife has received a medical discharge from the Women's Army Corps, necessitating many visits to the doctor, which defendant is obligated to pay; that defendant has been forced to purchase an automobile and make the payments thereon; that it is impossible for defendant to meet the expenditures which he is obliged to take care of and continue to pay the plaintiff $10.00 per week."

Appellant testified that he lived in Van Nuys and worked in Pasadena and "had to buy another" automobile; that while his wife was in the service "she was hit by an automobile and it left her permanently affected and she was discharged with 70% permanent disability * * * she has to continually visit the doctor"; that she had attempted to obtain medical care from the Veteran's Administration at Sawtelle, but "they were unable to take her * * * she is unable to drive a car * * * and they recommended that she continue with her present physician". On cross-examination, appellant testified that his wife owned the property in which they lived and that she purchased it with money she inherited.

Respondent testified that she lived in a small cottage in a court paying $28 a month rental therefor; that she was in charge of the "British War Relief Help", for which she received no compensation; that she "couldn't possibly hold a job if I had one. * * * I have to remain there where I can rest any time during the day, and I do frequently go into the back room and rest, because I could not work continuously." She further testified that she answered the telephone, kept the petty cash account, and was an experienced typist; that her only source of income was a room which she rented in the house in which she lived for $23 per month; that she had "no bank account, no insurance, no property, no jewelry, or no nothing." On cross-examination, this witness testified that she had "bronchial asthma, for one thing, and I have fainting spells frequently. * * * They come on very suddenly, and I am out, I may be just answering the telephone and I am gone. People pick me up, and that sort of thing."

It is appellant's contention that there was a distinct "change of circumstances from the former hearing in August, 1944", and that the failure of the trial court "to consider the evidence of appellant's expenses since the discharge of his present wife from the United States Army, and the uncontradicted testimony of appellant concerning his monthly income and expenses * * * showed an abuse of discretion." With respect to appellant's testimony regarding his present wife's ill health, the court voluntarily made the following statement: "May I point out to you, counsel, that while her condition may be very unfortunate we cannot, under the law, consider herein any obligation incurred by her to justify the inability to pay the previous order of court, because he entered upon this second marriage with full knowledge of his obligation under the previous order of court."

[1, 2] The following language appearing in the case of Whitehead v. Whitehead, 45 Cal.App.2d 447, 449, 114 P.2d 403, 404, applies to the instant situation:

"The power of the court to make the modification of the interlocutory decree comes directly from the statute. Sections 137 and 139 of the Civil Code provide that orders for the payment of alimony may be altered, modified or revoked 'at the discretion of the court.' The only successful attack upon such an order (when the only claim is that the award is too high or too low) must be based upon a clear showing of an abuse of that discretion. It was said in Wilder v. Wilder, 214 Cal. 783, 785, 7 P.2d 1032, 1033: 'An abuse of discretion is never presumed and it must be affirmatively established.' Here the whole case of the appellant rests upon the assertion that the trial court abused its discretion when it rejected his evidence and believed the conflicting testimony of the respondent.

[3, 4] "This does not present a debatable question on appeal. As the court said in Lent v. H. C. Morris Co., 25 Cal.App. 2d 305, 308, 77 P.2d 301, 302: 'An appellate court is never justified in substituting its discretion for that of the court sitting nisi prius. Its power is limited to the determination whether there has been such an abuse of discretion that it has resulted in a miscarriage of justice. Const. art. 6, § 4½; Davies v. Ramsdell, 40 Cal.App. 432, 433, 183 P. 702; Sunset Farms, Inc. v. Superior Court, 9 Cal.App.2d 389, 405, 50 P.2d 106.'"

[5] The evidence herein discloses that appellant lives in a home provided by his second wife and in addition has an income of $56.69 per week. It also discloses that

respondent pays $28 per month for her apartment; that she rents a room therein for $23 per month, which reduces her rent to $5 per month; but that she has no other income and is in a state of ill health. In this state of the record, it was incumbent upon the court to make a decision, and having done so, it cannot now be said that he abused his discretion in deciding as he did.

For the reasons stated, the order appealed from is affirmed.

DORAN and WHITE, JJ., concur.




75 Cal.App.2d 202

## BAIRD v. LINDBLAD.

Civ. 7244.

District Court of Appeal, Third District, California.

June 29, 1946.

**1. Appeal and error ⇐1008(3)**

Where trial court's construction of lease of land for growing tomatoes appeared to be reasonable and consistent with intention of parties, appellate court would not substitute another interpretation.

**2. Landlord and tenant ⇐37**

Where lease was prepared by lessee, any ambiguity therein was properly resolved against him.

**3. Contracts ⇐170(1)**

The construction put upon an ambiguous provision in a contract by the contracting parties as evidenced by their conduct under it is one of the most reliable guides for determining meaning of such provision.

**4. Landlord and tenant ⇐182**

Provision in lease of land for growing of tomatoes that second half of rental was due from buyer of tomatoes after crop mortgage had been satisfied was properly construed as evidencing an intention to furnish security to lessor, and not as evidencing intention that second half of rental was to be paid only if there remained in hands of buyer sufficient money to pay it after crop mortgage had first been satisfied.

**5. Customs and usages ⇐15(1)**

Evidence respecting custom in leasing contracts for growing of tomatoes was properly considered by trial court in determining whether provision in lease that second half of rental was due from buyer of tomatoes after crop mortgage had been satisfied should be construed as evidencing an intention to furnish security to lessor or as evidencing intention that second half of rental should be paid only out of the special fund so created. Civ.Code § 1646; Code Civ.Proc. § 1857.

Appeal from Superior Court, Yolo County; C. C. McDonald, Judge.

Action by Florence E. Baird, against T. D. Lindblad, to recover unpaid balance allegedly due under a lease by which plaintiff and her husband, since deceased, leased land to defendant for growing of tomatoes. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Busick & Busick, of Sacramento, for appellant.

Robert H. Schwab, Jr., and E. L. Means, both of Woodland, for respondent.

ADAMS, Presiding Justice.

Plaintiff brought this action to recover the sum of $1,294.80, which it is agreed is the unpaid balance due under a lease by which plaintiff (and her husband, since deceased) leased land to defendant for the growing of tomatoes. It is conceded that the total amount of the rental for the term of the lease was $3,850, upon which defendant paid, at different times, the total sum of $2,555.20, leaving an unpaid balance of $1,294.80. The lease which was dated March 10, 1944, was for a term of nine months from March 1, 1944. It was prepared by defendant, the lessee, upon a printed lease form, with portions filled in by typewriting. Following the printed recitation therein that the rental

was payable in lawful money of the United States in advance, "in the manner following, towit:" defendant inserted in typewriting, "Last half of first payment due May 1st. Balance due from Riverbank Canning Co., after R.A.C.C. Crop mortgage has been satisfied." He based his defense to plaintiff's action upon the ground that the foregoing language shows that the last half of the rental payable under the lease was to be paid out of a special fund, and that said fund never came into existence; that is, that said last half of the rental was to be paid out of any moneys in the hands of the Riverbank Canning Company, to whom defendant sold a portion of his tomato crop, and that, because the crop mortgage which had priority was never satisfied and there was no balance due defendant from that company, plaintiff cannot recover. The trial court rendered judgment for plaintiff and this appeal followed.

The evidence in the case shows the following pertinent facts. Defendant did not deliver the whole of his tomato crop to Riverbank Canning Company, but sold a portion of it to others. After he had paid the first half of the rental due plaintiff, he promised to pay her the balance out of moneys he said he was to receive from dragline work he was doing for a Mr. Cooling. He also promised her he would pay such remainder from moneys he would receive from similar work he was to perform for a Mr. Hershey. Defendant authorized plaintiff to dispose of some tomato dust he had left on the rented premises, and apply the proceeds to the balance of the rental. Plaintiff received $430 for same and it was so applied. Defendant also authorized plaintiff to collect the proceeds of the sale of sheeting and lumber left on the premises and apply the proceeds on the rental balance. Plaintiff received $375 from this transaction. Defendant never denied that he owed plaintiff the balance sued for, nor contended, until her suit was filed, that such balance was payable out of a special fund which never came into existence.

[1] We are of the opinion that the evidence is sufficient to sustain the findings and judgment of the trial court. What was meant by the language used in the lease was a matter for determination of the trial court, at least in the first instance; and when a trial court's construction appears to be reasonable and consistent with the intention of the parties, appellate courts will not substitute another interpretation. Tide Water Associated Oil Co. v. Curtin, 41 Cal.App.2d 884, 895, 107 P.2d 945; In re Estate of Northcutt, 16 Cal.2d 683, 690, 691, 107 P.2d 607; O'Hare v. Peacock Dairies, Inc., 26 Cal.App.2d 345, 354, 79 P.2d 433; In re Estate of Boyd, 24 Cal.App. 2d 287, 290, 74 P.2d 1049; Neff v. Mutual Life Insurance Co., 48 Cal.App.2d 110, 112, 119 P.2d 404; McNeny v. Touchstone, 7 Cal.2d 429, 435, 60 P.2d 986; Richards v. Pacific S. W. Discount Corp., 44 Cal.App.2d 551, 560, 112 P.2d 698.

[2] The lease having been prepared by defendant, any ambiguity therein was properly resolved against him. Hunt v. United Bank & Trust Co., 210 Cal. 108, 116, 291 P. 184; Weil v. California Bank, 219 Cal. 538, 541, 27 P.2d 904; 6 Cal.Jur., p. 307, § 185, and 4 Cal.Jur. 10-Yr. Supp., pp. 135, 136, and cases there cited.

[3] One of the most reliable guides for determining the meaning of an ambiguous provision in a contract is the construction put upon it by the contracting parties as evidenced by their conduct under it. Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665; Work v. Associated Almond Growers, 102 Cal.App. 232, 235, 282 P. 965; Wells v. Wells, 74 Cal.App.2d 449, 169 P.2d 23; Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 754, 47 P.2d 273; Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 481, 19 P.2d 785; Rosenberg v. Geo. A. Moore & Co., 194 Cal. 392, 403, 229 P. 34; Commercial Discount Co. v. Cowen, 18 Cal. 2d 610, 615, 116 P.2d 599; Burns v. Peters, 5 Cal.2d 619, 623, 55 P.2d 1182; Katz v. People's Finance, etc., Co., 101 Cal.App. 552, 558, 281 P. 1097.

[4, 5] The record before us also shows that the court construed the phrase under consideration as evidencing an intention to furnish security to plaintiff and not as evidencing an intention that the second half of the rental was to be paid only if there remained in the hands of the River-

bank Canning Company sufficient money to pay it after the crop mortgage had first been satisfied. Evidence that it was the custom in the locality to provide in leasing contracts that the first half of the rental of land for the growing of tomato crops should be paid down, and the last half should be secured by an order on the buyer of the crop to pay a portion of the purchase price to the landowner, was introduced and was proper to be considered by the trial court. See Civ.Code, sec. 1646; Code Civ.Proc., sec. 1857; Corey v. Struve, 16 Cal.App. 310, 318, 319, 116 P. 975; Watson Land Co. v. Rio Grande Oil Co., 61 Cal.App.2d 269, 272, 142 P.2d 950.

In view of the foregoing it cannot be said that there is not sufficient substantial evidence to sustain the findings and judgment of the court below, and its judgment is therefore affirmed.

PEEK and THOMPSON, JJ., concur.




75 Cal.App.2d 298

**PEOPLE v. HIGHTOWER.**

**Cr. 576.**

**District Court of Appeal, Fourth District, California.**

**July 10, 1946.**

1. **Criminal law** ⇐997

Petition for writ of error coram nobis cannot be used as a substitute for a motion for new trial or an appeal.

2. **Criminal law** ⇐997

Petition for writ of error coram nobis was properly denied where all questions presented by the petition were reviewable on a motion for a new trial or on appeal.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Edison R. Hightower was convicted of armed robbery, and from an order denying his petition for a writ of error coram nobis, he appeals.

Affirmed.

Edison R. Hightower, in pro. per.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This is an appeal from an order denying defendant's petition for a writ of error coram nobis.

Petitioner is appearing here in propria persona. The petition prepared by him is confused and confusing. If we have analyzed it correctly it presents three grounds on which he hopes to obtain the relief asked. They are: (1) Alleged errors in admitting in evidence a pistol supposed to have been used by petitioner in perpetrating the armed robbery of which he was convicted; (2) Failure of his counsel to object to the introduction of certain evidence during his trial and to move to strike out other evidence; (3) Failure to compel the attendance at his trial of three witnesses whom he seems to believe would have supported his defense of an alibi.

The trial judge was most considerate of petitioner and very patient at the hearings on the petition. He ordered him returned from the penitentiary to present his arguments.

When petitioner first appeared at the hearing the trial judge appointed counsel for him who had represented him in other matters and then continued the hearing. When the petitioner with this attorney again was before the court it appeared that this attorney thought it best not to represent him. The reason for this may have been suggested in the following remarks of petitioner: "To be honest with you, Your Honor, I was in hopes after talking to me, that you could get somebody to represent me properly who believed that I had a chance, as I believe that I have."

Another attorney was appointed, the hearing was continued. At the next hearing it appeared that this attorney was not satisfactory to petitioner and that he hoped to be able to secure the services of a third

attorney. The hearing was again continued with the statement of petitioner concerning the third attorney, that "If he fails to represent me, I will submit my case without argument."

Petitioner again appeared, without counsel, and submitted the matter for decision. The trial judge stated that the shorthand notes of the trial had been read to him by the reporter; that he was satisfied that the trial of petitioner had been fair and impartial; that there was nothing to be done except to deny the petition.

[1, 2] The petition for a writ of error coram nobis cannot be used as a substitute for a motion for new trial or on appeal. All questions presented by the petition were reviewable on a motion for new trial, or on appeal, so there was nothing before the trial court, and there is nothing before us to justify the issuance of the writ. People v. Knight, Cal.App., 166 P.2d 899.

The order denying the writ is affirmed.

BARNARD, P. J., concurs.




75 Cal.App.2d 150

## FREER et al. v. WELLS FARGO BANK & UNION TRUST CO. et al.

Civ. 7181.

District Court of Appeal, Third District, California.

June 26, 1946.

Hearing Denied Aug. 22, 1946.

1. **Husband and wife** ⇐264

In widow's action to quiet title to land which had been deeded to widow who reconveyed such land to her husband, substantial evidence sustained finding that land was not community property contrary to statutory presumption that property acquired after marriage constitutes community property. Civ.Code, § 164.

2. **Husband and wife** ⇐49½(8)

In widow's action to quiet title to land, trial court in determining whether gift of land to widow was intended could consider fact of husband's retention of control of land and its income, his written statements, including tax returns and other factors. Civ.Code, § 164.

3. **Evidence** ⇐589

Trial court could give to plaintiff's testimony such credence as court in its considered judgment deemed proper even to the point of completely disregarding it.

4. **Husband and wife** ⇐264

In widow's action to quiet title to land which husband had purchased by deed which named widow as grantee, in absence of any evidence to the contrary, deed to widow of the land must be taken as evidencing intention of outright conveyance as her separate property, and where defendants failed to sustain burden of showing to the contrary, presumption remained uncontroverted, requiring court to find for widow. Civ.Code, § 164.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by Dorothy E. Freer, formerly Dorothy E. Fuller, against the Wells Fargo Bank & Union Trust Company and another, as executors of the last will and testament of Harry B. Fuller, deceased, and others to quiet title to property wherein defendants filed a cross-complaint. From a judgment, plaintiff appeals.

Modified with instructions and as modified affirmed.

Libby & Finn, of Sebastopol, Barrett & McConnell, of Santa Rosa, and A. Dal. Thomson, of San Francisco, for appellant.

Heller, Ehrman, White & McAuliffe, of San Francisco, and L. R. Lambert, of Santa Rosa, for respondents.

PECK, Justice.

By this action in quiet title, appellant, the widow of Harry B. Fuller, deceased, seeks to establish as her separate property two parcels of real estate which the respondent executors claim as part of the estate of said deceased. The minor children of appellant and the decedent, as well as the latter's minor adopted son, were

brought in as parties defendant, appearing through their guardian ad litem.

Briefly summarized, the facts are as follows:

Appellant and decedent intermarried in 1933, at which time Mr. Fuller had an adopted son four and one-half years of age. Two children were born of the marriage. The husband was then vice-president and cashier of the Sebastopol National Bank, and in 1939 became president of its successor, the Bank of Sonoma County.

In 1939 decedent purchased an unimproved business lot in the city of Sebastopol, financed the erection of a building thereon, and leased the principal portion thereof to a grocery concern. The remaining portion was leased to a clinic. The deed to the property was taken in the name of decedent's nephew, Paul O'Neil, who resided with the Fullers in their home. O'Neil gave back a note and trust deed to a Santa Rosa Bank, which had financed the project with a loan of $12,000. According to appellant's testimony, the reason for using this method of handling the transaction was that Mr. Fuller did not want the public to know he was involved in the matter, and, being an officer of the bank, he did not want his name to appear in any way in connection therewith. On November 18, 1940, Paul O'Neil, being about to enter the armed forces, deeded the property to appellant, at decedent's request. Mr. Fuller took and retained possession of this deed, placing it in a safe deposit box to which he alone had access. At about the same time, the loan of the Santa Rosa Bank was taken over by the Bank of Sonoma County, and the loan account was set up in the name of Harry B. Fuller. The commercial checking account through which all deposits and disbursements relating to the property were cleared originally was captioned "Paul O'Neil North Main Street Property account" and showed the signatures of O'Neil and decedent. After the transfer by O'Neil to appellant, the account was changed by deleting the name of O'Neil and retaining that of decedent. As additional collateral security, Mr. Fuller took out and pledged with the bank a ten thousand dollar insurance policy on his life, naming as beneficiary his estate and not appellant. On April 9, 1942, appellant, at her husband's instance, executed and delivered to him a deed to the store property. This deed also was placed by Mr. Fuller in his safe deposit box. On April 14, 1942, the deed of November 18, 1940, from Paul O'Neil to appellant, was recorded at the request of the Bank of Sonoma County. On December 19, 1942, Mr. Fuller died. Appellant's deed to him, found in his safe deposit box, was recorded at the request of the corporate executor. From the time of the purchase of the store property to the time of his death, Mr. Fuller assumed the entire management and control thereof, never consulting appellant with regard thereto. His bank statements reflected ownership of said property in himself, as did his income tax returns, according to the unchallenged statement of respondents' counsel.

Decedent's will disclosed the creation of a trust in his entire estate, with directions that specified sums be paid monthly to his three children. According to the briefs, there appears to a a question whether at the time of the making of the will the income from the balance of the estate would have been sufficient to meet the maximum requirements of the trust; and it might be inferred that the testator intended the income from the store property to augment the estate.

The other parcel of land involved in this proceeding is a six acre tract adjoining a parcel of three acres that friends of the Fullers previously had deeded to the two boys for their use. On January 28, 1942, Mr. Fuller purchased the six acres, having the deed made to appellant as grantee. The acreage was used by the boys and appellant as a place to keep and ride the boys' ponies and her horse. Decedent took and retained possession of this deed also. On February 12, 1942, said deed was recorded at the request of the Bank of Sonoma County. On February 19, 1942, at her husband's instance, appellant executed a deed to him of the six acres. This deed likewise was placed by Mr. Fuller in his

safe deposit box. Upon his death said instrument also was recorded at the request of the corporate executor.

With respect to each of the properties, appellant testified to certain declarations alleged to have been made by the deceased which undoubtedly tended to show an intention on his part to make a gift of the same to her, or to create in her mind the impression that such was his intention. Her testimony was that both parcels always were referred to by decedent and herself as her property; that when she executed the deeds to him it was only because of his statements that neither would be recorded, but would be held by him and recorded only if she should predecease him; and that solely because of such statements and the reliance she placed thereon and not otherwise (for as she stated there was no intent to divest herself of title) she executed the deeds and gave them to him to hold.

In addition to the testimony of appellant and the deeds here in issue, the only evidence which appears in the record is the will of decedent, signature cards and bank statements relating to the building account, decedent's financial statements for the years 1940 and 1941, decedent's income tax returns to which counsel made reference but which do not appear in the exhibits forwarded to this court, and testimony of certain officials of the bank and the corporate executor merely for the purposes of identification of the above-named documents.

The trial court found against appellant, and in particular that, by causing the deeds to her to be executed, decedent did not intend to make gifts to her or other transfers of ownership, but, on the contrary, intended at all times to retain the ownership and control of said property in himself. The court also found that by her deeds back to her husband appellant merely intended to and did confirm in him the ownership and control of the properties.

The trial court expressly pointed out in its memorandum opinion: "No specific issue was tendered or presented and tried with regard to whether the properties constituted the separate property of the decedent or community property of himself and his wife. This issue must not be considered as having been disposed of in this case, but may appropriately be passed upon in the estate proceeding at the time of distribution." In its conclusions of law a like statement was made.

[1] Appellant, in urging that the evidence does not support the findings, (1) relies on the presumption in favor of a wife under section 164 of the Civil Code, citing cases to the effect that only by clear and convincing proof can such a presumption be overcome, and that, in the absence of evidence to the contrary, the court is bound to find in accordance with the presumption, and (2) contends that, as the deed from appellant was to be recorded and become effective only if she should predecease her husband, the mere delivery of the deed to him, under such circumstances, was ineffectual to transfer title.

However, it is readily apparent from an examination of the record herein in relation to the store property that there is substantial evidence on which the trial court could base a finding contrary to the presumption.

[2] In this connection, the recent decision of the Supreme Court in Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, 168 P.2d 946, is peculiarly pertinent. In that case a transfer of stock in form absolute from the testator to his mother was held by the trial court to constitute merely a transfer in trust. In affirming the determination of said court, the Supreme Court enunciated and discussed exhaustively, with the citation of appropriate authorities, many of the principles dealing with the questions herein presented. Specifically, under the authority of that decision, it clearly appears that the trial court herein would have been warranted in taking into consideration, as apparently it did, in order to determine whether a gift was intended, the fact of the decedent's retention of control of the property and its income, his written statements, including tax returns, describing the property as a part of his assets, and other factors, such as the reasons which the deceased had for keeping his name out of the transactions, the manner in which he insured his life in order to provide security for the payment

of the loan on the property, the method of handling the income account and payments on the loan, his testamentary plan disclosed by the will and trust provisions, and other interwoven circumstances.

But with regard to the six acre tract an entirely different situation is presented. The record discloses no element of management and control such as existed in the case of the store property. Likewise the element of income in relation to the trust estate which decedent set up for the benefit of the boys, is entirely lacking. For all that appears the six acres were unimproved in any way horticulturally or otherwise, although stables had been built on the adjacent three acres. The record is devoid of any written statement by decedent or other documentary evidence tending in any way to show this acreage to be a part of decedent's assets. The original deed was taken in appellant's name, and the property was used solely for the recreation of herself and the two boys. No such reason appears, by inference or otherwise, for keeping decedent's name out of the record title as appears with respect to the store property, with its attendant financial arrangements and loan obligations. In fact, as to the six acres, our examination of the record has disclosed neither evidence nor circumstance to rebut the presumption relied upon by appellant.

[3] It is true that the trial court in considering the testimony of appellant could give to it such credence as the court in its considered judgment deemed proper, even to the point of completely disregarding the same. Hansen v. Bear Film Company, Inc., supra, 28 Cal.2d at page 154, 168 P.2d 946. However, if this has been done here, then, as we have noted, no other evidence of any character appears in the record and all that remains is the presumption to which we have referred.

[4] All presumptions being in favor of conveyances to the wife, therefore, in the absence of any evidence to the contrary, the deed to appellant of said six acres must be taken as evidencing the intention which upon its face it imports, i. e., an outright conveyance to her of the property described therein as her separate property. Respondents having failed to sustain the burden of making a showing to the contrary, said presumption remains uncontroverted and this court is bound, as is the trial court, to find in accordance therewith. Rhea v. Thomson, 115 Cal.App. 466, 471, 1 P.2d 1091.

This being true, it necessarily follows that the finding of the trial court to the effect that the deed covering the six acres from the original grantors to appellant did not transfer title to her is not substantiated by the record. For the same reason, that portion of the subsequent finding of the trial court that the deed from appellant to her husband was to confirm title in him is likewise without support in the evidence.

For the foregoing reasons the judgment is modified with instructions to the trial court to amend its findings in conformance herewith and its judgment in accordance with the views herein expressed.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concurs.




75 Cal.App.2d 265

**WATERS v. WATERS.**

**Civ. 3430.**

District Court of Appeal, Fourth District, California.

July 6, 1946.

**1. Divorce ⇐253**

Where wife was granted divorce on ground that husband had been guilty of extreme cruelty, evidence sustained trial judge's finding that realty acquired during the marriage was community property, and awarding wife a half-interest in the realty and the furniture in a house on one piece of the realty. Civ.Code, § 146.

**2. Divorce ⇐252**

Where fee of one-third interest in realty was earned by husband as attorney

during his marriage with wife who obtained divorce on ground of extreme cruelty, interest was "community property", though case was not finally decided before divorce action was tried, and trial judge was justified in granting wife half of the one-third interest. Civ.Code, § 146.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

3. Divorce ⊂252

Trial judge was justified in granting wife who had obtained divorce from husband on ground of extreme cruelty, one-half of anything to be received by defendant husband as attorney in case taken by husband on a contingency of one-half of property recovered, though Supreme Court had granted a hearing and case was pending in that court so that there was a possibility that cause might go back for a new trial and might not be fully decided before the parties were finally divorced. Civ.Code, § 146.

4. Divorce ⊂254

Interlocutory divorce decree that attempted to make an immediate division of community property of the parties and order them immediately to execute necessary and proper deeds and conveyances to effectuate the division was erroneous, since final division of community property should be made in the final divorce decree.

5. Divorce ⊂287

Trial judge's error in attempting to make an immediate division of community property in interlocutory divorce decree was an error that could be corrected on appeal without a reversal of the decree.

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Appeal from Superior Court, Orange County; Elmer W. Heald, Judge assigned.

Suit for divorce by Glee Waters against William L. Waters, wherein defendant filed a cross-complaint seeking an annulment or a divorce. From a decree in favor of the plaintiff, the defendant appeals.

Decree modified and, as modified, affirmed.

Harold A. McCabe, of Fullerton, for appellant.

Winthrop O. Gordon, of Santa Ana, for respondent.

MARKS, Justice.

This is an appeal from portions of a judgment which awarded plaintiff an interlocutory decree of divorce, gave her attorney's fees and costs, a temporary monthly allowance and divided the community property of the parties.

Certain portions of the judgment appealed from are set forth in the notice of appeal as follows:

"It is further ordered, adjudged and decreed that plaintiff and cross-defendant be and by this order is granted as her sole and separate property, with right of immediate possession thereto, the following parcels and pieces of property and each of them

"(a) Here follows description of what is called the Long Beach property and its rentals.

"(b) Here follows a description of the furniture, household goods and equipment in the Long Beach property.

"It is further ordered, adjudged and decreed that the parties hereto be and by this order are, and each of them is required concurrently with the entry of this judgment herein, to make and execute appropriate deeds and instruments of conveyance in order to effectuate the division of property herein provided."

Defendant also appealed from other portions of the interlocutory decree awarding plaintiff (1) a one-half interest in an attorney's fee involved in the case of William L. Waters v. Laura B. Resh, then pending in the Superior Court of Orange County, (2) a one-half interest in any fee to be received by defendant in the case of Adolph W. Strudthoff et al. v. Sydney Yates et ux., decided in favor of defendants in the Superior Court and now on appeal, and (3) that portion of the interlocutory decree denying defendant either an annulment of his marriage to plaintiff or a divorce from her, "And that said defendant and cross-complainant take nothing by the judgment herein other than herein specifically provided."

Defendant specifically disclaims any intention of questioning the portion of the

interlocutory decree under which plaintiff will ultimately obtain her divorce.

The trial judge found that defendant had been guilty of extreme cruelty towards plaintiff so that he was at liberty to award her any portion or all of the community property. Sec. 146, Civil Code.

The parties were married in Yuma, Arizona, on July 18, 1934. Defendant is a duly licensed attorney at law. He had three children, the issue of a former marriage, and owned separate property at the time of his marriage to plaintiff.

All receipts from both the separate property of defendant, and from the community, were handled by defendant and were commingled in a common bank account which he managed. He kept all accounts and records so we are entirely dependent on his records and testimony in determining the status of the title to any of the properties involved.

In 1938, defendant was retained by George S. and Edna Baker to represent them in certain litigation. He received as his fee an undivided one-half interest in the Long Beach property. That interest was conveyed to him by deed on or about December 9, 1938. This interest is admittedly community property. The other half interest in this property and its furnishings was acquired in July, 1939, for $870, the deed naming as grantees the parties to this action as joint tenants.

Defendant testified that the $870 which purchased the second half interest in the Long Beach property came from his separate estate and he argues that such half interest and the furniture should have been regarded as his separate property.

What is known as the Buena Park property was acquired for $500 in May, 1935. The deed named as grantees, the husband and wife as joint tenants. Defendant testified that the purchase price came from his separate estate and urges that this property should have been found to be his separate estate instead of giving a one-half interest to each.

Defendant prepared and introduced in evidence various statements which he testified were consolidations of books of account kept by him. Defendant's exhibit "M" lists what he evidently regarded as community property under the heading of "Community Income and Expense". This shows a gross community income from the Long Beach property from January 1, 1939, to August 18, 1944 (five days before the trial started) of $15,078.31. Against this is charged "Cost of one-half interest", "Alterations" and "Other expenses, furniture, upkeep and taxes" all totaling $15,168.86, leaving a net deficit of $87.55, after defendant had been repaid the $870 of his separate funds used to purchase the second half interest in the property, and the cost of all improvements, furnishings and expense had been deducted from income.

The Buena Park property is listed in the same exhibit, under the same heading, with a gross income between May 24, 1938, and August 18, 1944, of $3,544.03, against which is charged "Cost of Lot", "Alterations" and "Other expenses & upkeep", and "Furniture", all totaling $2,719.35. Thus after defendant had received back his $500, used as purchase price, and all improvements, cost of furniture and all other expenses and upkeep had been paid from the income, there remained to the community a profit of $824.68.

Defendant testified as follows concerning the agreement between himself and plaintiff at the time the second half interest in the Long Beach property was acquired: "Then when this second deed came up, she says, 'I want you to put my name on that deed as joint tenants, or I will never sign any mortgage or anything about that property.' I said, 'This half interest I am buying with my own money, and it really is mine.' She said, 'I wont sign any deed.' I said, 'I can't do anything with the property unless your name is on it.' She said, 'I wont do anything about the property or sign any deed ever unless my name is put in as joint tenants.' I said, 'This property ultimately can be community property if and when the money I advance from my own personal and separate estate is paid off', and so that same thing came up about the Buena Park property."

Defendant further testified as follows as to the agreement of the parties at the

time the Buena Park property was acquired: "I said, 'I am buying this because we have no income except what I have and I necessarily have to put your name on or leave it in my own name, but if we are going to do anything with that as I contemplate doing we will have to raise some money on it one way or another, and we did, and that's what helped put the improvements upon it, and she insisted we put it in there as joint tenants, and I said, 'All right, but I am not making any gift of any of my own property to the community, but when the community pays off any advances I have made to it, then it will own the property free from the money I invested. She said, 'I am not making any claim to any of your separate property, but I want what we earn community.' I said, 'You will get it, you will have it, that will be easily shown at any time.' "

The same exhibit "M" shows that defendant received a gross income in fees from his law practice of $20,109.20 between July 18, 1934, and August 18, 1944, making a gross community income of $38,731.54. He also showed his gross separate income, including sales of separate property, for the same period of $28,180.62. These moneys were all commingled in one bank account in defendant's name and were drawn upon by him indiscriminately as he saw fit.

[1] The foregoing evidence fully justified the trial judge in concluding that a one-half interest in both the Long Beach and Buena Park properties should vest in each party hereto (Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905) and in awarding the furniture in the Long Beach property to plaintiff. Sec. 146, Civil Code.

A stipulation of counsel shows that after the marriage of the parties, Laura B. Resh employed defendant as her attorney to represent her in an action involving title to three parcels of real property and agreed in writing to give him a one-third interest in all property recovered; that Mrs. Resh was successful in that action; that the action of Waters v. Resh was brought to compel the delivery or conveyance to Waters of that one-third interest in the properties and to secure an accounting of their rents, issues and profits; that the case of Waters v. Resh had been tried and the trial court had directed judgment in Mr. Waters' favor but that findings had not been signed nor had judgment been entered at the time of the trial of the divorce action.

[2] It is clear that the fee of a one-third interest in the real property involved in the first Resh case had been earned by defendant during his marriage with plaintiff so that it was community property. It became the duty of the trial court to provide for the division of that property in the divorce action. The fact that the case of Waters v. Resh had not been finally decided before the divorce action was tried becomes unimportant as the fee had been earned and was clearly community property.

The case of Strudthoff v. Yates involved property which belonged to the estate of John D. Strudthoff who died in 1936. Defendant was employed by the plaintiffs in that action, who were some of the children of the deceased, to recover part of the estate property. He took the case on a contingency of one-half of the property recovered. The case was tried in the Superior Court and judgment was entered for defendants. On appeal this court reversed that judgment. Strudthoff v. Yates, 162 P.2d 845. The Supreme Court granted a hearing and the case is now pending in that court.

[3] In dividing the community property of the parties the trial judge gave plaintiff one-half of anything to be received by defendant in the Strudthoff case. If the Supreme Court affirms the judgment of the trial court neither plaintiff nor defendant will receive anything. If the judgment is reversed the cause will go back for new trial and may not be finally decided before the parties here are finally divorced. Defendant argues that all compensation for services rendered in that action after the final decree of divorce will be his separate property free from any claim of plaintiff. While this might be true, we do not believe the apportionment of the fee made by the trial judge to be unreasonable. The contract of employment under which the

contingent fee, if any, will be earned, was made during coverture. The evidence for the plaintiff was assembled and the case was tried, the briefs on appeal were prepared and the case on appeal was argued while the parties were husband and wife. Thus a very considerable part of the ultimate compensation, if any, to be received by defendant must be credited to the community, even though we assume the soundness of his argument to the effect that a portion of the fee which may be earned after the dissolution of the marriage will be his separate property. The trial court could have set aside all community property to plaintiff as she will receive her divorce on the grounds of extreme cruelty. In support of the judgment we may assume that the trial judge regarded half of the entire fee to have been earned during coverture and therefore community property and that he awarded all of that community interest to plaintiff. This is not an unreasonable assumption and is sufficient to support this portion of the interlocutory decree of divorce.

Defendant argues other questions, such as the determination that a set of sterling silver is the separate property of plaintiff. If these matters are before the court at all, it is sufficient to say that the findings on these questions are supported by the evidence of plaintiff.

[4, 5] The only other point raised by defendant, necessary to consider, is that the interlocutory decree attempts to make an immediate division of the community property of the parties and orders them to immediately execute the necessary and proper "deeds and instruments of conveyance in order to effectuate the division of property herein provided". The final division of the community property should be made in the final and not in the interlocutory decree of divorce. This is an error which may be corrected on appeal without a reversal of the judgment. Leupe v. Leupe, 21 Cal.2d 145, 130 P.2d 697; Lo Vasco v. Lo Vasco, 46 Cal.App.2d 242, 115 P.2d 562; Strupelle v. Strupelle, 59 Cal.App. 526, 211 P. 248; Prout v. Prout, Cal.App., 167 P.2d 1.

The interlocutory decree of divorce is modified by striking therefrom the following:

"It is further ordered, adjudged and decreed that plaintiff and cross-defendant be and by this order is granted as her sole and separate property, with the right of immediate possession thereto, the following parcels and pieces of property and each of them", and inserting in lieu thereof the following:

"It is further ordered adjudged and decreed that plaintiff and cross-defendant should be, and in the final decree of divorce shall be given and awarded as her sole and separate property with the right of immediate possession thereof the following described real and personal property."

The interlocutory decree of divorce is further modified by striking therefrom the following:

It is further ordered, adjudged and decreed that defendant and cross-complainant be and by this order is granted as his sole and separate property with right of immediate possession thereto the following parcels and pieces of property and each of them:", and in lieu thereof inserting the following:

"It is further ordered, adjudged and decreed that defendant and cross-complainant should be, and in the final decree of divorce shall be given and awarded as his sole and separate property with the right of immediate possession thereof the following described real and personal property."

The interlocutory decree of divorce is further modified by striking therefrom the following: "It is further ordered, adjudged and decreed that the parties hereto be and by this order are, and each of them is required concurrently with the entry of this judgment herein, to make and execute appropriate deeds and instruments of conveyance in order to effectuate the division of property herein provided."

As so modified the interlocutory decree of divorce is affirmed, plaintiff to recover her costs on appeal.

BARNARD, P. J., concurs.

75 Cal.App.2d 91

## CITY OF PASADENA v. CITY OF ALHAMBRA et al.

Civ. 15241.

District Court of Appeal, Second District, Division 3, California.

June 24, 1946.

**1. Appeal and error ⇐460(2)**

A mandatory injunction is automatically stayed by an appeal, but a prohibitory injunction is not.

**2. Appeal and error ⇐460(2)**

An injunction that compels a party to surrender a position which he holds and which upon the facts alleged by him he is entitled to hold is "mandatory" within rule that a mandatory injunction is stayed by appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Injunction".

**3. Appeal and error ⇐460(2)**

In action involving water rights, where injunction required the parties to measure and keep records of all production, diversion and distribution of water, and the depth to the water table, to install and maintain in good order devices for such measuring of water, to install facilities for testing devices, to have records available for inspection by the water master, and to contribute to the expenses of the water master, and appellant claimed on the facts, alleged prior and paramount right which was invaded by the decree appealed from, the injunction was "mandatory" and was automatically stayed by appeal.

**4. Appeal and error ⇐477**

The District Court of Appeal has inherent power to issue on such conditions as it deems just a writ of supersedeas where necessary or proper to the complete exercise of appellate jurisdiction, irrespective of whether injunction appealed from is mandatory or prohibitory. Const. art. 6, § 4b; Rules on Appeal, rule 49.

**5. Appeal and error ⇐479(1)**

In view of water rights involved and long delay of plaintiff in instituting proceeding and fact that stay pending appeal would not injure plaintiff, whereas failure to stay proceedings pending appeal would injure appellant, writ of supersedeas would issue. Const. art. 6, § 4b; Rules on Appeal, rule 49.

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Action by the City of Pasadena against City of Alhambra and others and the California-Michigan Land & Water Company for a declaration of the rights of the parties to underground water in the Raymond Basin Area, to quiet title to such water rights, and for injunctive relief. From the judgment rendered, the last-named defendant appeals. On petition of appellant for a writ of supersedeas to stay the enforcement of the judgment relating to water rights.

Petition granted.

Paul Vallee and Goodspeed, McGuire, Harris & Pfaff, all of Los Angeles, for appellant.

A. E. Chandler, of San Francisco, Special Counsel, H. Burton Noble, City Atty., of Pasadena, for respondent.

WOOD, Justice.

This is a petition of the California-Michigan Land and Water Company, a corporation, for a writ of supersedeas to stay the enforcement of a judgment relating to water rights.

In September, 1937, the City of Pasadena filed an action against 27 defendants, including petitioner, for a declaration of rights of the parties to underground water in a certain area, referred to as the Raymond Basin Area; to quiet title to such water rights; and for injunctive relief to protect those rights.

The cause came on for trial in May, 1944, and all of the parties to the action except petitioner stipulated to the judgment. The judgment provides, in part, that each of the parties to the action has the right to take water from the ground in said area; that said rights are of equal priority and of the same legal force and effect; that petitioner's water right is in that part of the area designated as the Western Unit; that the total of the rights, described as the "present unadjusted"

rights, to take water from the Western Unit is 25,608 acre feet per year; that petitioner's "present unadjusted right" of said total is 521 acre feet per year; that the safe yield of said unit is 18,000 acre feet per year; that to maintain and protect the supply of water in the ground in said unit each party is limited in the exercise of its "present unadjusted right" to a "decreed right"; and that petitioner's "decreed right" is 359 acre feet per year. The judgment further provides that all the parties, except petitioner, are forever enjoined on and after July 1, 1944, from taking more water than their decreed rights, and as to petitioner the judgment provides that it is so enjoined from and after July 1, 1945; provided, however, that any party to the action may take in any 12-month period, for its beneficial use and for the release of water for use by other parties in accordance with the "Raymond Basin Area Water Exchange Agreement of 1943 and amendment thereto," any amount of water not exceeding 120 per cent of its decreed right, and such greater amount as may become necessary in case of an emergency as determined by the water master, but in no event shall the aggregate amount taken by any party during any period of 60 consecutive months exceed the amount released to it pursuant to said above referred to agreement, and 5 times the annual decreed right of said party. The judgment also provides that a water master shall be appointed by the court to enforce the provisions of the judgment, the agreement above referred to and the amendment thereto, and the instructions and orders of the court. It authorizes the creation of an advisory board to assist the water master—such board to be designated by, and to represent, the parties to the action; and it provides that the payment of the costs for such representation "shall be optional with the respective parties," and any party at his own expense has the right to consult and advise with said board or water master. It further provides that each party at his own expense shall measure and keep records of all its diversions of water from any source, of its importations of water, and of its production of water from the ground in said area, subject to the approval of the water master as to equipment and methods; that each party shall measure and keep records of its production and distribution in such manner as to show its use in, transfers within, and exports of water from the area, or any subdivision thereof, as required by the water master; that once a month or as required by the water master, each party shall measure and record the depth to the water table in all wells owned or operated by it within the area; that any party owning any facilities for the diversion of water from any source contributing to the supply of water in the ground in that area, or for pumping or otherwise taking water from the ground in said area, at his own expense, shall install and at all times maintain in good working order reliable measuring devices and facilities for testing said devices and shall keep records of its diversions and production through the use of such devices and facilities as may be required by the water master; and that the cost of enforcing the judgment should be borne by the parties in proportion to their respective decreed rights. Defendant California-Michigan Land and Water Company appealed from the judgment on February 23, 1945.

On December 10, 1945, the water master filed a report with the court which stated that the records of petitioner showed the petitioner had pumped 488 acre feet of water from the ground in the area from July 1, 1945 to November 2, 1945; that it had exceeded its decreed right; and that it was continuing to pump water in excess of that right. A hearing on said report was had on January 11, 1946, at which hearing petitioner objected to the jurisdiction of the court, stating that the injunction is mandatory in character and, therefore, is stayed by the appeal. The court decided that the injunction herein is prohibitory, and not mandatory, and therefore is not stayed by the appeal. Thereafter, the court issued an order to show cause, based upon an affidavit of the city attorney of Pasadena, and ordered petitioner to appear on March 4, 1946, and show cause why it should not be punished for contempt. Petitioner thereupon, on February 26, 1946,

filed its petition for a writ of supersedeas to stay enforcement of the judgment pending the decision on appeal. On February 27, 1946, this court ordered that respondent show cause why a writ of supersedeas should not be issued, and ordered that all proceedings to enforce the judgment be stayed pending the hearing.

[1] Petitioner contends that the injunction is mandatory, requiring affirmative action by petitioner, and therefore is stayed by the appeal. It is established that an injunction mandatory in character is automatically stayed by an appeal and that a prohibitory injunction is not so stayed. "The question of whether a decree is of the one character or the other is sometimes a difficult one, as an order which is entirely negative or prohibitory in form may prove upon analysis to be mandatory and affirmative in essence and effect, or the decree may partake of a dual nature, in which event an appeal will stay operation of the mandatory features but not of the prohibitory." Food & Grocery Bureau v. Garfield, 18 Cal.2d 174, 177, 114 P.2d 579, 580. In the present case the judgment commands the doing of many affirmative acts, such as requiring the parties to measure and keep records of all production, diversion, and distribution of water, the depth to the water table, to install and maintain in good order devices for such measuring of water, to install facilities for testing said devices, to have records available for inspection by the water master, and to contribute to the expenses of the water master.

[2] Petitioner asserts further that the judgment compels it to surrender a position which it holds and which, upon the facts alleged by it in its answer, it is entitled to hold as one owning prior and paramount overlying owner's rights, and prior and paramount prescriptive rights. It was stated in the case of Stewart v. Superior Court, 100 Cal. 543, 547, 35 P. 156, 158, 563, "An injunction, though restrictive in form, if it have the effect to compel the performance of a substantive act, is mandatory, and necessarily contemplates a change in the relative positions or rights of the parties from those existing at the time the injunction is granted, or the decree is entered." Therefore, "if the injunction compels a party affirmatively to surrender a position which he holds and which upon the facts alleged by him he is entitled to hold, it is mandatory." Ambrose v. Alioto, 62 Cal. App.2d 680, 685, 145 P.2d 32, 35. Petitioner is a public service corporation which, since 1913, has been engaged in supplying water, from sources involved herein, for domestic, industrial, irrigational and municipal purposes. It alleges that, under its water rights, it has the right to take 700 acre feet of water a year, and any additional amount as may be reasonable and necessary to serve its consumers. Since 1937 the population of the area served by petitioner increased from 3300 to approximately 5000. At the time of the trial petitioner was using in excess of 800 acre feet of water a year for the reasonable and necessary uses of its consumers, and contends that it is entitled to that volume for such purposes. It alleges that it has the prior and paramount right to such water by reason of its ownership of approximately 171 acres of land in which it has all the appropriative, prescriptive, and overlying landowner's water rights, and by reason of its ownership of various other water properties and water rights which have been owned continuously and adversely for more than 40 years. It further alleges that the average annual supply of water to that general vicinity by rainfall and run-off from the mountains is more than 62,000 acre feet. It was stipulated that all of the water taken by each of the parties to the action was taken adversely to the claims of each of the other parties.

In the case of Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 7 P.2d 706, 707, the trial court had issued a temporary injunction restraining defendants from "continuing to divert any of the waters of Hat Creek from the natural channel of said stream, where the same passes through, over, along, by, upon and past" the plaintiff's land. Defendants sought a writ of supersedeas to stay the operation of the judgment pending appeal. The writ was denied without prejudice upon the ground that the injunction was mandatory in character and its effect was stayed as a matter of law pending the appeal, and the court

stated therein, 214 Cal. at page 637, 7 P.2d at page 708: "After further consideration of the question we are persuaded that the injunctive order issued herein has the essential characteristics of a mandatory injunction. The defendants are and always have been lawfully in possession of their property. In that possession they are engaging in a lawful use thereof. They are not trespassing upon any of the rights of the plaintiff. They are not maintaining a nuisance. They are entitled in any event to their proportional share of the water by reason of the fact that their rights and the rights of the plaintiff are correlative, co-ordinate and in common as to said opposite riparian lands. These rights may be exercised by either party subject to the equitable power of the court to apportion the use of the water as between them. The effect of the order, if enforced, would be to disturb a lawful use of property lawfully in possession, and to dispossess the defendants of the use of any of the waters of the stream. It would thus compel the surrender of the lawful possession of real property and would amount to affirmative relief as contemplated by the decisions. United Railroad v. Superior Court, 172 Cal. 80, 155 P. 463; Ohaver v. Fenech, 206 Cal. 118, 122, 273 P. 555."

In the case of People v. Stutz, 66 Cal. App.2d 791, 153 P.2d 182, the court found that portions of a building were dangerous to life and property, constituted a public nuisance, and ordered that all use of such portions cease until major changes were made. In holding that the injunction was mandatory, the court stated, 66 Cal.App.2d at page 794, 153 P.2d at page 184: "Thus petitioners' right to use the property under their lease was interfered with. Such a right is a vested property right. Also petitioners' contracts with their guests would of necessity be terminated during the period of remodeling. Thus the injunction necessarily contemplated, and its enforcement would compel, a change in the position and rights of petitioners and force them to surrender a position and property rights which they lawfully held at the time it was issued by causing them and their tenants to vacate during the remodeling period. Thus by requiring an affirmative action on the part of petitioners and the abandonment of their property rights, the effect of the injunction is mandatory and is automatically stayed by the appeal."

[3] Petitioner asserts further, in support of its contention that the injunction changes its position, that the effect of the judgment, in decreeing petitioner's water right to be 521 acre feet per year (the unadjusted right) but limiting its use to 359 acre feet per year (the decreed right), is to oust petitioner from possession of 162 acre feet of water per year. In the case of Byington v. Superior Court, 14 Cal.2d 68, 92 P.2d 896, the city of San Francisco was decreed a prescriptive right to store water from a river to the capacity of two reservoirs then owned by it, and was enjoined from storing water in excess of that amount. Subsequent to the entry of that judgment, and while the case was on appeal, the city enlarged the capacity of one of the reservoirs and stored water therein to the amount of the enlarged capacity. In holding that the injunction required the surrender of real property and, therefore, was mandatory and stayed by appeal, the court stated, 14 Cal.2d at page 70, 92 P.2d at page 897.: "The authorities indicate that an injunctive decree that compels the surrender of the lawful possession of real property amounts to the granting of affirmative relief and is mandatory in character." In that case the trial court found that the city was entitled to the amount of water it was using at the time of the decree, but enjoined it from taking water in excess of the capacity of its reservoirs at that time, whereas in the present case the trial court found that petitioner was not entitled to the amount of water it had been using over the past several years, and, furthermore, enjoined it from using the full amount to which it found petitioner was entitled as its unadjusted right. It appears that the decree herein affirmatively compels petitioner to surrender a substantial existing right. The injunction herein is mandatory in character.

[4, 5] Irrespective of whether an injunction is mandatory or prohibitory, this court has the inherent power to issue a writ of supersedeas if such action is nec-

essary or proper to the complete exercise of its appellate jurisdiction. Food & Grocery Bureau v. Garfield, 18 Cal.2d 174, 177, 114 P.2d 579; Const. art. VI, § 4b, and may issue the writ upon any conditions it deems just. Rules on Appeal, Rule 49. It is apparently petitioner's theory that the water involved in this action is an underground stream, that petitioner takes water from a place therein below the places where the other defendants and respondent city of Pasadena take water, and if petitioner is prevented from using the water it will be lost irrevocably and will be wasted. It is apparently the theory of respondent that the water is an underground reservoir, and that any use of the water depletes the supply available to the other defendants and respondent city of Pasadena. Petitioner, as above stated, is a public service corporation which has been engaged in supplying water for public use in a certain area since 1913. As the population of that area increased, the number of consumers served by petitioner also increased, which necessitated a corresponding increase in its water supply. It does not appear that the other 26 defendants herein ever objected to such increase, nor that respondent, city of Pasadena, objected prior to filing this action. Furthermore, in view of the many years delay in instituting this proceeding, and the fact that 7 years elapsed from the date the action was filed (September, 1937) to the date of trial (May, 1944), it cannot be said that respondent will be deprived of a substantial right should action on the judgment be suspended until decision on the appeal is made. The petitioner has never been a party to the "Raymond Basin Area Water Exchange Agreement of 1943 and Amendment thereto," which agreement was attached to and made a part of the judgment. It appears that a stay of enforcement of the judgment should be granted.

It is ordered that a writ of supersedeas issue staying all proceedings in the trial court as against the California-Michigan Land and Water Company until the final determination of the cause on appeal.

DESMOND, P. J., and SHINN, J., concur.



75 Cal.App.2d 195

## GOODWIN v. FOLEY.

Civ. 12993.

District Court of Appeal, First District, Division 2, California.

June 28, 1946.

Hearing Denied Aug. 26, 1946.

1. Appeal and error ⇐110

Order denying motion for new trial is not appealable. Code Civ.Proc. § 963.

2. Trial ⇐295(1)

Instructions must be read as a whole and harmonized if possible and a judgment will not be reversed for error which can be found only by detaching a portion or portions of a charge from the context where such charge in its entirety fairly and accurately states the law.

3. Trial ⇐296(1)

The giving of erroneous instruction is not cured by the giving of other correct instructions, where the effect is simply to produce a clear conflict in the instructions and it is impossible to know which instruction was followed by jury in arriving at a verdict.

4. Automobiles ⇐206

A pedestrain proceeding with ordinary care may assume that operators of automobiles entering intersection will exercise proper care with respect to pedestrian's right of way under statute while crossing roadway within marked crosswalk. Vehicle Code, § 560.

5. Automobiles ⇐245(72)

Whether pedestrian who collided with automobile approaching from her left while attempting to cross street within marked crosswalk was proceeding with ordinary care so as to be entitled to assume that motorists would respect her right of way was a question of fact. Vehicle Code, § 560.

6. Automobiles ⇐245(72)

Whether act of pedestrian in stepping out beyond line of parked automobiles to see if any automobile was approaching from her left before crossing street within marked crosswalk was the act of an or-

dinarily prudent person was a question of fact.

**7. Appeal and error ⇐1064(1)**
**Automobiles ⇐246(31)**

Instruction that pedestrian before placing himself in position of danger must look in direction from which danger should be anticipated and that such duty was continuing and was not met by looking only once was prejudicially erroneous as directing verdict against pedestrian even though jury believed her testimony that before crossing street within marked crosswalk she stepped out beyond line of parked automobile and looked to her left once and, seeing automobile approaching rapidly, attempted to step back out of danger but was struck by defendant's automobile while doing so. Vehicle Code, § 560.

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Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Action by Margaret Goodwin against James K. Foley to recover damages for personal injuries sustained by plaintiff when she collided with defendant's automobile. Verdict for defendant and from the judgment entered thereon and from the order denying her motion for a new trial, plaintiff appeals.

Appeal from order denying new trial dismissed and judgment reversed.

Melvin M. Belli, of San Francisco, for appellant.

Keith, Creede & Sedgwick, of San Francisco, for respondent.

GOODELL, Justice.

This action was brought by appellant to recover damages for injuries sustained in a collision between herself and an automobile driven by respondent at the intersection of Post and Polk streets in San Francisco. Post street runs approximately east and west and is intersected by Polk street at right angles. The intersection is level and is marked by pedestrian crosswalks about ten feet wide, the boundaries of which are painted in white lines. At the time of the accident the appellant was endeavoring to cross Post street in the marked crosswalk and respondent was driving his automobile westerly on Post street. The accident occurred during daylight on March 24, 1944, about 6:30 p. m.

The appellant testified that a few moments before the accident she left her apartment on the north side of Post street, and walked west to Polk street. She watched the traffic as she walked up to the corner because she intended to cross the street, and noticed that cars were passing in both directions. Although she could not remember whether she looked in either direction as she stepped off the curb, she stated that she stepped out beyond the line of cars parked on the north side of the street to see if there were any cars coming from her left. She saw a car about half a block away which she realized was traveling fast—"too fast for me to get across the street"—stepped backward to return to the curb. She stated that she had no further recollection of the circumstances of the accident, but believed that she was struck by the automobile before she was able to reach the curb. Apart from the testimony of the respondent and one of the passengers riding in his car, the record contains no testimony of any person who observed the appellant prior to or at the moment of the accident.

The respondent testified that at the time of the accident he was enroute to his home from work. He had turned his automobile into Post from Larkin street, a block east of the intersection where the accident occurred, and throughout that block his maximum speed was from ten to 12 miles an hour. His car was about a foot and a half from the cars parked on the north side of the street and although he was driving against the sun, his visor was down so that he was able to see without the sun glaring in his eyes. It was his intention to turn to the right at Polk street, and about 25 feet from the intersection he shifted to second gear because the traffic on Polk street required that he reduce his speed. He stated that he first saw the appellant when his car was about six or seven feet east of the easterly line of the crosswalk. At that time the crosswalk was clear and appellant was standing on the sidewalk about a foot or a foot and a half east of

the easterly boundary of the crosswalk. As the car approached the crosswalk, she started off the curb at a rapid pace. Respondent realized that she was going to walk into the car, and applied his brakes immediately, bringing his car to a stop in the middle of the crosswalk. At that moment appellant walked into the side of his right front fender and fell to the ground, landing within the white lines. Respondent stated that he did not remember whether appellant looked to her left or to her right as she stepped off the curb. During the course of the few steps before she collided with the car she continued to look straight ahead, as near as he could see.

[1] The jury returned a verdict for the defendant, and the plaintiff prosecutes this appeal from the judgment thereon and from the order denying her motion for a new trial. The latter order is nonappealable and the appeal therefrom should be dismissed. Wilbur v. Donohoe Kelly Banking Co., 10 Cal.2d 473, 75 P.2d 514; Padilla v. Padilla, 38 Cal.App.2d 319, 100 P.2d 1093; Sanker v. Humborg, 48 Cal. App.2d 203, 205, 119 P.2d 431, 433; Code Civ.Proc. § 963.

Appellant's sole contention is that the judgment should be reversed because of the trial court's error in instructing the jury as follows: "You are instructed that even though a pedestrian has the right of way, she cannot proceed blindly and in reckless disregard of obvious danger, but must exercise ordinary care to avoid a collision if the same could be avoided by the exercise of such care. And it is the duty of a pedestrian in the exercise of ordinary care, *before placing himself or herself in a position of danger, to look in the direction from which danger was to be anticipated. This is a continuing duty and was not met, if you so find from the evidence in this case, by looking once and then looking away.*" (Emphasis added.)

In support of her contention appellant relies chiefly on Salomon v. Meyer, 1 Cal. 2d 11, 32 P.2d 631, 632, a case which has several features in common with the case at bar. In that case the plaintiff, a woman pedestrian crossing an intersection, was struck by an automobile. She testified that she looked in both directions before attempting to cross the street and that she did not look either way after leaving the curb. In that case, as in this, there was evidence that she walked into the automobile. A verdict for the defendant was reversed on the sole ground that an instruction reading as follows was prejudicially erroneous: "* * * it is a duty resting upon any person attempting to cross a street that is likely to be dangerous, *before placing himself or herself in a position of danger, to look in the direction from which such danger is to be anticipated. This is a continuing duty, and is not met by looking once and then looking away.* In the exercise of ordinary care it is the duty of the pedestrian to look to the right and to the left whenever he or she has voluntarily put himself or herself into a position which may be one of peril coming from either direction * * *."

The language which we have emphasized is substantially identical in both quoted instructions (except for the phrase "if you so find from the evidence in this case"). That the use of this language led to the reversal in the Salomon case appears from the following: "The vice of the instruction here complained of lies in the unqualified statement that 'this is a continuing duty, and is not met by looking once and then looking away.' Whenever there is room for an honest difference of opinion between men of average intelligence, the question of whether the plaintiff was negligent in failing to look again in the direction from which the defendant's car was approaching is a question of fact for the jury and the finding of the triers of fact is conclusive. McQuigg v. Childs, 213 Cal. 661, 3 P.2d 309."

The court further said that it could not escape the conclusion that the error was prejudicial. The instruction, said the court, "set up continued observance as a definite and absolute standard of duty, upon the basis of an assumption that she had voluntarily placed herself in a position of probable danger, thus fixing for the jury a measure of ordinary care without requiring them to first find, as a condition of its application, that the plaintiff had ex-

posed herself to a continuing danger. Under the holding of Long v. Barbieri, [infra], this should have been made an express condition of a finding of contributory negligence under the instruction given. * * * Applying this inflexible measure of ordinary care to the admitted facts," the court stated, "the jury could not have found otherwise than that the plaintiff had failed to exercise it."

Nickell v. Rosenfield, 82 Cal.App. 369, 255 P. 760, 763, is another pedestrian case where there was a reversal of a judgment for the defendant because of an instruction which the court said "took from the jury the right to determine the negligence of plaintiff by particularly specifying just what acts on her part were negligent." The court in that case cites Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649, and says that "the conclusion reached there is that it is a question of fact for the jury to determine whether the conduct of a pedestrian, under all of the circumstances at the time and place and conditions of traffic, was or was not negligent."

In Long v. Barbieri, 120 Cal.App. 207, 7 P.2d 1082, 1085, a pedestrian case, the court followed Nickell v. Rosenfield, supra, in reversing a judgment for the defendant because of erroneous instructions, one of which contained some of the language found in the instruction challenged in the instant case. That case points out forcefully "that it is a dangerous practice, and one not to be followed, to take excerpts from the opinions of courts of last resort and indiscriminately change them into instructions to juries" (citing Rosander v. Market Street R. Co., 89 Cal.App. 710, 718, 265 P. 536).

In King v. Unger, 25 Cal.App.2d 632, 78 P.2d 255, an order granting plaintiff a new trial after a judgment for defendants on an instructed verdict was affirmed. The language or propriety of instructions was not involved, but the court discussed the duty of a pedestrian at an intersection and cited Salomon v. Meyer, supra; McQuigg v. Childs, supra; Long v. Barbieri, supra; Filson v. Balkins, 206 Cal. 209, 212, 273 P. 578; and Walker v. Mason, 109 Cal. App. 361, 293 P. 125. See, also, Schulman v. Los Angeles R. Corp., 44 Cal.App.2d 122, 129, 111 P.2d 924; Young v. Tassop, 47 Cal.App.2d 557, 563, 564, 118 P.2d 371; Sanker v. Humborg, 48 Cal.App.2d 203, 204, 119 P.2d 431; Reed v. Stroh, 54 Cal.App.2d 183, 190, 192, 128 P.2d 829.

[2] The respondent argues that when the instructions are taken as a whole the jury was properly informed as to the law. The cases of Lund v. Pacific Electric R. Co., 25 Cal.2d 287, 153 P.2d 705; Westover v. City of Los Angeles, 20 Cal.2d 635, 128 P.2d 350; Megee v. Fasulis, 65 Cal.App.2d 94, 150 P.2d 281; Wood v. Moore, 64 Cal. App.2d 144, 148 P.2d 91; and Barlow v. Crome, 44 Cal.App.2d 356, 112 P.2d 303, are cited on the general proposition that instructions must be read as a whole and harmonized if possible. In the Lund case [25 Cal.2d 287, 153 P.2d 708] the rule is stated "that a judgment will not be reversed for error which can be found only by detaching a portion or portions of a charge from the context, when such charge in its entirety fairly and correctly states the law."

[3] On the other hand, in Westberg v. Wilde, 14 Cal.2d 360, 370, 94 P.2d 590, 596, the court quoted approvingly from Akers v. Cowan, 26 Cal.App.2d 694, 80 P.2d 143, the following: "It has been frequently held that the giving of an erroneous instruction is not cured by the giving of other correct instructions, where the effect is simply to produce a clear conflict in the instructions and it is not possible to know which instruction was followed by the jury in arriving at a verdict (citing cases)."

In Nickell v. Rosenfield, supra, the court said that the instructions taken together informed the jury fully as to the claims of the parties and, as to the burden of proof, and on all the general subjects proper in like cases, still an instruction that the duty to look to the left was imperative upon the pedestrian during all the time that she was crossing was held to be reversible error. Such instruction, the court said, "took from the jury the right to determine the negligence of plaintiff by particularly specifying just what acts on her part were negligent. * * * the jury were not left to determine * * * whether his [defendant's] car was

observed by plaintiff, or, in the exercise of ordinary care could have been observed, and this was an issue in the case. * * * [We] cannot concede that in an action of this character, when the facts are disputed a trial court can fix the standard of conduct with reference to specific acts without the jury's determination of the facts. * * * We are not forgetful of the general rules that instructions are to be read together and construed as a whole, but we do not feel that this rule goes so far as to hold that one or two detached general statements are sufficient to overcome the force of a direct instruction based upon the particular facts of the case." See, also, Ferguson v. Nakahara, 43 Cal.App.2d 435, 442, 110 P.2d 1091; Van Fleet v. Hevler, 51 Cal.App.2d 719, 734, 125 P.2d 586. A similar result was reached in Long v. Barbieri, supra, where the court stated (120 Cal.App. at pages 216, 217, 7 P.2d at page 1086): "The instruction in question removes from the jury its prerogative of determining whether or not the conduct of the plaintiff (as the jury shall find it to have been) conformed to the standard of ordinary care, and in lieu thereof substitutes a fixed and rigid standard given to it by the court."

[4-6] One of the undisputed facts in this case is that the point of contact was the right front fender of respondent's automobile, and that it (the fender) was approximately half way across the crossing lane when the appellant came in contact with it. This placed the appellant within the marked crosswalk. Section 560, Vehicle Code, provides that "The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk * * *" and the cases hold that, *while proceeding with ordinary care,* a pedestrian has the right to assume that operators of automobiles entering the intersection will exercise a proper degree of care and will respect the pedestrian's right of way. Ladas v. Johnson's etc., Co., 43 Cal.App.2d 223, 228, 110 P.2d 449; Sanker v. Humborg, supra; Lowell v. Harris, 24 Cal.App.2d 70, 84, 74 P.2d 551. Whether the appellant proceeded with ordinary care was one of the important questions of fact in this case. It is also an admitted fact that there was a line of cars parked along the northerly curb of Post street and whether stepping out—as she testified she did—to look for on-coming vehicles was the act of an ordinarily prudent person under such circumstances was another question of fact.

The respondent testified that he saw appellant standing on the sidewalk and that, while looking directly ahead, appellant walked rapidly into the right front fender of his car which by that time he had brought to a stop. The appellant testified that she looked once to her left and, seeing that she could not proceed across Post street safely because of a rapidly approaching car, started back toward the curb but remembered nothing further. If the jury believed appellant's testimony they may well have drawn the inference that she was struck by the respondent's car while it was turning right into Polk street during the time that she was retracing her steps to the sidewalk.

If the jury so found the instruction complained of informed them that if appellant looked once easterly up Post street and, having seen an approaching car, did not look again while she was retracing her steps to the curb they must find her guilty of contributory negligence. Since there was no testimony that she looked again this was tantamount to directing a verdict against appellant even if the jury believed her testimony that she was struck while seeking to avoid that catastrophe.

[7] We cannot know that the jury did not believe appellant's story and arrive at their verdict solely because of this erroneous instruction. Considering the sharp conflict in the evidence the giving of the instruction complained of was clearly prejudicial.

The appeal from the order denying the motion for new trial is dismissed and the judgment is reversed.

DOOLING, J., concurs.

Hearing denied; EDMONDS, J., dissenting.

75 Cal.App.2d 173

**ALBERT ALBEK, Inc., v. BROCK.**

**Civ. 7266.**

District Court of Appeal, Third District, California.

June 27, 1946.

**1. Food ⇐3**

Application for unlimited food processing license was not an issue and was not properly included in a proceeding to cancel a former limited license for alleged violation of the statute where the new application was a separate and distinct proceeding from the investigation for cancellation of the old license, hence Director of Agriculture was without jurisdiction to deny the application for unlimited processor's license without a hearing. Agricultural Code, §§ 1300.1, 1300.4a.

**2. Licenses ⇐22**

When a statute authorizes an officer, board or tribunal to grant or refuse licenses to conduct businesses, after a "hearing", it contemplates a fair and impartial hearing of the application therefor with an opportunity for the petitioner to present competent evidence upon that application.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearing".

**3. Mandamus ⇐1**
**Certiorari ⇐20**

The proceedings of a statewide administrative agency cannot, in the absence of constitutional authorization, be reviewed by certiorari but where the record and circumstances permit, an application for writ of review may be considered as an application for a writ of mandate. Const. art. 6, § 4.

**4. Mandamus ⇐1, 87**

Application for writ of review of denial by Director of Agriculture of petitioner's application for processor's license to handle and process farm products was entertained and granted as a petition for writ of mandate where it appeared that petitioner's application for license as processor was arbitrarily denied without affording petitioner formality of a hearing. Agricultural Code, §§ 1300.1, 1300.4a.

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Petition by Albert Albek, Inc., doing business as Tarzana Herb Farms, against A. A. Brock, as Director of Agriculture of the Department of Agriculture of the State of California, to review an order of Director of Agriculture denying plaintiff's application for an unlimited processor's license to handle and process farm products.

Writ granted.

Albeck & Albeck, of Los Angeles, for petitioner.

Robert W. Kenny, Atty. Gen., and Paul M. Joseph, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

In a petition for a writ of review it is alleged that the Director of Agriculture, without acquiring jurisdiction and without a hearing, arbitrarily denied petitioner's application under Section 1300.1 of the Agricultural Code for a processor's license to handle and process farm products.

The petition alleges that petitioner "held a limited processor's license" on October 19, 1944; that, on November 30, 1944, a verified complaint was filed under Section 1300.3 of the Agricultural Code to cancel the license for violation of the statute; that upon a hearing of said charges oral and documentary evidence was adduced and said proceeding was concluded and submitted for determination on July 11, 1945; that, because the last-mentioned section was amended by the legislature in 1945, Stats. 1945, p. 1057, "eliminating restricted processor's licenses," the petitioner "surrendered his limited processor's license * * * and respondent did, on the 15th day of September, 1945, cancel the same," and that petitioner held no license after that date. The respondent's answer admits those allegations, from which it must be inferred petitioner held no license after the last-mentioned date. A motion to dismiss the proceedings as moot was made after the surrender and cancellation of the license, but the motion was not passed upon

until after findings and the order complained of was made and filed. The director did thereafter, on February 2, 1946, make an order denying the motion to dismiss.

The director adopted findings on the complaint to cancel the limited license, on January 28, 1946, determining that petitioner had violated the statute as charged by refusing to pay for farm products and by rejecting products purchased, without cause. No order was, however, then made canceling the license. According to the pleadings in this proceeding, the license had been previously canceled by the director, at the time when it was surrendered. Since the license, which was the subject of investigation, had been surrendered and canceled, it would appear that the findings became ineffectual in that proceeding. But that is immaterial.

We infer from the order of the director that, subsequent to the cancellation of its license, petitioner filed with the department a new application for an unlimited processor's license. The only order which the director made pursuant to the findings which were adopted is the following:

"In accordance with the above findings, and good cause appearing,

"It is ordered:

"That the application by respondent for Processor's License, as said application is now on file with said Director of Agriculture, be and the same is hereby denied."

The petition alleges that the director, without jurisdiction and without a hearing, arbitrarily denied the subsequent application for an unlimited license. It is not contended that a hearing was had upon the new application for license. It is not claimed that the application for a new license did not conform in every respect to the requirements of Section 1300.1 of Agricultural Code as amended in 1945. Section 1300.4a of that code, as amended in 1945, properly contemplates a hearing upon the application for a license, as it does for the revocation or suspension thereof. That section now reads, in part:

"The director *may refuse to grant a license* and may revoke or suspend any license, as the case may require, when *after a hearing as herein provided* he is satisfied of the existence of any of the following facts, the existence of which is hereby declared to be a violation of this chapter: * * *." (Italics added.)

[1] It may not be contended that the application for a new unlimited license was an issue or that it was properly included in the proceeding to cancel the former limited license for alleged violation of the statute. The new application was a separate and distinct proceeding from the investigation for cancellation of the old license, especially since the application was filed after the former license had been surrendered and canceled. It follows that the director was without jurisdiction to deny the independent application for license without a hearing.

We assume that the denial, without a hearing, of an application in due form for license clearly infers a lack of jurisdiction. The case of Redlands High School District v. Superior Court, 20 Cal.2d 348, 360, 125 P.2d 490, upon which the respondent relies, is not in point. In that case, upon certiorari, it was held that the rendering of judgment without evidence *of the filing of a claim* against the school board, was not jurisdictional, but that it was a mere error of procedure which might be waived by failure to demur to the complaint or to object to evidence on that ground. There is a clear distinction between that case and the present procedure of denying an application for license without a hearing which is specifically required by the statute.

[2] When a statute authorizes an officer, board or tribunal to grant or refuse licenses to conduct businesses, "after a hearing," as it does in section 1300.4a of the Agricultural Code, it contemplates a fair and impartial hearing of the application therefor with an opportunity for the petitioner to present competent evidence upon that application. Carroll v. California Horse Racing Board, 16 Cal.2d 164, 105 P.2d 110; Martin v. Board of Supervisors, 135 Cal.App. 96, 100, 26 P.2d 843; Irvine v. State Board of Equalization, 40 Cal.App.2d 280, 104 P.2d 847; 33 C.J. 548, § 138. In the Martin case, supra [135 Cal.App. 96, 26 P.2d 845], in which a writ of mandate was issued directing the Board of Supervisors of Lake

County to grant a hearing to the petitioner for a liquor license, it was said that while such hearings before licensing tribunals are not required to be conducted with all the formality of a court, nevertheless, "This informality * * * does not justify the denial of a hearing, or the refusal to permit a fair presentation of the petitioner's claim, or the arbitrary denial of a license," without a hearing.

In the present case there was no hearing on the petition for the new unrestricted license. That application was not an issue in the previous proceeding to revoke the old license for alleged violations of the statute. While the director may have been warranted in denying the motion to dismiss that proceeding as moot after the surrender and cancellation of the license under investigation, because it involved interests of a public character (Van De Vegt v. Board of Commissioners, 98 Colo. 161, 55 P.2d 703, 710; Rattray v. Scudder, 67 Cal.App.2d 123, 127, 153 P.2d 433), that proceeding did not serve as a hearing upon the subsequent independent application for an unrestricted license. The petitioner had no warning or notice that its new application would be considered as involved in that proceeding. It reasonably assumed that its motion to dismiss the proceeding as moot would be granted, since the license under investigation had been surrendered and canceled. It might therefore have been induced to submit the cause without available evidence satisfactorily showing that it was entitled to the new license.

[3, 4] While, as urged by respondent, it is the established rule in this state that the proceedings of a statewide administrative agency cannot, in the absence of constitutional authorization, be reviewed by certiorari (citing Standard Oil Company v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119, and Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457), it is equally well settled that where the record and circumstances permit, an application for a writ of review may be considered as an application for a writ of mandate. Board of Trustees v. State Board of Equalization, 1 Cal.2d 784, 787, 37 P.2d 84, 96 A.L.R. 775. Such being the situation presented herein, we have, under the authority vested in this court by Article VI, section 4, of the Constitution, entertained the within petition as one for a writ of mandate.

For the foregoing reason that it appears without conflict that the petitioner's application for a license as a processor was arbitrarily denied by the respondent without affording him the formality of a hearing, we are of the opinion that the writ of mandamus should issue.

The writ is therefore granted, directing said respondent Director to grant petitioner a hearing and to afford him the opportunity of presenting competent evidence thereat in support of his application for said processor's license.

ADAMS, P. J., and PEEK, J., concur.




75 Cal.App.2d 161

## MURPHY v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al.

Civ. 13060.

District Court of Appeal, First District, Division 1, California.

June 27, 1946.

**1. Constitutional law ⇐275(1)**

The fact that board of medical examiners, on the basis of charges against petitioner by an agent of the board, heard the charges and revoked the petitioner's license did not deprive petitioner of a property right without due process of law in light of board's statutory duty to determine any accusations bearing upon qualifications of licensee to continue the practice of medicine and the right of judicial review of action of board. Const. art. 1, § 13.

**2. Physicians and surgeons ⇐11(3)**

Evidence justified revocation of physician's license for unprofessional conduct consisting of the procurement of a criminal abortion. Business and Professions Code, § 2377; Pen.Code, § 274.

**3. Physicians and surgeons ⇐11(3)**

A disciplinary proceeding before the board of medical examiners for the revocation of a physician's license for unprofessional conduct consisting of the performance of a criminal abortion is not criminal in its nature and is not to be judged by legal standards applicable to criminal prosecutions. Business and Professions Code, § 2377; Pen.Code, § 274.

**4. Physicians and surgeons ⇐11(3)**

Where Legislature has created a professional board, such as board of medical examiners, and has conferred on it, power to administer provisions of a general regulatory plan governing the members of the profession, such board is not required to conduct its proceedings for the revocation of a license in accordance with theories developed in the field of criminal law.

**5. Physicians and surgeons ⇐11(3)**

Where physician in disciplinary proceedings before board of medical examiners for revocation of his license for performing criminal abortions admitted performing the operations, he could not attack sufficiency of evidence on ground that women involved were accomplices, his admission being sufficient corroboration, and, in any event, since requirements of corroboration in a criminal case do not apply to administrative proceedings. Business and Professions Code, § 2377; Pen.Code, § 274.

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Appeal from Superior Court, San Francisco County; Frank T. Deasy, Judge.

Mandamus by Philip J. Murphy against the Board of Medical Examiners of the State of California and others to review the revocation of petitioner's certificate of registration as a physician and surgeon. From an adverse judgment, petitioner appeals.

Affirmed.

Samuel A. Rosenthal, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment denying a writ of mandate and recalling an alternative writ of mandate theretofore issued in a proceeding brought against respondent Board of Medical Examiners of the State of California to secure a judicial review of the administrative revocation of appellant's certificate of registration as a physician and surgeon on a charge of unprofessional conduct in performing two abortions.

The judicial review proceeding was tried upon the record in the administrative proceeding, the transcript in said proceeding being offered jointly by appellant and respondent in the trial court.

No procedural errors in either the administrative proceeding or in the trial of the mandate proceeding are urged by appellant upon this appeal, but appellant contends that the judgment of the trial court should be reversed upon the following grounds: 1. The board's actions were unreasonable, unwarranted and an arbitrary and illegal exercise of authority, and in direct violation of section 13, Article I of the Constitution of the State of California; 2. The evidence is insufficient to sustain the respondent medical board's order revoking appellant's license or the judgment of the trial court denying petitioner's petition for a peremptory writ of mandate.

[1] Appellant's first point deserves scant attention. He contends that because the accusation against him was made by an agent of respondent medical board and said board heard the evidence and determined appellant guilty, appellant was deprived of his valuable property right to practice medicine without due process of law. No authority is cited in support of this contention, nor, in our opinion, can there be. Under our statutes the right to practice medicine is granted to all qualified persons by respondent board and said board is likewise granted the right (and, indeed, charged with the duty) to hear and determine any accusations bearing upon the qualifications of the licensee to continue the practice of medicine. If a physician whose license is ordered revoked by the board is

not satisfied with the determination of the board, he may, as was done in the instant case, apply to the superior court for a review of the board's action, and he then may have a full and complete hearing in the superior court. Not only is he not deprived of a right of property without due process but he is given ample legal opportunity to protect that right.

Appellant's principal contention is that the evidence is insufficient to sustain either the respondent medical board's order or the judgment of the trial court. Before discussing this contention of appellant we shall summarize briefly the evidence, setting forth separately the evidence as to each abortion charge.

The Ballard Case

On the morning of June 15, 1942, Annie Ghneva Ballard went to appellant's office in Los Angeles and spoke to appellant's nurse, and was told to come back later in the day. She was also told that the fee would be $100. Pursuant to the nurse's instruction, Miss Ballard returned at 11 a. m. the same day, and by that same nurse was taken into a room and told to disrobe. She was supplied with a wrap-around dress and told to lie down upon a table. Appellant came into the room at about 12 noon. He merely said "Hello" to Miss Ballard, washed his hands, and then started inserting a "spreader" and "scissors-like device" into Miss Ballard's private parts. She felt sharp pains inside her abdominal area. Appellant then left the room. Miss Ballard noticed a jar of light red water, which had been extracted from her, on an adjoining table. Appellant made no statements and put no dressing on Miss Ballard, but the nurse placed a sanitary napkin on her, and told her that in "around 24 hours" she "would start having pain" and that she would then pass something from her body. Miss Ballard went to her home in San Diego, and had to go to the hospital the next morning, June 16, 1942. On that same day, and while still in the hospital, she "passed something" which was "fleshy," of "dark color" and about "7 or 8 inches long."

After leaving the hospital, Miss Ballard had, by the date of the board hearing, three normal menstruations. Immediately prior to her first visit to appellant (on June 15, 1942) Miss Ballard, according to her testimony, was "beside being pregnant," in "fine" physical condition. In February, 1942, she had intercourse, and had "missed" four successive menstrual periods immediately before going to appellant. On the morning of June 15th, prior to her seeing appellant, Miss Ballard had given appellant's nurse an envelope which contained $55 or $60 in currency, together with a memorandum prepared by another doctor. She had gone to that other doctor for a "pregnancy" examination.

Appellant testified that he examined Miss Ballard and discovered her to be approximately four months pregnant. He said he took her temperature, which was 101, then dilated and inserted instruments into her cervix and removed a piece of placental tissue, about the size of his little finger, which was protruding from the uterus. He also admitted depositing some abortafacient substance in the cervix, purposing to have it act as an evacuant. He further admitted that such substance would cause an abortion. He expected Miss Ballard to "pass" the fetus and the remaining placental tissue "later." Appellant further said that when Miss Ballard visited his office she was "bleeding" and "cramping" and "had a smelly discharge."

Appellant put in evidence a "statement" bearing Miss Ballard's signature, indicating that she had already had an abortion attempted upon her, and, presumably, that she was authorizing appellant to operate upon her to "save her life." Miss Ballard's testimony was that she signed a blank card, and the record shows that the body of the statement was in the handwriting of appellant or one of his nurses. No other history or office records on the "treatment" given Miss Ballard was furnished by appellant. Appellant had made no report to any law enforcement or medical association agency concerning the alleged "incomplete abortion" which had been performed on Miss Ballard before appellant administered his "treatment."

The Palmer Case

On either the 13th or 14th of August, 1942, Mrs. Edith Palmer went to appellant's office in Los Angeles, and was told

by his nurse to return later. She returned about a week later together with a Mr. Verdi. Mrs. Palmer did not see appellant, but the same nurse instructed her to disrobe. She was given an anaesthetic and was unconscious while appellant worked on her. When she went to appellant's office she was pregnant, but aside from that condition she was in good health. She had missed one menstrual period prior to going to appellant. Prior to visiting appellant, she had been given a "pregnancy" test by another doctor. While she was under the anaesthetic, $75 was removed from among her clothes, which she had left in the room where she disrobed. When she "came out" of the anaesthetic, she was weak and dizzy, and had "cramps" in her pelvic and abdominal areas. She also, upon awakening, found a dressing over her vaginal area. The transcript shows that Mrs. Palmer did not see appellant even after regaining consciousness, but Mr. Verdi, who came to the office with her, identified appellant.

Several days after leaving appellant's office, Mrs. Palmer noticed a dark discharge from her vagina, and consulted another doctor about it. The discharge continued up until the date of the board hearing on October 22, 1942. Prior to going to appellant's office, Mrs. Palmer did not have any such vaginal discharge.

Appellant had Mrs. Palmer (and Mr. Verdi) sign a card which when put in evidence by appellant, contained the same statement (about a prior incomplete abortion and an operation by appellant to save her life) as was in evidence in the Ballard case. As in the Ballard case, the body of the statement was in the handwriting of appellant or his nurses, and Mrs. Palmer and Verdi testified that the cards were blank when signed by them. As in the Ballard case, appellant offered no other office history or record on the "treatment" given by him to Mrs. Palmer.

Appellant admitted having performed a curettement upon Mrs. Palmer while she was under the anaesthetic on August 21, 1942, and admitted receiving $55 for such. He said that he took her temperature orally, but made no examination of the material he found within her during the pre-operation examination, even though he claimed he found an infection at that time. He admitted giving her no drug to combat the infection.

Appellant contends "that the state of the evidence is such as to be wholly insufficient to establish that he was guilty of performing a *'criminal abortion'* upon either of these two women."

Section 2377 of the Business and Professions Code, which is the section that appellant was charged with violating, provides: "The procuring or aiding or abetting or attempting or agreeing or offering to procure a criminal abortion constitutes unprofessional conduct within the meaning of this chapter."

A criminal abortion is defined by section 274 of the Penal Code as follows: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years."

[2, 3] A detailed analysis of the evidence heretofore summarized is not necessary to demonstrate that the respondent Board of Medical Examiners was justified in concluding that appellant committed certain prohibited acts with intent to cause a miscarriage upon the person of Ghneva Ballard, and also upon the person of Edith Palmer, and that the superior court was justified in reaching the same conclusion upon the same record. Indeed, it is difficult to understand how any other conclusion could be arrived at. The evidence showed that both women were pregnant and that defendant knew they were pregnant. Appellant admittedly performed the acts amounting to an abortion. The fact that the women were both in normal health, except for being pregnant, is certainly sufficient to show that the performance of an abortion was not necessary to save the life of either one of them. The evidence shows clearly that all essential elements of

a criminal abortion were established, and abundantly sustains the findings that appellant was guilty of violation of section 2377 of the Business and Professions Code.

Most of the authorities cited by appellant relate to the degree of proof required in criminal cases involving charges of abortion. The proceeding here involved is an administrative, disciplinary proceeding, and is not criminal in its nature, nor is it to be judged by the legal standards applicable to criminal prosecutions. In the late case of Webster v. Board of Dental Examiners, 17 Cal.2d 534, at pages 537, 538 and 539, 110 P.2d 992, at page 994, our Supreme Court states the rule:

"Appellant first challenges the order of suspension on the theory that administrative proceedings to revoke a professional license are quasi criminal in nature. * * * This analogy between a proceeding to revoke a license and a criminal trial is found in a number of the earlier cases. In some of the decisions, however, language describing the revocation of a license as penal in nature is entirely inapplicable to an administrative proceeding brought for that purpose, because in the particular case the legislature had provided for forfeiture of the professional license as an extra penalty to be added by the criminal court after a conviction for violation of the statute. * * *

[4] "Where, on the other hand, the legislature has created a professional board and has conferred upon it power to administer the provisions of a general regulatory plan governing the members of the profession, the overwhelming weight of authority has rejected any analogy which would require such a board to conduct its proceedings for the revocation of a license in accordance with theories developed in the field of criminal law. * * *

"Some of the cases relied upon by appellant are clearly distinguishable. Thus, Cavassa v. Off, supra [206 Cal. 307, 274 P. 523], is not in point because there the legislature actually contemplated a criminal prosecution. The statement in Messner v. Board of Dental Examiners, 87 Cal. App. 199, 205, 262 P. 58, that such a proceeding is quasi criminal, is dictum. In that case the court held that a reasonable construction of the statute required that where one was charged with aiding and abetting an unlicensed person to practice dentistry, it must be shown that the unlicensed person had some control over the rendering of professional services. The court said that there was an *entire absence of evidence* to show any such management of the office by an unlicensed person as the statute contemplated. 87 Cal.App. at page 204, 262 P. 58. This lack of evidence upon a material issue required the annulment of the Board's order. The further statement that the proceedings were quasi criminal in nature is dictum which is contradicted so far as it relates to matters of evidence by the long line of cases cited above. Randall v. Board of Medical Examiners, 110 Cal. App. 61, 64, 293 P. 790, does not apply theories of criminal law to matters of evidence. The few remaining decisions which contain language tending to support petitioner's view are contrary to the great weight of authority in California and elsewhere, as pointed out above."

[5] Appellant does not directly urge, but strongly intimates, that the evidence is insufficient because the two women involved were accomplices. In the first place, the defendant admitted he performed the operations. Moreover, the requirements of corroboration in a criminal case do not apply to administrative proceedings. The true rule is stated in Lanterman v. Anderson, 36 Cal.App. 472, 172 P. 625, a case in which the revocation for abortion of a physician's license was upheld. The court said at page 477 of 36 Cal.App., at page 627 of 172 P.: "The last contention which we shall notice is that there was no legal or sufficient evidence authorizing the medical board to make the order complained of. The force of this objection rests chiefly upon the assertion that all the material testimony furnished against the appellant was that given by accomplices. The action not being criminal in its nature, it is again apparent that the statutory mandate that a person may not be convicted upon the uncorroborated testimony of an accomplice has no application here. We feel satisfied that any witness whose testimony as to competent facts was convinc-

ing to the board engaged in the hearing of the charge would be legally sufficient. * * * We have expressed the conclusion, however, that the testimony of persons who might be accomplices could be received and might be considered by the board trying the charge. There was ample testimony coming from the persons concerned in the commission of the act charged to sustain the determination made by the medical board." The Supreme Court denied a hearing in the case. See also Suckow v. Alderson (Suckow v. Board of Medical Examiners), 182 Cal. 247, 251, 187 P. 965; Jordan v. Alderson et al., Board of Medical Examiners, 48 Cal.App. 547, 549, 192 P. 170.

Our conclusion is that appellant was given a full and fair hearing before the respondent Board of Medical Examiners and likewise in the superior court; that the record fully sustains the finding of the board and of the trial court, and fully justified the revocation of appellant's license; and that the judgment should be, and the same is hereby affirmed.

PETERS, P. J., and WARD, J., concur.




**ALDER et al. v. DRUDIS et al. ***

Civ. 14962.

District Court of Appeal, Second District, Division 2, California.

June 24, 1946.

Rehearing Denied July 10, 1946.

Hearing Granted Aug. 22, 1946.

1. Appeal and error ⇐1011(1)

Where the evidence as to fraud claimed by appellants was conflicting, findings of trial court against fraud would not be disturbed on appeal.

2. Appeal and error ⇐1071(5)

The finding against appellants on an immaterial matter was not prejudicial.

3. Sales ⇐38(1)

Whether seller's statement that another had an interest in polyscope device and that a further payment of $5,000 was due from such other person was true or false was immaterial, where buyers were buying an interest in the device and were not purchasing such other person's interest, if any, in a contract.

4. Replevin ⇐21

The owners of letters patent and polyscopes and the holder of a contractual interest therein were entitled to join in an action to recover possession of the letters patent and polyscopes.

5. Trusts ⇐257

One asserting rights in favor of the trust and as trustee could maintain the action without joining the beneficiaries. Code Civ.Proc. § 369.

6. Sales ⇐131
Trusts ⇐251

Where buyers had rescinded contract, they could not object to action by another person claiming an interest in property covered by contract, irrespective of whether plaintiff was suing individually, or as trustee of trust, of which buyers were beneficiaries.

7. Trusts ⇐257

Where corporation to which property held in trust was to be conveyed had never functioned and no permit for the issuance of stock was ever issued and trustee had never been asked to transfer the property to the corporation, the corporation was not a necessary party to action instituted by trustee, who also claimed a personal interest in such property.

8. Detinue ⇐1
Replevin ⇐1

The common-law action of "detinue" differs from statutory action for claim and delivery, or "replevin", in that in the former possession of the property is not sought by or given to the plaintiff pending the action, whereas in the latter the plaintiff may claim, and upon compliance with statutory provisions be awarded, possession at the commencement of the action. Code Civ.Proc. §§ 509–520.

See Words and Phrases, Permanent Edition, for all other definitions of "Detinue" and "Replevin".

* Subsequent opinion 182 P.2d 195.

9. Detinue ⇐1

In an ordinary action to recover personal property or its value, where the auxiliary remedy is not invoked to obtain possession of the property involved at the commencement of the action, the provisions of the code relating to claim and delivery of personal property do not apply, and the action must be governed by the general rules of pleading and practice. Code Civ. Proc. §§ 509–520.

10. Detinue ⇐8

In an ordinary action to recover personal property or its value, defendant cannot plead that before the commencement of the action he had wrongfully disposed of the property and was not in possession of it.

11. Bailment ⇐27

A bailee cannot defeat an action for recovery of property by showing that he had wrongfully parted with possession of the property before action was commenced since, if bailee authorizes or permits another to possess and detain the bailed property, he is liable.

12. Detinue ⇐6, 18

In action for recovery of personal property or damages, possession by defendant must be proved, but it is not necessary that possession continue up to the date of the commencement of the action.

13. Bailment ⇐34

Where parties to contract delivered it to another person for convenience and such person retained possession until approximately two months before action to recover such property or its value and the property was without authority delivered to another party to the contract, a judgment against person to whom property was originally delivered for possession and damages was proper.

14. Detinue ⇐19

Where personal property was wrongfully withheld from owners, owners were entitled to recover as damages the value of its use for the time they were wrongfully deprived thereof.

15. Damages ⇐106

Compensation for the use of property need not be limited to the value thereof.

16. Trial ⇐252(5)

In action to recover personal property or damages where there was no evidence as to depreciation, cost of maintenance and repairs, or natural wear and tear, court did not err in failing to instruct jury upon such matters.

17. Detinue ⇐19

In action to recover polyscopes, where evidence would have sustained a verdict for from $50,000 to $100,000 for wrongful detention of the property for some 2½ years, judgment for $20,000 was not excessive.

18. Sales ⇐194

Where buyers had failed to pay the remainder of purchase price as required by agreement and buyer's attorney was to receive percentage of the stock in corporation to be organized and notice of rescission of contract was prepared by attorney and was never rescinded, and neither buyer nor his attorney offered to perform agreement, finding that both buyer and his attorney had breached the contract was proper.

19. Contracts ⇐313(1)

Where executory contract has not been fully performed on either side, the repudiation of the contract by one party or his refusal of further performance will justify the other party in treating the contract as at an end and give him a right of action for damages for its breach.

20. Appeal and error ⇐1067
Trial ⇐206

An instruction directing jury to hold as true matters in cross-complaint not denied by cross-defendants' answers is proper, but refusal to give instruction where matter not denied was that an expert had given an opinion commending the possibilities of another machine was not prejudicial, since expert's opinion was of no importance.

21. Appeal and error ⇐1066

Where the evidence established that appellants had made an independent investigation of patents and were present when tests were made and were satisfied with the patented instrument, instruction on effect of investigation was not prejudicial because it omitted to qualify the rule by adding

that the parties must have stood on an equal footing and must have had equal means of knowing the truth.

22. Appeal and error ⇐1068(3)

Where requested instruction which was not given related to an equitable issue upon which the verdict of the jury was merely advisory and the findings were against appellants on all issues including issue upon which the issue to which refused instruction related, and neither the giving nor the failure to give the instruction would have resulted in a different finding by the trial judge, refusal to give instruction was not prejudicial.

23. Appeal and error ⇐1068(5)

Where findings of court were against the appellants on question of fraud and were fully sustained by the evidence and the evidence showed that other machines relied upon to show fraud were unworkable, failure to charge jury that uselessness of such machines was not sustained by proof that they were commercially unsuccessful, was not error.

24. Trial ⇐115(3), 233(2)

Whether a pleading is to be read in full to the jury, or summarized by either counsel or the court, is a matter that is within discretion of trial judge.

25. Trial ⇐115(3)

Where record showed that cross-complaint was summarized to the jury and there was no claim that appellants were prevented from discussing all the facts in evidence and all of their theories in defense of plaintiffs' causes of action and in support of appellants' cross-complaint, refusal to permit counsel to read cross-complaint in full to the jury was not an abuse of discretion.

26. Witnesses ⇐198(1)

Where patent attorney refused to use memorandum to refresh his recollection because memorandum was confidential communication addressed to client, court properly sustained objections to use of document. Code Civ.Proc. § 1881.

27. Pleadings ⇐236(5)

The allowance of amendments to conform with the proof rests in sound discretion of the court, which has great latitude in the matter. Code Civ.Proc. § 475.

28. Pleading ⇐236(5)

Where amendment to answers to cross-complaint to conform with the proof did not raise issues that were not included in the original pleadings and were based on competent evidence and did not state a new cause of action or defense, and it did not appear that any prejudice resulted, abuse of discretion was not shown. Code Civ.Proc. § 475.

29. Evidence ⇐158(1)

Questions relating to patent were properly refused on ground that patent itself was the best evidence.

30. Appeal and error ⇐1050(3)

In action involving polyscope patent, admitting in evidence argument addressed to Patent Office attempting to show that polyscope upon which patent was sought was different from device previously patented was not prejudicial though the evidence was immaterial.

31. Appeal and error ⇐1170(6, 7, 9)

Where it did not appear that any rulings of the court in relation to the admission or rejection of evidence and the giving or refusing of instructions or in the matter of procedure resulted in a miscarriage of justice, the judgment would be affirmed. Const. art. 6, § 4½.

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Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by William F. Alder and others against Jose Drudis and others to recover possession of two polyscope devices and letters patent, for damages, and for a declaratory judgment, wherein the defendants filed a cross-complaint against the plaintiffs and Frederick G. Stoehr and another. From an adverse judgment, the defendants and cross-complainants appeal.

Judgment affirmed.

Marcus L. Roberts and Geo. W. Rochester, both of Los Angeles, for appellants.

Conroy & Conroy and Edward L. Conroy, all of Los Angeles, Frederick G. Stoehr, of Pasadena, and Chambers & Ly-

man and Robert Chambers, all of Los Angeles, for respondents.

WILSON, Justice.

This action grows out of two agreements that were executed simultaneously and are to be considered as one. The first agreement is between plaintiff McMahon and defendant Drudis and recites that McMahon had an agreement with plaintiffs Alder and wife for the purchase and assignment of United States letters patent on a device referred to in the pleadings as a polyscope, an instrument for producing third dimensional motion pictures, and that a further cash payment of $5,000 was due under said agreement. It was agreed (1) that Drudis would pay said sum to Alder for the assignment of said letters patent; (2) that McMahon would take said assignment from Alder and his wife and hold the same in trust and would cooperate with Drudis in forming a corporation; (3) that McMahon would transfer the letters patent to the corporation together with all other things received by him from Alder; (4) that Alder and wife would receive one tenth of the capital stock of said corporation, Drudis 25 per cent, defendant Roberts 12½ per cent, and John H. Morton 12½ per cent; (5) that Drudis would advance funds for the incorporation of said corporation and would pay to or make available for said corporation's use the total sum of $20,000, which would include said sum of $5,000 paid to Alder and $2,000 to organize said corporation.

The second agreement recites that Alder had obtained letters patent for said device, dated June 6, 1939, and that he and his wife were the sole owners thereof; that McMahon was desirous of acquiring the entire interest in said letters patent as trustee for himself, Drudis, Alder and wife, and others, for the purpose of forming a corporation and transferring said letters patent to it in exchange for stock therein. Alder and wife, in consideration of the sum of $5,000 paid by Drudis, sold, assigned and transferred said letters patent to McMahon as trustee, subject to the obligation of McMahon to assign and transfer the same to said corporation when formed, and agreed to deliver to McMahon as trustee all existing apparatuses manufactured under and in accordance with said letters patent and all drawings and dies for their manufacture.

In the negotiations leading to the execution of said agreements and throughout all proceedings relating thereto, including the rescission of the agreements and the trial of this action, Roberts was acting as attorney and agent of Drudis.

Drudis paid said sum of $5,000 to Alder and wife upon the signing of said agreements. Two of the polyscope devices and the letters patent were delivered to Roberts for storage and safekeeping.

Disagreements having arisen among the parties, Drudis, by his attorney Roberts, served upon Alder and wife and McMahon an adequate notice of rescission of the agreement and offer to restore.

Thereafter Alder and wife and McMahon commenced this action to recover possession of said polyscopes and letters patent, or the reasonable value thereof which was alleged to be $5,000, and for damages for the alleged wrongful withholding of said property in the sum of $36,000 to date of filing the complaint, and at the rate of $2,000 per month thereafter.

As a second cause of action in the complaint plaintiffs alleged the execution of said agreements, the payment of said sum of $5,000 by Drudis to Alder, and the failure of Drudis to perform the other terms of the agreement, and prayed for a declaration of their respective rights and duties under said agreements, including a determination as to whether said contracts had been terminated by defendants.

Defendants Drudis and Roberts answered with appropriate denials of the material allegations of the complaint and filed a cross-complaint against plaintiffs, bringing in Frederick G. Stoehr and John H. Morton as additional cross-defendants upon allegations that they had an interest in the polyscopes. By their cross-complaint defendants pleaded fraud and misrepresentation in the inducement of said contracts and demanded restoration of the amount paid to Drudis and of their expenses incurred in

making tests with the polyscope. From an adverse judgment defendants have appealed.

All issues arising under the cause of action in the complaint for recovery of possession of the letters patent and the polyscopes and for damages for their detention were tried by a jury and determined against appellants. The issues raised by the cause of action for declaratory relief and those arising under appellants' cross-complaint were submitted to the jury for advisory verdicts. Upon those matters the jury advised adversely to appellants, the verdicts were adopted by the court and judgment was rendered accordingly.

1. *Appellants' claim of misrepresentation and fraud.* The evidence concerning the alleged false representations with reference to the polyscope and that concerning the character of the motion pictures taken with the machine was conflicting. Appellants assert that the polyscope was represented by plaintiffs to be fully covered by letters patent and was the first instrument designed that would produce third dimensional motion pictures, and that they later discovered that two patents had been issued which purportedly produced the same kind of pictures, one having been obtained by a person named Cervenka and referred to in the record as the "Cervenka patent," and one known as the "cinegraph." On the other hand there was evidence that the Cervenka patent was defective and that a machine made according to the description and specifications contained in the letters patent would be wholly unworkable; also that the cinegraph was commercially of no value and could not possibly be used. Besides, there is evidence that Drudis and Roberts made an investigation of the polyscope patent before the contracts were signed and before Drudis paid his money to Alder, and that upon their first meeting with Alder, Roberts announced that they had investigated and were satisfied. Roberts testified that he had seen tests of the film made with the polyscope, saw the actual taking of the pictures, and their reproduction on the screen after the film had been developed. The Cervenka and cinegraph patents were public records and open to inspection and comparison by appellants before they entered into the transaction.

Upon the occasion when Drudis and Roberts were first introduced to Alder at the latter's home near Santa Cruz, and before any discussion had taken place, Roberts stated that they were ready to give Alder a check for $5,000. Alder said that he thought they should hear the history of the difficulties which he had encountered in producing commercial stereoscopic or third dimensional motion pictures. Roberts replied that "I have made a thorough investigation and am quite satisfied and we needn't waste time." Alder, however, insisted on relating the details of his efforts, which had extended over a period of many years, to produce the polyscope. Ten pages of the transcript are consumed in his description of his experimental work and the methods he had tested, beginning in 1911 and continuing practically without interruption until the patent on the polyscope was obtained in 1939. Roberts finally interrupted Alder's chronological history and reiterated that he, Roberts, had made a personal investigation and was thoroughly satisfied and because the hour was late he wished to have the contract signed so that he could return to his home in Los Angeles. He produced a cashier's check for $5,000 payable to Drudis which was endorsed by the latter and delivered to Alder and the contracts were signed.

Appellants claim to have relied, among other things, upon a treatise given to them by McMahon which had been written by Professor Curtis R. Haupt, who is referred to by all parties as one of the outstanding optical physicists of the country, asserting that plaintiffs intended them to believe that the document referred to the machine constructed by Alder. Respondents deny that they so represented. Furthermore, the title page of the pamphlet shows that it was published in May, 1933, six years before the polyscope was constructed and patented. Clearly appellants could not have been led to believe that Professor Haupt had described a machine that had not been produced.

[1] There is much other evidence in the record supporting and controverting

the allegations of fraud. Since the findings of the trial court were based upon conflicting evidence they will not be disturbed on appeal. Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 779, 163 P.2d 756, and cases cited.

[2] The finding against appellants' allegation in their cross-complaint that it is a physical impossibility for Alder to have produced a sensation of depth in motion pictures by bodily weaving the camera back and forth is a finding upon an immaterial matter. The manner in which he originally conceived the thought of constructing a third dimensional motion picture machine is of no consequence. The point in issue is not how the idea first reached his mind but whether it resulted in a machine that would do what he represented.

[3] Appellants' cross-complaint charged further misrepresentation in that it was alleged to have been untrue, as affirmatively stated by plaintiffs to appellants, that McMahon had an agreement with Alder whereby the former had an interest in the polyscope and that a further cash payment of $5,000 was due to the latter. The court found that said allegation in the cross-complaint was not true and the finding is sustained by Alder's testimony that McMahon had such interest and that said sum was due from him. But whether the statement was true or false is immaterial because appellants were buying an interest in the machine and were not purchasing McMahon's interest, if any, in a contract.

[4] 2. *May plaintiffs maintain the action to recover possession of the personal property?* Appellants deny the right of plaintiffs to maintain the action to recover possession of the letters patent and the polyscopes. It is conceded that Alder and his wife had owned both the letters patent and the machines. Alder testified concerning a contract which he had made with McMahon whereby the latter had an interest therein. The Alders as owners and McMahon as holder of a contractual interest in the property were entitled to join in an action to recover it.

[5, 6] It is also claimed that McMahon was a trustee and could not maintain the action in his personal capacity. He testified that he "was the owner in trust" under an assignment from Alder and that he, McMahon, "was one of the trust." He apparently assumed that he was trustee under the Drudis contract, but his assumption did not create a trust. It is not necessary to determine whether he was or was not a trustee. Assuming that by reason of the language contained in the contract he was acting in that capacity, he was asserting rights in favor of the trust and as trustee he could maintain the action without joining the beneficiaries. Code Civ. Proc. § 369. The action to recover the property was not between the trustee and the beneficiaries but, if a trust existed, it was by the trustee against persons in possession and claiming adversely to him. If Drudis and Roberts ever were beneficiaries under the agreement hereinbefore mentioned, their objection to the maintenance of the action by McMahon in his personal capacity has several answers: (1) Appellants had rescinded the contract, renounced all rights thereunder and relinquished their claims to the patent and to the machines. (2) If McMahon was trustee for Alder and his wife and for appellants the interests of all parties could be defined by judgment because they were all parties to the action. Alder and wife, by joining as plaintiffs with McMahon, consented that he maintain the action in his personal capacity. If it be conceded that Drudis and Roberts were beneficiaries under the trust, it was necessary that they be made defendants because they asserted the right to hold the property adversely to the claims of the trustee who was entitled to possession. (3) If other persons were beneficiaries under the asserted trust and claimed an interest in the letters patent or in the machines they are privileged to proceed against McMahon to enforce their right, but appellants cannot assert the interests of other persons, if there be any, as a defense in this action. (4) If Morton was a beneficiary he was a party to the action, having been brought in by defendants' cross-complaint, and he is not objecting to the judgment.

Notwithstanding appellants' argument that McMahon was a trustee and could not

maintain the action in his personal capacity, they about face and state that McMahon was *not* a trustee and therefore was not entitled to prosecute the action as such. This point need not be noticed further than to say that it is obvious that if his claim to possession of the property were not made as trustee it was made by him personally, together with the Alders, and the action could be maintained in their individual names.

[7] Entirely without merit is appellants' claim that the corporation referred to in the Drudis agreement was, by virtue of the agreement, the owner of the letters patent and was a necessary party to the action. The articles of incorporation were filed but it does not appear that the corporation ever functioned as such or that any meeting of stockholders or of directors was held. It did not acquire or claim any interest in the letters patent or in the polyscopes. No permit for the issuance of stock in the corporation was issued. McMahon was not required to assign the letters patent or deliver the polyscopes until the shares were issued as provided in the agreement. McMahon testified that he did not know that the articles of incorporation had been filed until the case came to trial and Roberts admitted that he never asked McMahon to assign the letters patent to the corporation.

3. *The judgment for possession of the property and for damages.* Appellant Roberts complains that the judgment against him in the action to recover possession of the personal property and for damages is erroneous because he had delivered the property in question to Drudis two months prior to the commencement of this action, and, he contends, since it was not in his possession at the time the action was commenced he could not be sued for possession and is not liable for damages sustained by plaintiffs for the detention of the property.

[8-12] An ordinary action for the recovery of personal property, the common law action of detinue, differs from our statutory action for claim and delivery, or replevin, in that in the former possession of the property is not sought by or given to the plaintiff pending the action, while in the latter the plaintiff may claim and, upon compliance with the statutory provisions, be awarded possession at the commencement of the action. 1 C.J.S., Actions, § 36, subsec. f., p. 1079. The distinction is pointed out in Faulkner v. First National Bank, 130 Cal. 258, 263, 62 P. 463, 464: Sections 509 to 520 of the Code of Civil Procedure relating to "claim and delivery of personal property" merely provide an auxiliary remedy by which a plaintiff in an action to recover personal property may "claim" that the property be immediately delivered to him at the commencement of the action and without awaiting the trial. When a plaintiff avails himself of the provisions of said sections and takes immediate possession of the property at the commencement of the action, certain relations and rights arise between him and the defendant which grow out of the exercise of the auxiliary remedy; but in an ordinary action, such as the instant case, to recover personal property or its value, where the auxiliary remedy is not invoked, said provisions of the code have no application and the action must be governed by the general rules of pleading and practice. It is no defense to such an action to plead that the defendant, before the commencement of the action, had wrongfully disposed of the property and is not in possession of it. A bailee cannot defeat the action by showing that he had wrongfully parted with possession of the property before the suit was commenced; he is liable if he authorizes or permits another to possess and detain the bailed property. Possession by defendant must be proved but it is not necessary that possession continue up to the date of the commencement of the action. Id., 130 Cal. at pages 264, 265, 62 P. 463.

The case at bar is an ordinary action to recover personal property or its value and is not the statutory proceeding in claim and delivery covered by section 509 et seq. of the Code of Civil Procedure. All of the cases cited by appellants (Runge v. Wilson, 7 Cal.App. 577, 95 P. 178; Home Payment Jewelry Co. v. Smith, 24 Cal.App. 486, 141 P. 933; Teater v. Good Hope Dev. Corp., 55 Cal.App.2d 459, 130 P.2d 812, see prior decision in same case, 14 Cal.2d 196, 208,

93 P.2d 112; California Packing Corp. v. Stone, 64 Cal.App. 488, 222 P. 193) are of the latter class and are not in point. Some of the decisions cited by appellants refer to Riciotto v. Clement, 94 Cal. 105, 29 P. 414, and Richards v. Morey, 133 Cal. 437, 65 P. 886, as authority for the statement that an action to recover personal property will not lie against a person who is not in possession at the time of the commencement of the action. It is pointed out in Teter v. Thompson, 57 Cal.App. 329, 331, 207 P. 260, that the Riciotto and Richards cases had their origin in the wrongful taking or tortious seizure of the property and were not applicable in a case in which the defendant had come into possession of the property lawfully and peaceably, as in Faulkner v. First National Bank, supra, and as is true in the instant case.

[13] The property in question was delivered by Alder and McMahon to Roberts for convenience. He had possession of it until approximately two months before the complaint was filed, when he delivered the letters patent and the polyscopes to Drudis without the authority, knowledge or consent of plaintiffs, and therefore a judgment against Roberts for possession and for damages will not be disturbed. Transfer of possession of personal property does not relieve a bailee of liability in an action for possession. Teter v. Thompson, supra, 57 Cal.App. at page 332, 207 P. 260; New Liverpool Salt Co. v. Western Salt Co., 151 Cal. 479, 483, 91 P. 152.

[14-16] 4. *Was the judgment for damages excessive?* McMahon, who had had many years' experience in the motion picture business and at the time of the trial had been an assistant director for several years in one of the largest studios in Hollywood, testified that a conservative rental value was $100 per day for each of the two machines. Alder, who had been a cameraman and employed in many branches of the business for 20 years or longer, testified that he had made a limited license agreement for the use of one polyscope in 15 pictures for a rental of $200 per day and considered that to be a reasonable amount. An independent producer presented a contract which he had negotiated with a Mexican organization for the use of one instrument at $50 per day. There was no contradictory evidence as to rental value. The machines were in the possession of appellants from January 26, 1942, until the termination of the trial on June 14, 1944. The jury awarded a verdict for $20,000 damages for the wrongful withholding of possession of the property. Omitting Saturdays, Sundays and holidays from the computation of the time of withholding possession, the evidence would have sustained a verdict for from $50,000 to $100,000. Plaintiffs were entitled to recover as damages for the detention of the property the value of its use for the period during which they were wrongfully deprived thereof. Drinkhouse v. Van Ness, 202 Cal. 359, 379, 260 P. 869; Ferris v. Cooper, 125 Cal.App. 234, 237, 13 P.2d 536; Tucker v. Hagerty, 37 Cal. App. 789, 792, 174 P. 908. Compensation for the use of property need not be limited to the value of the property. Stanley W. Smith, Inc., v. Pilgrim, 117 Cal.App. 244, 246, 3 P.2d 573; Tucker v. Hagerty, supra, 37 Cal.App. at page 793, 174 P. 908. Since there was no evidence as to depreciation, cost of maintenance and repairs, or natural wear and tear, which appellants say should be deducted from the rental value, no allowance can be made therefor. The court did not err in failing to instruct the jury upon those items.

[17, 18] 5. *Appellants' breach of the contract.* The court found that since January 21, 1942, defendants without cause had failed and refused to perform any of the terms of the agreement. This finding is sustained by the evidence that Drudis failed to pay the remainder of the sum of $20,000 required by his agreement and that he served a notice of rescission of the agreement. Roberts was acting as his attorney and under the terms of the contract was to receive 12½ per cent of the stock in the corporation which was to be organized. It is admitted that Roberts prepared and served the notice of rescission, signing it as attorney for Drudis. The latter never retracted the notice and never offered to perform the agreement, nor did Roberts.

These facts justified the finding that both defendants had breached the contract and were in default under its terms.

[19] Where an executory contract has not been fully performed on either side, the repudiation of the contract by one party or his refusal of further performance will justify the other party in treating the contract as at an end and give him a right of action for damages for its breach. Flinn & Treacy v. Mowry, 131 Cal. 481, 486, 63 P. 724, 1006; Gold Mining & Water Co. v. Swinerton, 23 Cal.2d 19, 29, 142 P.2d 22; Atkinson v. District Bond Co., 5 Cal.App.2d 738, 743, 43 P.2d 867. Rescission and offer to restore is a complete repudiation of a contract. Cobb v. Pacific Mutual Life Ins. Co., 4 Cal.2d 565, 568, 51 P.2d 84.

[20] 6. *Asserted errors in giving and refusing to give instructions to the jury.* (a) Defendants requested an instruction directing the jury to hold as true certain matters alleged in appellants' cross-complaint and not denied by cross-defendants' answers. Though it is proper to give such an instruction, failure to give it in this case is not reversible error. The requested instruction followed in general language an allegation that motion pictures had been taken with the cinegraph and had been exhibited to the operator of a theater who was experienced in the motion picture business and that he gave an opinion commending the possibilities of the machine. It is admitted that Alder had had an interest in the cinegraph, but there is also evidence that it was unworkable and that pictures taken with it were of little, if any, value. The opinion of the motion picture exhibitor was of no importance.

[21] (b) The court instructed the jury as follows: "You are instructed that cross-complainants cannot recover if they had the means of investigating the facts with reference to the polyscope and did not do so, or if the circumstances attending the transaction were such as put plaintiffs upon inquiry and they did not make any inquiry, unless you further find that cross-complainants were induced to refrain from investigation by acts and statements of the cross-defendants." The instruction was defective in that it omitted to qualify the rule therein stated by adding that the parties must have stood upon equal footing and must have had equal means of knowing the truth. Palladine v. Imperial, etc., Ass'n, 65 Cal.App. 727, 755, 225 P. 291. The omission of this condition, however, was not prejudicial since the evidence established the fact that appellants made an independent investigation of the patent, were present when pictures were taken with the polyscope, saw the same pictures reproduced on the screen, and were satisfied with the machine and with the results produced. Appellants had also consulted with mechanics for the purpose of redesigning and "streamlining" the instrument; Roberts guaranteed payment of the cost of the work. McMahon testified that Roberts informed him that appellants were contemplating the construction of a similar machine that would accomplish the same result as the polyscope without using the Alder patent, in which event they intended to abandon the contract with Alder; but that if the new machine infringed Alder's patent they would continue under the contract. McMahon refused to be a party to such a transaction, whereupon Roberts handed him the notice of rescission. This evidence renders harmless the omission of the qualifying condition from the instruction.

[22] (c) Appellants requested, but the court did not give, an instruction to the effect that a party to a contract may rescind it if his consent had been obtained through fraud, but he must rescind promptly and must offer to restore everything that he had received upon the condition that the other party would do likewise. Said instruction was in reference to an equitable issue upon which the verdict of the jury was merely advisory; in making its findings the court was at liberty to accept or reject the theory adopted by the jury. The findings were against appellants on all issues, including the question of fraud and misrepresentation. Neither the giving nor the failure to give the instruction would have resulted in a different finding by the trial judge, whatever may have been the verdict of the jury.

[23] (d) Likewise, the failure of the court to instruct the jury that unusefulness of the Cervenka and cinegraph patents was not sustained by proof that the devices were commercially unsuccessful was not error, since (1) the findings of the court against appellants upon the question of fraud were fully sustained by the evidence; (2) the evidence that a machine made under either the Cervenka or the cinegraph patent was unworkable and could not be used showed the unusefulness of both.

[24, 25] 7. *Alleged errors occurring at the trial.* (a) Appellants' counsel expressed a desire to read their cross-complaint to the jury. The court had already declined to allow the reading of plaintiffs' complaint and stated that it would be much better if counsel would summarize his cross-complaint. Whether a pleading is to be read in full to the jury or summarized by either counsel or the court is a matter that is within the discretion of the trial judge. It was not an abuse of discretion to refuse the request that the pleading be read, since the record shows that it was summarized to the jury and there is no claim that appellants were prevented from discussing all of the facts in evidence and all of their theories in defense of plaintiffs' causes of action and in support of their cross-complaint.

[26] (b) A patent attorney was a witness on behalf of plaintiffs. On cross-examination he was interrogated concerning test pictures which he had seen in 1935, four years before the issuance of Alder's patent. He could not recall the type of machine with which the pictures were made. He was shown a memorandum purportedly written by him at the time the test pictures were made which had been obtained from the files of the firm of attorneys by whom he had been employed at that time. The witness said it was a confidential memorandum of the legal firm and of their client Alder which he had made while he and his firm were engaged in the performance of legal services for Alder; for that reason he declined to use it to refresh his memory. The court agreed with the witness's theory and sustained plaintiffs' objections to the use of the document. Appellants offered to prove that the test pictures referred to were made by the use of the polyscope and that they were "jumpy" and otherwise unsatisfactory. The offer of proof was rejected by the court on the ground that neither an attorney nor his employee may, without the consent of the client, be examined concerning any communication by the client or advice given to him or knowledge acquired in the course of professional employment. Code Civ.Proc. § 1881. There was no error in the court's ruling: (1) The memorandum was made in the course of the performance of legal services by the witness and his associates for Alder. If it contained unfavorable comments on the construction of the machine or on the pictures which it produced it will be assumed that the criticism was for the benefit of the witness's client and was for the purpose of assisting him in making improvements in his device. In such event the memorandum was privileged. (2) While it was a part of the offer of proof that the pictures made in 1935 were taken with a polyscope, that fact is not shown by the evidence to be true. The ruling of the court rejecting the use of the memorandum did not preclude appellants from proving by other witnesses, possibly Alder himself, the source of the test pictures. (3) Even though they were taken by means of a polyscope and were not satisfactory, the evidence does not inform us whether the machines in question here are the same as the one used in 1935 or whether such improvements have since been made as to remove all objections that may have been found in the early instrument. Without evidence that the machine used in 1935 was the same as or comparable in construction to those now in use, or at least that no improvements had been made, the evidence of the witness would have been immaterial. (4) Roberts, as already noted, participated in the taking and reproducing of pictures with the identical machine in question here and expressed his satisfaction with the result.

[27, 28] (c) The trial court did not err in permitting cross-defendants to amend their answers to the cross-complaints to conform to the proof. Section 475 of the

Code of Civil Procedure provides that the court must, in every stage of an action, disregard any error or defect in the pleadings and proceedings that does not affect the substantial rights of the parties; that no judgment shall be reversed by reason of any error, ruling, or defect unless the same is prejudicial, and also that by reason thereof the appellants sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, or defect had not occurred. The allowance of amendments to conform to the proof rests in the sound discretion of the court, and great latitude is accorded in the matter of allowing amendments for that purpose. Woods v. Cook, 14 Cal.App. 2d 560, 564, 58 P.2d 965; Big Boy Drilling Corp. v. Rankin, 213 Cal. 646, 649, 3 P.2d 13. The amendments complained of by appellants did not raise issues that were not included in the original pleadings, they were not based on incompetent evidence, and they did not state a new cause of action or a new defense. It does not appear from the record that appellants suffered any injury or prejudice by the allowance of the amendments, or that a different judgment would have resulted if the amendments had not been allowed.

[29, 30] (d) Several rulings of the court on the admission and rejection of evidence are cited as error. Some of the questions related to the patent and objections were properly sustained on the ground that the patent itself was the best evidence. Other questions were addressed to the attorney who procured the Alder patent relating to statements and arguments made by him to the United States patent office with reference to the Cervenka device in so far as it was cited against the application for the polyscope patent. We fail to see the materiality of the argument addressed to the patent office in attempting to show that the polyscope upon which the patent was sought was different from a device previously patented, and the reading of the attorney's differentiation between the two devices does not appear to have been prejudicial.

[31] From an examination of the record and of the objections presented by appellants it does not appear that any error, if there be such, in the rulings of the court in relation to the admission or rejection of evidence, the giving or refusing of instructions to the jury, or in any matter of procedure, resulted in a miscarriage of justice. Const., Art. VI, sec. 4½.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

28 Cal.2d 583

**Ex parte WARD.**

**Cr. 4636.**

Supreme Court of California, in Bank.

July 5, 1946.

1. Criminal law ⇐641(4)
Habeas corpus ⇐30(1)

Where, trial resulting in his conviction, petitioner was represented by a person of his own choosing, petitioner was required to abide the results of his selection of a representative and was not entitled to discharge on habeas corpus upon ground that he had discovered after his conviction that person who represented him on the trial had not been admitted to practice law in state.

2. Criminal law ⇐1202(1)

An admitted prior conviction of larceny of automobile committed in Wisconsin in 1928 was a felony at time of petitioner's conviction thereof both in Wisconsin and California, and, together with admitted prior burglary conviction in California, would support judgment sentencing petitioner as an habitual criminal. Pen. Code, §§ 487, 644.

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Proceeding in habeas corpus by Roy G. Ward to secure release from custody.

Writ discharged.

Roy G. Ward, in pro. per., and Ward Sullivan, of Los Angeles, for petitioner.

Robert W. Kenny, Atty. Gen., and Henry A. Dietz and David K. Lener, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Petitioner was convicted in Los Angeles County in 1937 of issuing a check without sufficient funds, and having admitted two prior convictions of felony as charged, he was sentenced as an habitual criminal.

He seeks his discharge on habeas corpus upon the ground that he has discovered that the person who represented him on the trial had not been admitted to practice law in this state. As a second ground he urges that one of the two prior convictions does not come within the purview of section 644, Penal Code, and will not therefore support his sentence as an habitual criminal.

In order to ascertain the facts relative to the appointment and status of the person who represented petitioner upon his trial, a reference was ordered and Judge W. Turney Fox of the Superior Court of Los Angeles County was appointed Referee to take evidence and submit findings.

Petitioner testified before the referee that he was not represented by counsel upon his preliminary hearing in the municipal court nor upon his arraignment for plea in the superior court before Judge Charles W. Fricke. He testified further that when he came on for trial he told Clifford Crail, the prosecuting officer, he would like a continuance in order to employ an attorney; that Crail then introduced R. McCurdy, who was in the courtroom, to petitioner, representing him to be an attorney; and at the same time Judge Frank M. Smith, who was presiding, stated in open court that he had known McCurdy for years and thereupon, with the consent of petitioner, appointed McCurdy to represent him as his attorney.

Judge Smith testified that he did not know a person by the name of R. McCurdy and that the only attorney he knew named McCurdy was J. Edward McCurdy, who testified before the referee that he did not represent petitioner. Judge Smith further testified that because of the intervening years he had no recollection of either petitioner or of his trial and therefore could not recall how petitioner had procured his counsel.

Mr. Crail denied that he had introduced McCurdy to petitioner and stated he never recommended defense counsel to persons being prosecuted by him.

The minutes of petitioner's arraignment for plea before Judge Fricke disclose that he was present, "with his counsel Richard McCurdy," thus refuting petitioner's testimony that he first acquired McCurdy as his attorney upon his trial and under appointment by Judge Smith.

The records of The State Bar disclose that no person named R. McCurdy or

Richard McCurdy had been admitted to practice law in this state and an extensive investigation by the office of the attorney general likewise failed to reveal the person who had appeared on behalf of petitioner.

The referee has found and reported as follows:

"I That upon the arraignment of petitioner on September 1, 1937, before Judge Charles W. Fricke on information No. 69101, petitioner herein according to the clerk's record in said court was present 'with his counsel, Richard McCurdy.'

"II That upon the trial of the defendant on said information by Judge Frank M. Smith (a jury trial having been waived) on October 1, 1937, the clerk's record shows that defendant was present 'with his counsel, R. McCurdy.'

"III That on October 1, 1937, no person by the name of Richard McCurdy or R. McCurdy was admitted to practice law in the state of California.

"IV That some person purported to represent the petitioner herein at the trial of said criminal case before Judge Frank M. Smith, on October 1, 1937.

"V That the identity of the individual purporting to represent petitioner herein at the aforesaid trial has not been ascertained, although diligent effort has been made by both counsel for petitioner and the Attorney General's office to ascertain the same.

"VI That the referee is therefore unable to determine whether or not the person purporting to represent the petitioner herein at the aforesaid trial was or was not duly admitted to practice law in the courts of this state at the time of said trial.

"VII That the person purporting to represent the petitioner at the trial of said criminal case on October 1, 1937 *was not appointed by the Superior Court but said person was employed by petitioner.*" (Italics added.)

[1] The findings are clearly supported by the evidence. Petitioner's testimony to the effect that he was introduced to McCurdy at the beginning of his trial by the prosecutor who represented him to be an attorney, thereby assertedly inducing petitioner to accept McCurdy as counsel under court appointment, is refuted by other testimony in the record and by the court minutes of petitioner's arraignment for plea. The record discloses that when petitioner appeared before Judge Fricke he did so "with his counsel Richard McCurdy" and there is no evidence that at that time any representations had been made to petitioner with respect to McCurdy's status or that McCurdy was acting under appointment of the court. The evidence and findings reveal that upon his trial petitioner was represented by a person of his own choosing and he must, therefore, abide the results of his selection of a representative.

[2] Nor do we find any merit in petitioner's second contention that the admitted prior conviction of "Larceny of Auto" committed in Wisconsin in 1928 will not, together with the admitted prior burglary conviction in this state in 1932, support the judgment sentencing him as an habitual criminal. In our consideration of this contention we will assume, without deciding, that habeas corpus is available for the purpose of now determining whether one of the prior felony convictions admitted by petitioner some nine years ago supports the habitual criminal adjudication.

The attorney general has furnished us with a copy of the Information filed against petitioner in the Circuit Court of Grant County, Wisconsin, on July 31, 1928, charging that he did "take, steal and carry away" an automobile of the value of $250. In addition, a certificate of the clerk of the Wisconsin court indicates that petitioner entered a plea of guilty to the charged crime and was sentenced to imprisonment in the state prison. Prior to petitioner's conviction in Wisconsin, section 487 of our Penal Code was amended (1927) to include an automobile, regardless of value, as the subject of grand theft. Thus, at the time of petitioner's conviction thereof in 1928, the larceny or theft of an automobile was a felony both in Wisconsin and in this state. And both at that time and when petitioner was adjudicated an

habitual criminal in 1937, such offense was included within section 644 of the Penal Code, the habitual criminal law of this state.

The writ is discharged and petitioner is remanded to custody.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.




28 Cal.App.2d 505

## TABOR et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY.

L. A. 19599.

Supreme Court of California, in Bank.
June 27, 1946.

**1. New trial ⇐153**

An order granting a motion for new trial was void where based on notice of intention to move for new trial which was filed before court had signed its findings of fact and conclusions of law. Code Civ. Proc. §§ 632, 656, 659.

**2. New trial ⇐3**

A new trial may be granted only after a trial and decision and a "decision" when a cause is tried by the court means the findings of fact and conclusions of law and not an informal recital of the conclusion to which the court had come on the facts. Code Civ.Proc. §§ 632, 656, 659.

See Words and Phrases, Permanent Edition, for all other definitions of "Decision".

**3. New trial ⇐3, 111**

Until the filing of the findings of fact and conclusion of law there remains something more for the court to do before judgment may be entered and there is no "aggrieved party" as required by the Code of Civil Procedure entitled to apply for a new trial. Code Civ. Proc. §§ 657, 659.

See Words and Phrases, Permanent Edition, for all other definitions of "Aggrieved Party".

**4. New trial ⇐10, 117(2)**

Proceedings for new trial taken prematurely are a nullity and ineffectual for any purpose, and it is not within the power of the litigants to invest the court with jurisdiction to hear and determine a motion for new trial by consent, waiver or acquiescence. Code Civ.Proc. §§ 632, 656, 659.

**5. New trial ⇐139, 153**

The notice of intention to move for new trial is essential to the court's jurisdiction and cannot be waived and a timely filing of the notice is essential. Code Civ. Proc. §§ 632, 656, 659.

**6. New trial ⇐153**

A premature notice of intention to move for a new trial was a nullity and ineffectual for any purpose and in the absence of the filing of a timely notice, court was without power to entertain the motion. Code Civ.Proc. §§ 632, 656, 659.

**7. New trial ⇐153**

Where notice of intention to move for new trial was served and filed before court had filed its findings of fact and conclusions of law, fact that the parties' oral presentation and argument of the motion was at a time when the ultimate findings had been made as the basis for a final judgment and when a written notice might have been seasonably filed had objection been raised did not satisfy the jurisdictional requirement under the statute expressly declaring that notice shall be deemed to be the motion. Code Civ.Proc. §§ 632, 656, 659.

**8. New trial ⇐139**

An implied waiver of the statutory notice of intention to apply for a new trial by the conduct of the parties is no more effective to confer jurisdiction upon the court than is an express waiver of such notice through stipulation. Code Civ.Proc. §§ 632, 656, 659, 660; Rules on Appeal, rule 3(a).

**9. New trial ⇐163(1)**

Where all proceedings for a new trial were abortive, the court lacked jurisdiction to grant the motion and its order purporting to grant a new trial was void and of no force or effect as completely as if never entered. Code Civ.Proc. §§ 632, 656, 659.

Petition by Minnie Estelle Tabor and others for a writ of prohibition to restrain the Superior Court of Los Angeles County from taking further proceedings in an action pending before it following its order granting a new trial.

Peremptory writ directed to issue.

Prior opinion, 162 P.2d 869.

Holcomb & Kempley, Charles A. Sunderlin, Mark F. Jones and Max L. Bernbaum, all of Los Angeles, for petitioners.

J. H. O'Connor, County Counsel, and S. V. O. Prichard, Asst. County Counsel, both of Los Angeles, for respondent.

SPENCE, Justice.

Petitioners seek a writ of prohibition to restrain respondent court from taking further proceedings in the hereinafter mentioned action following its order granting a new trial.

Petitioners were defendants in an action brought by Emma Viola Taylor, as plaintiff, to set aside her deed conveying to defendants certain real property and to quiet her title thereto. The action was tried by the court without a jury and, at the conclusion of the trial on December 14, 1944, the matter was submitted. On March 8, 1945, the court announced its decision in favor of defendants and ordered defendants' counsel to prepare findings. Eight days thereafter—March 16, 1945—plaintiff served and filed her notice of intention to move for a new trial. On April 5, 1945, the court signed and filed its findings of fact and conclusions of law, as well as the judgment. Judgment was entered on the next day, and notice of entry of judgment was served on plaintiff on April 10, 1945. Meanwhile and on April 6, 1945, the court heard and considered plaintiff's motion for a new trial. Defendants participated in the argument on the motion, which motion was submitted for a ruling on the merits. On April 17, 1945, the court made an order granting a new trial and, at the request of plaintiff, set November 27, 1945, as the date for retrial.

[1] Subsequent to the making of said order placing the cause on the calendar for retrial, defendants duly moved the court to strike the cause from the calendar on the ground that the order granting a new trial was a nullity inasmuch as it was made in response to plaintiff's notice of intention served and filed prior to the court's signing and filing of the findings of fact and conclusions of law. Defendants' motion was denied. Thereupon, defendants filed their petition herein seeking a writ of prohibition, relying upon the prematurity of the filing of the notice of intention to move for a new trial as invalidating all proceedings relating to the motion for a new trial. Under the undisputed facts in this case their position is well taken, and they are entitled to the relief sought.

[2, 3] Section 659 of the Code of Civil Procedure provides: "The party intending to move for a new trial must, either *before the entry of judgment* or within ten (10) days after receiving written notice of the entry of judgment, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial, designating the grounds upon which the motion will be made and whether the same will be made upon affidavits or the minutes of the court or both. Said notice shall be deemed to be a motion for a new trial on all the grounds stated in the notice. The time above specified shall not be extended by order or stipulation." (Emphasis added.) The italicized words have been repeatedly held by this court not to authorize the filing of the notice prior to the court's signing and filing of the findings of fact and conclusions of law as the basis for a final judgment. Root v. Daugherty, 201 Cal. 12, 255 P. 181; Estate of Barker, 207 Cal. 112, 276 P. 992; Middleton v. Finney, 214 Cal. 523, 6 P.2d 938, 78 A.L.R. 1104; Reeve v. Jahn, 9 Cal.2d 244, 70 P.2d 610. A new trial may be granted only after a "trial and decision" (Code Civ.Proc. § 656); and a "decision," when a cause is tried by the court, means the findings of fact and conclusions of law (Code Civ. Proc. § 632) and not an informal recital of "the conclusion to which the court had come on the facts." Estate of Barker, supra, 207 Cal. at page 113, 276 P. at page 992. So here until the filing of the findings of fact and conclusions of law, "there remained something more for the court to do

before judgment could be entered" (Estate of Green, 25 Cal.2d 535, at pages 540, 541, 154 P.2d 692, 694), and there was no "aggrieved" party, as required by section 657 of the Code of Civil Procedure, entitled to apply for a new trial. Root v. Daugherty, supra, 201 Cal. at pages 14, 15, 255 P. 181.

[4, 5] "Proceedings for a new trial taken prematurely are a nullity and ineffectual for any purpose" (Root v. Daugherty, supra, 201 Cal. at page 14, 255 P. at page 181), and it is not within the power of the litigants to invest the court with jurisdiction to hear and determine the motion for a new trial by consent, waiver, agreement or acquiescence. Peters v. Anderson, 113 Cal.App. 158, 160, 298 P. 76; Frye v. Pacific Freight Lines, 27 Cal.App.2d 748, 750, 81 P.2d 1027. Thus, in the Peters case it was held that the trial court was without power to grant a new trial in the absence of the statutory notice of intention to move for a new trial, although the parties had stipulated that such a motion might be made. Moreover, the specified notice is not only "essential to the court's jurisdiction" (Watkins v. Nutting, 17 Cal.2d 490, 499, 110 P.2d 384, 389) and cannot be waived (Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, 194, 152 P. 542; Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 398, 205 P. 446), but its timely filing is likewise required. With regard to this point, it was significantly said in Abelleira v. District Court of Appeal, 17 Cal.2d 280, at pages 288, 289, 109 P.2d 942, 947, 132 A.L.R. 715: "'Lack of jurisdiction' * * * may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. Thus, * * * a court may have jurisdiction to grant a new trial after motion based upon proper statutory grounds, but has no jurisdiction to make the order unless the moving party has given his notice of intention within the prescribed statutory time. See Peters v. Anderson, 113 Cal. App. 158, 298 P. 76."

[6-8] Under these settled principles, it is plain in this case that the premature notice of intention to move for a new trial was "a nullity and ineffectual for any purpose" and that in the absence of the filing of a timely notice, respondent court was without power to entertain the motion. The parties' oral presentation and argument of the motion, though at a time when "ultimate findings" had "been made as the basis for a final judgment" (Hughes v. DeMund, 70 Cal.App. 265, 267, 233 P. 93) and when a written notice might have been seasonably filed had objection been raised (The Yamato v. Bank of S. California, 170 Cal. 351, 149 P. 826; Middleton v. Finney, 214 Cal. 523, 6 P.2d 938, 78 A.L.R. 1104), did not satisfy the jurisdictional requirement under the controlling statute expressly declaring that "said notice shall be deemed to be [the] motion." Code Civ. Proc. § 659. Certainly, an implied waiver of the statutory notice by conduct of the parties is no more effective to confer jurisdiction upon the court than is an express waiver of said notice through stipulation. Peters v. Anderson, supra, 113 Cal.App. 158, 298 P. 76. Such definite interpretation of the statute governing new trials leaves no doubt as to the earliest possible time at which such proceedings may properly be instituted and precludes confusion on the part of litigants in safeguarding their statutory rights. Middleton v. Finney, supra, 214 Cal. at page 528, 6 P.2d 938, 78 A.L.R. 1104.

There can be no doubt that the rule which is firmly established by the cited authorities may lead to harsh results in certain cases. On the other hand, the adoption of any other rule could lead to endless confusion in computing the expiration of the time within which the trial court has power to pass upon a motion for a new trial (Code Civ.Proc. § 660) and in computing the time within which an appeal may be taken in cases where the motion is denied by operation of law (Rules on Appeal, rule 3(a)—and particularly in those cases where findings are not filed for several months after the notice of intention is given and in those cases where a second notice of intention is filed, admittedly with-

in the time provided by law, as was the fact in The Yamato v. Bank of S. California, supra, 170 Cal. 351, 356, 149 P. 826. See, also, Peters v. Anderson, supra, 113 Cal.App. 158, 161, 298 P. 76.

[9] All proceedings for a new trial having been abortive in this case, respondent court lacked jurisdiction to grant the motion, and its order purporting to grant a new trial was "void and of no force or effect * * * as completely as if never entered." Peters v. Anderson, supra, 113 Cal.App. at page 160, 298 P. at page 77.

Let the peremptory writ of prohibition issue as prayed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.




28 Cal.2d 406

## BALDWIN v. BALDWIN.

L. A. 19280, 19296.

Supreme Court of California, in Bank

As Modified June 25, 1946.

1. Divorce ⇐327

In wife's action for divorce, a Nevada decree granting husband a divorce was entitled to full faith and credit in California where evidence established that husband acquired and maintained bona fide residence and domicile in Nevada before rendition of decree. U.S.C.A.Const. art 4, § 1.

2. Divorce ⇐184(10)

In divorce action, the trial court's fact finding on conflicting evidence on issue of domicile must stand on appeal.

3. Divorce ⇐326

In action for divorce from husband pleading in bar a Nevada decree granting him divorce from plaintiff, evidence that defendant was wrongdoer and secured divorce by untruthful testimony regarding plaintiff's acts of cruelty was inadmissible, as question of who was offending spouse could not be considered for purpose of affecting validity of such decree.

4. Divorce ⇐326

A state court's power to grant divorce to resident of state, as distinguished from wisdom of exercise thereof, does not depend on which spouse was at fault, but on relationship created by domicile and state's pervasive control over marriage and divorce within its borders.

5. Divorce ⇐214(3), 239

In wife's divorce suit, evidence of extent of plaintiff's income as compared to that of defendant justified determination that plaintiff had sufficient means to support herself and was not entitled to allowance of either temporary or permanent support from defendant's separate estate. Civ.Code, § 142.

6. Divorce ⇐211, 235, 286

The granting and refusal of alimony in divorce actions lies largely in trial court's discretion, with exercise of which appellate court will not interfere, unless abuse of such discretion clearly and affirmatively appears on face of entire record.

7. Divorce ⇐202

Where husband neither voluntarily appears, nor is duly served with process, in wife's divorce action, alimony and expense allowances to wife pendente lite, without notice to husband, are ineffectual as personal judgments against him.

8. Divorce ⇐207

Where personal jurisdiction over husband is not obtained in wife's divorce suit, but receiver is appointed to take charge of, or attachment is levied on, husband's property in state, court's power to make alimony and expense allowances to wife pendente lite is limited to husband's property within court's control through receiver.

9. Divorce ⇐202, 205, 207

Where husband was not served with process, either personally or by publication, in wife's divorce suit, and receiver appointed by court did not take possession of, nor court attach, husband's property, before order directing payment of alimony, attorney's fees, and costs to wife pendente lite

was made, such order was void. Code Civ. Proc. § 413.

10. Divorce ⇐182

In action for divorce from husband, pleading in bar a Nevada decree granting him divorce from plaintiff several weeks after filing of complaint, plaintiff was entitled to payment by defendant of costs and attorney's fees on appeal from judgment for defendant.

11. Divorce ⇐326

The validity, or invalidity and effect of Nevada divorce decree, pleaded by divorced husband in bar of wife's California action for divorce, and parties' consequent marital status and reciprocal obligations in state, can be conclusively settled only after appeal from judgment for defendant in California action has been finally determined or a California trial court's judgment adjudicating such issue has become final.

12. Divorce ⇐182

Where parties to wife's divorce action had no community property, only cash in plaintiff's possession was $2,000 current support money, mostly from her mother, and $1,450 proceeds of insurance policy on ring lost by her, and defendant did not dispute reasonableness of court's award of $2,500 fees to plaintiff's attorney, court did not abuse its discretion in awarding plaintiff costs and attorney's fees incident to her appeal from judgment for defendant, though plaintiff had income of $900 to $1,000 monthly.

13. Divorce ⇐182

In wife's divorce action, court is under no duty to require plaintiff to exhaust her separate capital resources before ordering defendant to pay plaintiff her costs and attorney's fees on appeal from judgment for defendant.

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Appeals from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Rowena Schneider Baldwin against Baldwin M. Baldwin for a divorce, support, and a share of alleged community property. From a judgment for defendant, plaintiff appeals, and, from an order requiring defendant to pay plaintiff's attorney's fees and costs on such appeal, defendant appeals.

Affirmed.

Prior opinion 163 P.2d 54.

Jerry Giesler, Meyer M. Willner, Joseph Scott, A. H. Risse, and J. Howard Ziemann, all of Los Angeles, for plaintiff and appellant.

Meserve, Mumper & Hughes, Roy L. Herndon, Frank P. Doherty, and Willaim R. Gallagher, all of Los Angeles, for defendant and appellant.

SCHAUER, Justice.

Plaintiff appeals from a judgment rendered against her in an action against defendant, Baldwin M. Baldwin, for divorce, support, a share of alleged community property, costs of suit, and attorneys' fees; and defendant appeals from an order made following the filing of plaintiff's notice of appeal and requiring defendant to pay plaintiff's attorneys' fees and costs on appeal. We have concluded that both the judgment in the main action and the order appealed from must be affirmed.

The Judgment in the Main Action.

At the trial of the divorce suit plaintiff conceded that the parties had no community property. The trial court found at a fact that since the intermarriage of the parties, which took place on October 21, 1937, "defendant has inflicted upon plaintiff extreme mental cruelty, causing her grievous mental suffering," but held that a decree of divorce in defendant's favor and against plaintiff, rendered by a Nevada court on December 16, 1939, is entitled to full faith and credit in this state and that "plaintiff is not entitled to any relief whatsoever herein." On this appeal plaintiff contests the validity of the Nevada divorce, asserting that California is not bound by the provisions of section 1 of article IV of the United States Constitution to give full faith and credit to the Nevada decree and that the evidence is insufficient to support the trial court's finding that the "residence and domicile acquired and maintained by * * * defendant * * * in the * * * State of Nevada, commencing on July 1, 1939,

* * * was acquired in good faith and was at all times a bona fide residence and domicile; that * * * defendant continued to maintain his said [Nevada] residence and domicile * * * subsequent to said [Nevada] judgment and decree of divorce." Plaintiff further asserts that consequently the Nevada decree is not entitled to recognition in California. She also urges that the trial court erred in sustaining defendant's objection to an offer made by plaintiff to prove that defendant "was the wrongdoer and that his Nevada divorce decree was secured by untruthful testimony" in support of the ground (extreme cruelty) upon which such decree was secured.

It appears from the record that on October 21, 1937, plaintiff and defendant, who were then residents of California, intermarried, and on or about January 24, 1939, a final separation took place between them. Until on or about July 1, 1939, both parties continued to maintain residence in this state. No children were born as the issue of the marriage; plaintiff, however, has three minor children by former marriages. Following the separation of the parties and on approximately July 1, 1939, defendant left California and went to the county of Washoe in the State of Nevada, where, on October 13, 1939, he filed a complaint for divorce against plaintiff herein. On October 27, 1939, plaintiff herein, Rowena Schneider Baldwin, filed, in Los Angeles County, in this state, this divorce suit against defendant, Baldwin M. Baldwin. On November 15, 1939, a copy of the summons and complaint in the Nevada suit was personally served on plaintiff herein in Los Angeles County, and on December 16, 1939, a judgment was rendered in the Nevada suit, by which it was decreed "that the bonds of matrimony * * * existing between the plaintiff and defendant be, and the same hereby are, forever dissolved." On March 29, 1943, defendant herein filed his answer to plaintiff's complaint (First Amended and Supplemental) in the California suit, setting up as a plea in bar the Nevada divorce decree. On August 3, 1944, judgment was entered sustaining such plea and decreeing that the parties have not been husband and wife since the Nevada decree was rendered on December 16, 1939; that, except as to the payment of certain attorneys' fees, plaintiff is entitled to no relief whatever against defendant; that she has no "right, title, claim or interest in and to any of the property" of defendant; that an order made in this action and dated January 5, 1940, "directing payment of support money and counsel fees, be and the same is hereby vacated"; and that defendant pay certain additional attorneys' fees to plaintiff's attorneys. Plaintiff's appeal is from all portions of the judgment except that awarding the attorneys' fees.

[1, 2] Concerning the bona fides of defendant's domicil in Nevada, the trial court in the instant case found that on July 1, 1939, defendant moved all of his personal effects to Washoe County in Nevada with the intention of making that county and state his permanent residence and domicil, and thereafter resided continuonsly in such county to the date of filing (on October 13, 1939) his complaint for divorce against plaintiff herein, and still resided there at the time this present action was tried (on July 10, 1944); that during the period between July 1, 1939, and October 13, 1939, defendant opened a bank account and rented a safe deposit box in Washoe County; that he has paid his personal property taxes to and registered to vote and has voted in such county, and is there registered under the Selective Service Act, 50 U.S.C.A. Appendix, § 301 et seq.; that he has registered his automobile in the State of Nevada, filed income tax returns as a resident of that state. and actively participated in the civic and political affairs of Washoe County; that defendant's Nevada residence and domicil were acquired in good faith and were at all times bona fide, and that at all times subsequent to moving to Nevada on July 1, 1939, defendent had intended Washoe County to be his permanent residence and domicil.

These findings—many of them of probative facts—are fully supported by the evidence. In furtherance of her attack upon the bona fides of defendant's Nevada residence, plaintiff selects and quotes certain testimony which she asserts establishes that such residence was a sham. She urges also that "a careful analysis of the evidence submitted on behalf of respondent [defend-

ant] to support his contention that he had changed his domicil to Nevada shows little more than a carefully followed out artifice planned to give the appearance of a change of domicile." Without setting forth the evidence in detail, it is sufficient to observe that that relied upon by plaintiff, together with the inferences in her favor which might be drawn therefrom, does nothing more than create a conflict upon the mooted point. Under such circumstances the finding of the trial court must stand. (DeYoung v. DeYoung (1946), 27 Cal.2d 521, 525, 165 P.2d 457, and cases there cited.) Under any view, therefore, of the effect of the full faith and credit clause (U. S. Const., art. IV, § 1) the Nevada decree is valid as against this attack.

[3] Plaintiff's next contention—that the trial court erred in refusing to permit her to introduce evidence to prove her claim that defendant was the "wrongdoer and that his Nevada divorce was secured by untruthful testimony" regarding acts of cruelty by plaintiff towards defendant—is answered by the decision in the first Williams case (Williams v. State of North Carolina (1942), 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273). In plaintiff's briefs she concedes that "The rule laid down by the Supreme Court of the United States outlined in the first Williams case may briefly be stated as holding that it is immaterial whether or not the spouse who secured the divorce in the foreign state was the wrongdoer." Nevertheless, she urges that under the decision of this court in Delanoy v. Delanoy (1932), 216 Cal. 27, 37, 13 P.2d 719, 86 A.L.R. 1321, she should have been permitted to testify that she gave defendant "no ground for divorce, she treated him as a dutiful and loving wife." The applicable principles were, however, correctly stated by the learned trial judge, in rejecting plaintiff's offer of proof, as follows: "[T]hat would be her conclusion. Lots of wives think they are dutiful, when others think they are not. I am satisfied under the state of the law it is not proper for this Court in this case to inquire into the merits of the grounds on which that decree was granted. This Court will hold that the court had jurisdiction to grant that divorce, right or wrong; if the court had jurisdiction, it had the right to grant the divorce, even if the testimony was not sufficient, or if his decision was contrary to the testimony, the court had power to do it. When the court gets jurisdiction, it has the right to exercise it rightly or wrongly, and that it has exercised it wrongly is very often manifested by the number of motions for a new trial and appeals taken from a judge's decision. Always one side thinks he exercises jurisdiction wrongly. The objection to the question is sustained. I am satisfied I am correct in standing on that proposition that the merits, or as this Court says the fact as to who was the offending spouse cannot be entered into on this trial for the purpose of affecting the validity of the Nevada decree." (See 27 C.J.S., Divorce, § 336, p. 1303; 34 C.J. § 1634, p. 1153; 17 Am.Jur. § 744, p. 560; 31 Am. Jur. § 580, p. 179.)

[4] Moreover, plaintiff's briefs reveal that her purpose in attempting the introduction of such testimony is not to attack the validity of the Nevada decree in Nevada, but to support her contention that she is the innocent spouse, that therefore the marital domicil remained with her in California, and consequently Nevada's courts were without jurisdiction to dissolve the marriage of the parties. As stated above, by the decision in the first Williams case, such a contention has been conclusively settled adversely to plaintiff. In that case the Supreme Court observed, at page 300 of 317 U. S., at page 214 of 63 S.Ct., 87 L.Ed. 279, 143 A.L.R. 1273, that "the question as to where the fault lies has no relevancy to the existence of state power * * *. The existence of the power of a state to alter the marital status of its domiciliaries, as distinguished from the wisdom of its exercise, is not dependent on the underlying causes of the domestic rift. As we have said, it is dependent on the relationship which domicil creates and the pervasive control which a state has over marriage and divorce within its own borders. * * * As stated above, we see no reason * * * for making the existence of state power depend on an inquiry as to where the fault in each domestic dispute lies. And it is difficult to pick

out any such line of distinction in the generality of the words of the full faith and credit clause." The Nevada court must be held to have had jurisdiction to render the divorce decree to defendant herein.

[5, 6] With regard to plaintiff's claim for support, costs of suit, and attorneys' fees, plaintiff herself testified and the trial court found that "plaintiff is now and has been, since prior to the commencement of this action, receiving an income of $300.00 per month; that in addition, for a period of years prior to and following the commencement of this action, plaintiff's mother gave to plaintiff the sum of $800.00 per month, which said sum was later reduced to $600.00 per month; that, in addition, plaintiff's said mother supplied her, during all of said period, with additional sums of money to meet plaintiff's needs; that defendant Baldwin M. Baldwin paid to plaintiff the sum of $300.00 per month from January, 1939, to September, 1939, inclusive. * * * That the respective fathers of * * * [the] three minor children of plaintiff are now and have been for some time past making payments to her for the support of said children pursuant to orders of the above-entitled Court; that said defendant Baldwin M. Baldwin never, at any time, agreed to take or took said children into his home and family and maintained and supported them as his own children." The court further specifically found the ultimate facts "that plaintiff, prior to the commencement of the within action, had and now has a substantial income of her own in an amount sufficient to maintain and support plaintiff and provide plaintiff with all the necessities of life, in the station of life in which plaintiff is and has been accustomed; * * * That it is not true * * * that plaintiff is or was without sufficient means with which to support herself and/or the minor children of plaintiff by two former marriages; * * * that it is further not true that the sum of $1,100.00 per month, or any other sum or amount whatsoever or at all, is a reasonable sum to be allowed plaintiff as and/or for permanent alimony, support and/or maintenance, or for maintenance pendente lite." The court also found, pursuant to evidence introduced, that defendant was possessed of separate property real estate of the value of approximately $15,000; that under the terms of a trust created by the will of his deceased mother he "is to receive" an income of $1,500 a month for a period of fifteen years from October 25, 1939; and that at the expiration of such fifteen-year period he will, provided he is then living, inherit an undivided one-half interest in the remaining corpus of the trust estate; that the value of such corpus, as of March 31, 1944, was $2,035,000. It appears that at the time of the trial herein defendant was also receiving a salary as a commissioned officer in the United States Army.

In view of the evidence and the findings as to the extent of plaintiff's income as compared to that of defendant, it is apparent that the trial court was justified in its determination that plaintiff possessed sufficient means with which to support herself and was not entitled to an allowance for either temporary or permanent support from the separate estate of defendant. It is provided by section 142 of the Civil Code that where, as here, "there are no children [of the marriage], and either party has a separate estate sufficient for his or her proper support, no allowance shall be made from the separate estate of the other party." The rule has also been declared that "The granting and refusing of alimony in actions for divorce is a matter which lies largely in the discretion of the trial court. * * * Before the appellate courts will interfere, it must be made clearly and affirmatively to appear upon the face of the entire record in the case that this discretion has been abused." (1 Cal.Jur. 1012, § 64.) Upon the record now before us, no such abuse of discretion appears as to the order under discussion.

[7–9] A further issue involves the validity of an order made and entered herein on January 5, 1940, directing the payment from the property of defendant of $850 alimony pendente lite to plaintiff, and of $15,000 attorneys' fees and $1,000 costs of suit to plaintiff's attorneys. The trial court found, and the evidence supports the findings, that such order was made without any notice whatsoever to defendant herein and "without the Court having

any jurisdiction over the person or property of said defendant. * * * That the within action was commenced on the 27th day of October, 1939; that on the 15th day of December, 1939, the * * * amended and supplemental complaint was filed herein. * * * That an order for the service of summons by publication on the defendant * * * was signed and filed * * *; that said order * * * directed that service of the summons * * * be made * * * by publication thereof in The Los Angeles Daily Journal [and] directed that a copy of the summons and complaint * * * be mailed to the defendant Baldwin M. Baldwin at his place of residence, to wit, El Reno Apartments, 1307 South Virginia Street, Reno, Nevada * *; that said order did not direct that any copy of the first amended and supplemental complaint, which was then on file in said action, be served upon or mailed to said defendant Baldwin M. Baldwin.

"That on the 23rd day of February, 1940, an affidavit of publication of summons on first amended and supplemental complaint was filed herein, reciting that the summons on first amended and supplemental complaint was published in the Independent Review, a newspaper of general circulation printed and published semi-weekly in the County of Los Angeles; that no other affidavit of publication of summons was ever made or filed in this action; that no summons in this action, either on the original complaint or on the first amended and supplemental complaint, was ever published in said The Los Angeles Daily Journal, as required by the said order for publication of summons; that on January 16, 1940, an affidavit of mailing of copy of summons and complaint and copy of affidavit and order for publication of summons was filed herein, reciting that * * * [one] Joseph Collins did, pursuant to an order of this Court for publication of summons, mail a copy of the summons and complaint in said action to the defendant Baldwin M. Baldwin at El Reno Apartments, 1307 South Virginia Street, Reno, Nevada; that no affidavit of mailing any copy of the first amended and supplemental complaint herein to the defendant Baldwin M. Baldwin has been filed in this action; that no copy of the first amended and supplemental complaint herein was, in fact, mailed to the defendant Baldwin M. Baldwin, nor was said defendant ever personally served with a copy of said first amended and supplemental complaint. That on the 15th day of December, 1939, an order to show cause in re attorneys' fees, Court costs, alimony pendente lite, restraining order and appointment of receiver was issued * * * requiring the defendant * * * to show cause, * * * on the 22nd day of December, 1939, why he should not be required to pay to the plaintiff reasonable sums for attorneys' fees, Court costs and for the support * * * of plaintiff during the pendency of this action. * * * That on the return day of said order to show cause, to wit, December 22, 1939, the hearing on said order to show cause with respect to attorneys' fees, Court costs and alimony pendente lite was continued on motion of the plaintiff to January 5, 1940, in Department 8 of the above-entitled Court, without any notice whatsoever to the said defendant Baldwin M. Baldwin; that on the date the hearing on said order to show cause was continued, to wit, December 22, 1939, and likewise on the date to which said hearing was continued, to wit, January 5, 1940, the said defendant Baldwin M. Baldwin had not appeared in the above-entitled action, nor had said order to show cause been served upon him, nor had any process of any kind or character been served upon him; that said * * * Baldwin M. Baldwin had no notice of the hearing on said order to show cause to be had on December 22, 1939, and did not appear in Court on either said December 22, 1939, or the date to which said hearing was continued, to wit, January 5, 1940 and had not notice of the continuance of said hearing from December 22, 1939, to January 5, 1940, or notice that said hearing was to be had on said January 5, 1940. * * * That on January 5, 1940, an order was made and entered * * * without any notice whatsoever to defendant * * * and without the Court having any jurisdiction over the person or property of said defendant

* * * ordering and directing [the payment by a receiver theretofore appointed herein, and from property of defendant] * * * to plaintiff for alimony pendente lite the sum of $850.00 per month * * * commencing forthwith * * * [and] $15,000.00 attorneys' fees * * * [and] $1,000.00 costs * * *; that no copy of the summons and complaint, or first amended and supplemental complaint herein, was ever served upon said defendant and no property of said defendant was seized, or sequestered by said receiver as hereinbefore found prior to the making of said order on January 5, 1940, * * * and said defendant did not make any appearance in the action prior to the filing of his answer on March 29, 1943."

It thus appears that on January 5, 1940 (when the disputed order was made), the defendant had not voluntarily appeared, had not been served with process either in this state or by publication (disregarding other infirmities the proceedings were incomplete as two months had not elapsed following the order for publication; see Code Civ.Proc. § 413), the receiver who had theretofore been appointed did not have in his possession or under his control property belonging to the defendant, and (impliedly) no property of the defendant had been attached. The rule in this jurisdiction is clearly to the effect that pendente lite allowances to a wife are ineffectual as personal judgments against the husband where he has neither voluntarily appeared nor been personally served with process in this state, and that in cases where personal jurisdiction over the husband is not obtained but a receiver is appointed to take charge of, or an attachment is levied on, the husband's property in this state the power of the court is limited to property within its control. (1 Cal.Jur. pp. 949, 950, § 5, and cases there cited.) Inasmuch as service had not been had on defendant nor had the receiver taken into his possession or the court attached property of the defendant at the time of the making of the order of January 5, 1940, such order was correctly held by the trial court to be void and of no effect. (Cf. Nichols v. Superior Court (1934), 1 Cal.2d 589, 36 P.2d 380, 95 A.L.R. 894.)

The Order re Attorneys' Fees and Costs on Appeal.

[10, 11] On October 16, 1944, plaintiff caused to be issued an order directing defendant to show cause why he should not pay her costs and attorneys' fees on appeal, together with alimony pending appeal. Defendant again set up the Nevada divorce decree as a plea in bar, and also defended on the ground that plaintiff possessed sufficient funds to support herself and to meet such costs and fees. At the hearing, on November 20, 1944, plaintiff again testified that in addition to support money from her former husbands for her children, she received $300 a month from a trust fund together with such further sums (ranging from $600 to $800 and upwards monthly) from her mother as were necessary for the support of plaintiff and her children. She stated further that her living expenses totaled approximately $1,000 per month; and that on the date of the hearing she possessed in funds approximately $2,000, which was made up of current support money and of $1,450 paid to her by an insurance company following her loss of a ring, but that she had no other liquid assets. Evidence was also again introduced to the effect that defendant was receiving $1,500 a month from the trust established by the will of his mother, together with his salary as an army officer. The court refused defendant's request to make a finding in this proceeding concerning the validity and effect in California of the Nevada divorce decree, stated that plaintiff had sufficient funds to support herself and denied her request for alimony pending appeal, but ordered defendant to pay out of his separate estate plaintiff's costs on appeal together with $2,500 to her attorneys as their fees on appeal.

In attacking such order defendant urges, first, that following the Nevada divorce decree plaintiff was no longer his wife, and that only a wife or a husband can properly be awarded suit money; and, second, that plaintiff failed to show that an award from him was needed in order to enable her to properly prosecute her appeal.

In support of his first contention defendant relies upon statements contained in

Hite v. Hite (1899), 124 Cal. 389, 57 P. 227, 45 L.R.A. 793, 71 Am.St.Rep. 82; Carbone v. Superior Court (1941), 18 Cal. 2d 768, 771, 117 P.2d 872, 136 A.L.R. 1260; and Ex parte Cook (1941), 42 Cal.App.2d 1, 3, 108 P.2d 46, to the effect that before alimony or suit money can be awarded, the person seeking it must prove "existence of the marriage" with the other party to the proceeding. In the Hite and the Cook cases, however, it was the fact or the validity of the original marriage which was in dispute, and in the Carbone case the holdings of the Hite and the Cook cases were discussed by the court in considering the application of an illegitimate child to enforce support pendente lite from her alleged father. In none of the three cases was an issue presented as to the validity of a divorce decree secured by one party following an admitted marriage to the other. Here the marriage relationship admittedly existed at the time of, and continued for several weeks following, the filing by plaintiff of her divorce complaint in this state, and the chief defense offered by defendant to plaintiff's requests for relief is that he thereafter secured in another state a decree of divorce from her. It is our view that under such circumstances, and upon a proper showing otherwise, plaintiff should not be denied the payment from defendant of funds to enable her to properly prosecute an appeal from the judgment determining the fact and effect of the Nevada decree. (Cf. Fisher v. Superior Court (1930), 110 Cal.App. 565, 567, 294 P. 445; Stewart v. Stewart (1939), 32 Cal.App.2d 148, 150, 89 P.2d 404.) It is now the law of this state that it is only after such an appeal has been finally determined (or the judgment of a California trial court adjudicating such issue has become final) that the validity or lack thereof of the Nevada decree and its effect—and consequently the marital status and reciprocal obligations of the parties in this state—can be conclusively settled. (Crouch v. Crouch (1946), 28 Cal.2d 243, 169 P.2d 897.)

[12, 13] Concerning plaintiff's need for an award from defendant in order to enable her to pay the costs and attorneys' fees incident to her appeal, defendant asserts that the trial court abused its discretion (see 1 Cal.Jur. § 46, p. 992, and cases there cited) in making such an award to one who was in receipt of $900 to $1,000 monthly and who had in her possession at the time of the hearing the sum of approximately $2,000 in cash. Defendant does not, however, dispute the reasonableness of the sum ($2,500) awarded to plaintiff's attorneys.

We are of the view that under all of the circumstances presented, it cannot be said that as a matter of law plaintiff failed to establish her need for the award or that the trial court was unwarranted in making it. The parties had no community property. Except for current support money (the greater part of which came to plaintiff from her mother), the only cash in plaintiff's possession was the $1,450 insurance proceeds received by her following loss of certain of her separate personal property. The court is under no duty to require her to first exhaust her own separate and meagre capital resources before it can order defendant to pay her costs and attorneys' fees on appeal (cf. Westphal v. Westphal (1932), 122 Cal.App. 379, 386, 10 P.2d 119). Moreover, her liquid resources were, at the moment, not fully adequate to meet the $2,500 which the trial court determined was a reasonable sum to be paid to plaintiff's attorneys, and to pay the expenses of securing reporter's and clerk's transcripts and printing appeal briefs. While the circumstances would well have supported a contrary determination we are of the view that those same circumstances do not necessarily require the conclusion that the trial court abused its discretion in making the disputed award.

In case No. L.A. 19280 the judgment from which plaintiff appeals is affirmed, and in case No. L.A. 19296 the order from which defendant appeals is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

75 Cal.App.2d 105

## BIAGGI v. SAWYER.

No. 13007.

District Court of Appeal, First District, Division 2, California.

June 25, 1946.

Hearing Denied Aug. 22, 1946.

1. **Attorney and client** ⇐143

Attorney who definitely requested the services of a second attorney in the handling of an appeal thereby impliedly agreed to pay for such services.

2. **Accord and satisfaction** ⇐11(1)
**Compromise and settlement** ⇐5(2)

Check from defendant to plaintiff representing a little over half of a contingent fee under the circumstances was insufficient to establish an accord and satisfaction of plaintiff's claim for compensation for legal services rendered at request of defendant. Civ.Code, §§ 1521, 1523.

3. **Accord and satisfaction** ⇐10(1), 11(1)
**Compromise and settlement** ⇐5(2), 6(2)

Before a payment will be considered as establishing an accord and satisfaction, it must appear in express terms that payment was intended as full satisfaction of disputed account.

4. **Accord and satisfaction** ⇐10(1), 11(2)
**Compromise and settlement** ⇐5(2) 6(2)

Where attorneys agreed to divide a contingent fee and defendant, upon receiving an installment covering 55 per cent of fee, sent plaintiff a check for full amount received with a letter stating that defendant was waiving his part and expressing hope that arrangement was satisfactory but not mentioning what defendant intended to do with plaintiff's half of remaining 45 per cent and no dispute existed at the time, defendant's letter did not establish an accord and satisfaction. Civ.Code, §§ 1521, 1523.

5. **Attorney and client** ⇐151

Attorney who assisted chief counsel at trial with respect to claim of one of 150 plaintiffs on an agreement to divide contingent fee in connection with such claim was not estopped by failure to notify chief counsel that he intended to charge for additional services from claiming reasonable compensation for his services in connection with an appeal which was heard in both District Court of Appeal and Supreme Court as a representative of all of the plaintiffs since such services were beyond scope of original contract. Code Civ.Proc. § 1962, subd. 3.

6. **Appeal and error** ⇐984(5)

Where trial court has fixed compensation of an attorney upon consideration of evidence and its own judgment, appellate court will not interfere unless a plain and palpable abuse of discretion has occurred.

7. **Attorney and client** ⇐141

Award of $4,000 as attorney fees to associate counsel for his services in participation in trial of case and two appearances in appellate courts in litigation involving claims totaling $222,700, was not excessive.

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Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action by William R. Biaggi against Frank W. Sawyer to recover the reasonable value of legal services rendered. Judgment for plaintiff, and defendant appeals.

Affirmed.

Frank W. Sawyer in pro per.

Campbell, Hayes & Custer, of San Jose (Kevin R. Twohy, of San Jose, of counsel), for respondent.

GOODELL, Justice.

The respondent, a lawyer practicing in San Jose, sued the appellant, a lawyer practicing in Los Angeles, for $15,000, alleging that sum to be the reasonable value of legal services rendered at the special instance and request of the appellant. A judgment for $3,769.63 was recovered, from which this appeal was taken.

A brief history of the underlying litigation wherein the services were rendered is as follows: On January 23, 1933, the building and loan commissioner took over the California Mutual Building and Loan Association for the purpose of liquidation. The appellant handled certain litigation on behalf of investors in the association, including the Alexander case, Alexander v. State Capital Co., 9 Cal.2d 304, 70 P.2d 619, and respondent, learning of this, wrote

him on January 30, 1936, that he had clients named Gomes who were investors with a $2,500 claim against the association which he would gladly turn over to appellant "for attention on some fair and equitable basis". This was acceptable to appellant, and in an action filed by appellant in the Superior Court, Santa Clara county, in February, 1936, the Gomes claim was included. That action was entitled "Mrs. W. A. Allen et al. v. California Mutual Building and Loan Assn. et al.", on the plaintiffs' side of which there were several hundred of the association's investors who sued to establish their claims and to participate in the liquidation but who had not filed claims with the commissioner. When the case came on for trial and before any evidence was introduced a motion for judgment on the pleadings was made and granted on the ground that the complaint did not state a cause of action. A motion for new trial was made and granted. From the order granting the new trial an appeal was taken and the order was affirmed by this court. Allen v. California Mut. Building & Loan Ass'n, 40 Cal.App.2d 374, 140 P.2d 851. The case then went to trial on the merits and resulted in a judgment, entered on August 8, 1941, which established the claims of about 150 plaintiffs, aggregating about $222,700 (including the Gomes claim of $2,500) and denied the claims of about 150 other claimants. Notice of appeal was filed on behalf of the association and a motion to terminate proceedings on appeal was made and denied. The appeal came before this court, and the judgment for the claimants was reversed primarily on the ground that they had not filed their claims with the commissioner before commencing suit. Cal. App., 129 P.2d 703. A hearing was granted by the Supreme Court and the case was again argued there. That court affirmed the judgment on July 8, 1943, 22 Cal.2d 474, 139 P.2d 321.

The plaintiff in the instant case sued for legal services rendered in the Allen case between August 21, 1942, and March 7, 1943, "in looking up law, preparing memorandum of points and authorities, and in counseling and advising the defendant" Sawyer in connection with the second appeal.

The appellant contends that respondent cannot sue on a quantum meruit because there was an express contract whereby respondent agreed to accept from appellant one-half of 30% of the Gomes recovery. He contends, further, that respondent was paid more than said one-half of said 30% by a check which he accepted, and that the cashing of such check constituted an accord and satisfaction. Next, he contends that respondent is estopped herein because "he omitted to notify defendant that he intended to charge for alleged additional services". Finally, he contends that the judgment is excessive.

The dealings between the parties opened on January 30, 1936, when respondent as already noted wrote appellant about the Gomes claim. Appellant's response was favorable and on February 14, 1936, respondent wrote appellant authorizing the inclusion of the Gomes claim for $2,500 in the forthcoming suit and stating that "in the event of recovery the Gomes are willing to and will pay you 30% of the amount recovered." Respondent and appellant agreed that this 30% contingent fee would be divided equally between themselves. While it was understood that appellant would control the litigation, it was also agreed that respondent would assist him to the extent of handling the presentation of all the evidence required to prove the Gomes claim. When the case came to trial that understanding was carried out; respondent conducted the examination of the Gomes witnesses and put in all the evidence on their part of the case (just as other lawyers did for their clients). Respondent thereby performed his part of the express contract. There is no conflict or dispute up to this point. The court found that this express contract had been made, but it also found that the services performed by respondent were not all performed as attorney for his Gomes clients, but that they "were to a large extent performed by plaintiff for all the plaintiffs in the said 'Allen Action' at defendant's request," and that there was no understanding that respondent's compensation "was to be limited to one half of the fee allocated" to the Gomes claim. This

brings us to the second phase of the dealings between the parties.

The second phase opens after the entry of judgment in favor of the plaintiff-investors in the Allen case. Appellant sent to respondent moving papers on which appellant had added respondent's name to his own as counsel on a motion to terminate proceedings looking to an appeal, and in doing so he wrote, "I have added your name to mine as the attorneys for the plaintiffs in this motion. I trust you will not take off your name and that you will act with me in this matter." The same letter expressed the hope that respondent could attend to the motion without the necessity of appellant journeying to San Jose from Los Angeles, and this hope was realized, for respondent alone handled the motion. From the outset respondent felt the motion was not well taken, but appellant insisted on it being presented, and it was. One of the plaintiffs whom appellant had chosen to make a supporting affidavit declined to do so, and respondent finally got his client to come in from Milpitas to make it. The motion was denied, as respondent had predicted. In one of his letters concerning the motion appellant said, "I consider you a most careful attorney and would like you to stay on, but if that is not possible, or to your liking, then omit your name and proceed with my name appearing alone." This attitude is understandable. The respondent had his office in San Jose where he had practiced for many years. Appellant's office was in Los Angeles. San Jose was the place where the case was tried and it was near to San Francisco where the appeal would be heard. Appellant testified, in fact, that he was desirous of having an associate in San Jose. Respondent not only "stayed on", but he left his name on the court papers, at which appellant expressed his pleasure.

When the second appeal in the Allen case came on for argument in this court appellant wrote respondent requesting him to be present. He made similar requests of all other attorneys who had turned in claims for their individual clients. Respondent was present in court but did not argue and his name does not appear on the briefs.

This court reversed the judgment in the Allen case on October 10, 1942, 129 P.2d 703, which reversal initiated another series of letters between appellant and respondent. The former expressed indecision whether to petition directly to the Supreme Court or first seek a rehearing, and requested of respondent "your information on that question and also your desire * * *. Think it over and let me have your valued consideration." The following day appellant wrote respondent that he had decided upon the former procedure and said, "I shall need your valued assistance in the preparation of this petition, * * * and there are a number of other good attorneys interested and would suggest that they all be asked to assist and especially to sign and appear of record as attorneys for the petitioners." After the petition for hearing was filed respondent, at appellant's instance, journeyed from San Jose to San Francisco to file a memorandum of supplemental points and authorities prepared by appellant and to confer with the clerk. The petition for hearing was granted.

Thereafter appellant wrote respondent that the hearing would probably take place in March, 1943, and asked respondent to "save this time on your calendar". When he learned the exact date he informed respondent and asked, "May I have your assistance?" He outlined the position he proposed to take, and concluded, "Let me hear from you with some citations in support of my contention." Respondent answered that he would be present and would "endeavor to prepare a memorandum of authorities", which he did, and sent it a few days later to appellant, who commented, "I am sure that it will be very helpful". Permission was obtained from the Supreme Court at the hearing to file this Biaggi memorandum as a supplement to the briefs which appellant Sawyer had filed.

At the hearing respondent Biaggi appeared and made an argument on the investor-claimants' side of that case. A minute order entered by the court shows

that both "F. W. Sawyer and William R. Biaggi appeared for the respondents." The report of the case at 22 Cal.2d 474, 478, 139 P.2d 321 shows counsel for respondents as "Frank W. Sawyer and Wm. R. Biaggi". The Supreme Court affirmed the judgment on July 8, 1943. When appellant learned of the victory he immediately wrote thanking the respondent.

In response to numerous requests while the case was under submission and thereafter, respondent supplied information desired by the appellant and attended to numerous other commissions

On November 17, 1943, respondent, at appellant's request, appeared at a hearing in San Jose in relation to the claims of certain mutual shareholders of the association, and assisted in resisting the petition then under consideration, although it had no relation whatever to the Gomes' claim. In fact it involved the opposition to the allowance to other attorneys of counsel fees in the same liquidation but in other litigation. It was at this hearing, according to the respondent, that a representative of the commissioner inquired how the checks for the attorneys' fees in the Allen suit should be made out and respondent stated that he had no objection to the checks being made directly to appellant; the latter then stated that "I'll take care of Mr. Biaggi's fees."

The appellant's position herein is made particularly clear by the following allegation in his affirmative defense: "Any and all service, if any performed by plaintiff, Biaggi, in said Allen action was performed by him as an attorney for his clients, Gomes, in the presentation of the facts and the law to the courts in support of said claim of his said clients Gomes, all as understood and agreed as herein alleged. * * *"

The trial judge however determined that the express contract did not contemplate the services later rendered by respondent on the appeal.

In Roche v. Baldwin, 135 Cal. 522, 65 P. 459, 67 P. 903, cited by appellant, the suit was on a quantum meruit but the proof showed an express contract that Baldwin and his associate could fix the attorney fee. There was a variance between pleading and proof. It is not in point. Nor are Lavenson v. Wise, 131 Cal. 369, 63 P. 622, Reynolds v. Sorosis Fruit Co., 133 Cal. 625, 66 P. 21 or Bechtel v. Chase, 156 Cal. 707, 712, 106 P. 81, in point, for in the instant case the facts already summarized show that respondent's services on the appeal were wholly disconnected from the original contingent fee contract. The case at bar is squarely within the rule of McKee v. Lynch, 40 Cal.App.2d 216, 104 P.2d 675.

There were two distinct phases. The first had to do with the Gomes claim alone. It was fully performed on the respondent's part as soon as the Gomes claim was proved. Appellant says in his brief that this situation was one into which the parties just "drifted". Respondent did not "drift" nor did he force himself into the second phase of the Allen case, for it was the appellant who put respondent's name on the motion papers in the trial court and who was anxious to have him continue on as an attorney of record. Again, when the case was to be argued in this court appellant requested respondent to be, and he was, present, although he did not argue.

Further, after the case had been lost in this court appellant enlisted respondent's active help and advice on the petition for hearing before the Supreme Court; asked respondent to prepare authorities supplementing appellant's brief, and respondent did so; moved, in open court, (as only he could) the association of respondent with himself as attorney of record for the plaintiffs—all of them—and respondent's is the only name that appears with appellant's as attorney of record for the prevailing parties—all of them—in the Supreme Court.

It cannot be said that respondent was thus associated because he had turned in a mere $2,500 claim and was interested in seeing it established and protected. Numerous other lawyers had likewise turned in claims for their clients, aggregating, according to the judgment, $222,700, compared to which $2,500 is a mere "drop in the bucket". It was the appellant who, for reasons of his own, singled out and selected the respondent as his associate counsel, and it was the respondent who was called

upon, after the judgment had been reversed, and the situation looked none too bright, to furnish further authorities and to add his voice by arguing before the Supreme Court.

[1] It was then and there that the opportunity was presented for the last time to argue the cause of the 150 plaintiffs in the Allen case in an endeavor to save and uphold the judgment for $222,700 which they had won in the trial court. This "last stand" was recognized by appellant in one of his many letters to respondent, wherein he said "We must win in the Supreme Court or not at all". The parties did not "drift" into this situation. The appellant definitely requested the respondent's services and thereby impliedly agreed to pay for them.

[2] Appellant contends that an accord and satisfaction was established by the following circumstances. The contract called for an equal division of the 30% contingent fee on the Gomes claim. After the judgment had become final the commissioner sent out checks for the first liquidating dividend of 55%, and on December 1, 1943, appellant wrote to respondent enclosing his check for $460.74, and pointing out that the Gomes claim was for $2,500, to which had been added $292.43 interest, making $2,792.43, 30% of which was $837.72. Appellant stated that he had received the dividend of 55% thereof, or $460.74, and that, "While it was understood that this fee was to be divided between us, I am waiving my part and paying you the full amount, $460.72, and my check herewith for that purpose. I hope that this may be satisfactory to you. Edwards' division with me is 40 cents to him and 60 cents to me, but he did very little and you helped a whole lot and for which I greatly appreciate." The cashing of this check is relied on as showing an accord and satisfaction under sections 1521 and 1523, Civ.Code.

Appellant cites Johnston v. Burnett, 17 Cal.App. 497–501, 120 P. 436, Robertson v. Robertson, 34 Cal.App.2d 113, 93 P.2d 175 and Hardy v. Hardy, Cal.App., 135 P.2d 615. In the Johnston case [17 Cal.App. 497, 120 P. 437] the letter enclosing the check read, "Which check is given in full settlement of all matters between us", and the payee, with this letter before him, cashed the check. In the Robertson case [34 Cal.App.2d 113, 93 P.2d 177], the checks sent each month by the husband to the wife bore the words, "In full payment to (date)." In each case the court held that there was an accord and satisfaction. In the Hardy case the Supreme Court granted a hearing and in its decision, 23 Cal.2d 244, 143 P.2d 701, the question of accord and satisfaction is not discussed.

The check for $460.74, dated December 1, 1943, drawn by F. W. Sawyer on his Los Angeles bank, payable to William R. Biaggi, was introduced in evidence. On its face is typewritten, "In Full Allen Action". This check came, of course, from the possession of appellant. The record shows the following testimony as having been first given by appellant: "That the words 'in full Allen action' were put on the check by defendant with his own typewriter at the time the check was drawn; that he was sure that the words were put on there at that time."

This testimony brought the case squarely within Johnston v. Burnett, supra, and Robertson v. Robertson, supra, relied on by appellant. But respondent produced an employee of the San Jose bank where the check was cashed, who testified that the bank photographed out-of-town checks, and who produced a photograph of this check taken as it had gone through the bank, with the words "In full Allen action" conspicuous by their absence. He was corroborated by respondent's secretary, as well as by respondent himself, who testified that no such words were on the check when he received it.

The record shows that after being confronted with the photograph the "defendant later testified that after looking at the photograph of the check, * * * it refreshes my recollection to this extent, I am not ready to say, or urge, that those words you mention were on the check at the time the check was drawn. It may have been they were put on the check as an office memorandum after the check got back to my file. * * * I am not urg-

ing it as a part of the defense here. I don't know why I testified, I am not asking any court to pass upon that question."

The appellant while thus receding from his original position still adheres to the contention that there was an accord and satisfaction. What he said in the letter which enclosed the check has been already quoted. It must be remembered that respondent in any event was clearly entitled to half of $460.72, (or $230.36) also, that $460.72 was not the whole 30% (which would be $837.72) but only 55% of $837.72, leaving the remaining 45%, or $376.97, still unpaid. Appellant did not say how he intended to deal with respondent's share of the remaining 45% whenever it was paid. The letter is not clear and unequivocal even on that score.

[3, 4] Johnston v. Burnett, supra, makes it clear at page 501 of 17 Cal.App., at page 438 of 120 P. that it must appear "in express terms" that the payment is intended as full satisfaction of the disputed account. It cites Weller v. Stevens, 12 Cal.App. 779, 108 P. 532 holding that there must be a definite indication either on the check or in the accompanying letter that it is intended as full payment of a disputed claim. In the latter case it was held that no existing dispute had been shown. Messer v. Tait's, Inc., 121 Cal.App. 698, 700, 9 P.2d 536, holds that there must be an "explicit statement" or an "explicit understanding".

There is nothing definite or explicit about appellant's letter of December 1, 1943. At most it is equivocal.

Finally, no dispute existed at that time, for not a word had then been said between the parties as to respondent's compensation for services after judgment and on appeal. This is borne out by the statement found in appellant's brief that "At that time Sawyer had not been notified, or informed, by Biaggi that he, Biaggi, had the mental reservation that he, Biaggi was going to charge anything more than as fixed by the original contract." In Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 27, 134 P. 989, 990, the court says, "Whether there was a dispute concerning the amount due, and whether the tender was on condition that acceptance would be in full satisfaction, are primarily questions of fact for the trial court." In the case at bar the court found "that it is not true that on December 1st, 1943, or at any other time, plaintiff accepted the sum of $460.72 in full payment of said services * * *", and we are satisfied that such finding is amply supported and that there was no accord and satisfaction.

[5] The appellant claims that because respondent commenced the performance of his services under a contract fixing his fees and "omitted to notify defendant that he intended to charge for alleged additional services" respondent is estopped from prosecuting this action (sec. 1962, subd. 3, Code Civ.Proc.) From what has been said we think it clear that there were two distinct phases to the relations of these parties. Respondent was not called on to do anything on the first appeal. But he was requested to render services on the second, as already appears—services for the benefit of all the plaintiffs. Appellant cites respondent's testimony as follows: "I did not state to Mr. Sawyer at that time nor at any time before the final judgment from the Supreme Court that I intended and was going to charge him a fee for this work. He always told me to go ahead and do the work." We do not see how respondent was under any duty to tell appellant that he intended to charge for legal services which were wholly beyond the scope of the original express contract. The rule is, of course, that when one employs another he impliedly agrees to pay him whatever his services are reasonably worth. The record in this case is full of requests from appellant to respondent. It certainly was not incumbent on respondent to tell appellant—a lawyer of many years experience—that he expected to be paid for what he did. Moreover, appellant recognized an obligation to pay respondent something over and above the original one-half of 30% when he sent respondent $230 more than that contract called for. This the appellant explains by saying that his purpose was to make "an equitable adjustment of a situation that we drifted into."

[6] Lastly, appellant contends that the judgment for $4,000 (less the $230.37 credit-

ed) was excessive. The rule is stated in 3 Cal.Jur. 718 as follows: "Where the trial court has fixed the compensation of an attorney upon the consideration of the evidence and its own judgment, the appellate court will not interfere unless a plain and palpable abuse of its discretion has occurred". See, also, Crocker v. Crocker First National Bank, 60 Cal.App.2d 725, 141 P.2d 482; Mayock v. Splane, 56 Cal. App.2d 563, 573, 132 P.2d 827.

The amount at stake on the Allen appeal, in which the respondent was called upon to assist, was upwards of $222,000. Appellant testified that he did not know how much he had received in fees in that litigation—that he paid no attention to fees received in litigation, but that he considered his services reasonably worth between $40,000 and $50,000. Respondent testified that appellant had received approximately $45,000 as attorneys fees in the litigation.

While the second appeal was pending numerous letters were exchanged between the parties. Respondent's claim, however, is really based, as we have seen, on "looking up law, preparing memorandum of points and authorities, and in counseling and advising the defendant in connection with the appeal" in this court, on petition for hearing by the Supreme Court and "in preparing to argue and in arguing" before the Supreme Court.

The appellant characterizes the respondent's services as follows: "He appeared twice in the appellate courts, performing such services as might have been performed by an 'errand boy' following instructions and not exercising any responsibility whatsoever."

It is not disputed that appellant sought and respondent gave his advice and counsel to respondent on this second appeal. It is not disputed that he prepared to argue, and did argue, before the Supreme Court, and it is an admitted fact that he prepared and filed in the Supreme Court a memorandum supplementing appellant's brief therein, on the question of the statute of limitations and laches.

This court on the present record has no way of telling what weight the respondent's argument and memorandum might have had, or what value should be attached to them, either by themselves or when compared and weighed with the argument and brief of the appellant before the same tribunal. There is no way of telling how persuasive respondent's presentation was. In the very nature of things that can not now be determined. We do know however from an examination of the report in 22 Cal.2d 474, 139 P.2d 321 that the statute of limitations and laches played an important part in that decision. It is a matter of record that respondent did not brief or argue the case when it was presented and submitted to this court—where the decision was adverse—but that he did argue and did file a memorandum of authorities when the case was presented to the Supreme Court—where the decision was favorable.

[7] The trial court has found that the reasonable value of respondent's services was $4,000. We cannot say that, in arriving at that figure there was any abuse of discretion (3 Cal.Jur. 718, supra).

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.




75 Cal.App.2d 242

**LITT v. LITT.**

**Civ. 15326.**

District Court of Appeal, Second District, Division 2, California.

July 2, 1946.

**1. Trial ⇐56**

While a trial court must be fair in affording litigants full opportunity to present their proofs, court need not permit repetition of testimony which has already fully presented the facts.

**2. Witnesses ⇐283**

The recall of a witness for further cross-examination is a matter within court's discretion.

3. Appeal and error ⇐205

Trial court's ruling upon rejection of suggested evidence will not be disturbed on appeal in absence of offer of proof at the time.

4. Appeal and error ⇐1170(6)

Irregularity in proceedings or misconduct on part of trial judge is not deemed a departure from due and orderly method of adjudicating an action unless substantial rights of party have been materially prejudiced. Const. art. 6, § 4½.

5. Divorce ⇐253

In wife's suit for divorce on ground of extreme cruelty evidence that wife had occupied apartment for five years prior to her marriage, and retained lease on it for a sister's return from army service, and that husband gained sole possession by trick and thereafter denied wife the privilege of entering the apartment warranted judgment awarding apartment to wife and requiring husband to vacate such apartment regardless of whether wife's property right in the tenancy was separate property or part of community estate. Civ. Code, §§ 146-148.

6. Divorce ⇐249(3, 6)

In wife's suit for divorce on ground of extreme cruelty, court was warranted in awarding apartment to wife who was granted a divorce regardless of whether apartment was the homestead or any part of community property. Civ. Code, §§ 146-148.

7. Divorce ⇐249(3)

Where wife was granted divorce on ground of husband's extreme cruelty, and their agreement did not definitely assign apartment to one of them, court could award apartment to wife as support even if apartment had been husband's separate property. Civ.Code, §§ 146-148.

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Appeal from Superior Court, Los Angeles County; H. S. Shaffer, Judge Pro Tem.

Action by Rose Litt against Isadore Litt for divorce, community property and support and maintenance. From a judgment, defendant appeals.

Affirmed.

Jay Gralla, of Los Angeles, for plaintiff and respondent.

Bertram H. Ross, of Los Angeles, for defendant and appellant.

MOORE, Presiding Justice.

Basing her action upon extreme cruelty plaintiff demanded an interlocutory decree of divorce, the community property and her support and maintenance. She alleged that the duration of the marriage had been three months and 22 days. In addition to his general denial defendant alleged that the parties had theretofore adjusted their property rights by an agreement and that it had been fully consummated. The decree confirmed plaintiff's ownership of $2,025 and defendant's separate ownership of a Pontiac sedan in accordance with their property settlement. It was further decreed "That the apartment heretofore occupied by the parties hereto located at 3456¼ Plata Street, Los Angeles, California, is awarded to the plaintiff; that the defendant is hereby ordered to vacate said apartment on or before the 15th of December, 1945."

The property settlement agreement contained no mention of the apartment. It had for some years been under lease to respondent. She resumed her tenancy after her separation from appellant about September 30, and her possessions were there. A week thereafter appellant called upon and engaged her in conversation relative to the apartment. By falsely stating to her that he was sleeping in his automobile and that he would like to sleep in her apartment until he could find a place, he induced her to submit to his sole occupancy "for a few days" and he remained. Having found such facts the court made the award contained in the quoted paragraph from which defendant appealed.

In support of his contention that the evidence is "insufficient to support the finding that respondent was entitled to the possession of the apartment" appellant argues (1) that following the marriage

they resided in his apartment but respondent insisted that they leave the place and enter the Plata street apartment; (2) that after the separation he remained in the Plata street location and paid the rent; (3) that while the parties were in the midst of litigating the issue as to which was entitled to possession of the apartment the court "decided no more time would be allowed for the matter" and ordered the judgment.

[1, 4] The record discloses that the court was neither abrupt nor arbitrary in hearing the evidence. There was nothing so complex or unusual about the facts as to render them difficult of comprehension or to require a repetition of the testimony. While a trial court must be fair in affording litigants full opportunity to present their proofs (Rosenfield v. Vosper, 45 Cal.App.2d 365, 114 P.2d 29) it is not obliged to permit a repetition of testimony which has already fully presented the facts. 3 Am.Jur., pp. 531, 532; McCormick Saeltzer Co. v. Grizzly Creek Lumber Co., 74 Cal. App. 278, 285, 240 P. 32; Reay v. Reay, 97 Cal. App. 264, 281, 275 P. 533. When the court announced that it had heard enough appellant made neither protest not offer of proof. He had completed his testimony when his counsel requested leave to "find out one thing from the lady." Whether he referred to respondent or to her landlady who had testified in her behalf he did not make clear. But both had been generously cross-examined. The recall of a witness for further cross-examination is a matter within the court's discretion. No ruling of the trial court upon rejection of suggested evidence will be disturbed on appeal in the absence of an offer of proof at the time. Neither irregularity in the proceedings nor misconduct on the part of a trial judge is deemed a departure from the due and orderly method of adjudicating an action unless the substantial rights of a party have been materially prejudiced. Constitution, Art. VI, sec. 4½; Koyer v. Willmon, 12 Cal.App. 87, 92, 106 P. 599. While the court was trying the case as a default it granted appellant leave to file his answer and to furnish evidence on a subsequent day of his asserted right without contesting respondent's demand for divorce. This was done. More than half of the time given to the entire case was consumed by the inquiry into appellant's claim.

[5–7] After the complaint had been filed appellant met respondent in the office of her counsel where after some conversation concerning their differences appellant said: "Well, if you pay for the divorce, one or the other, you pay for the divorce and I keep the apartment or you keep the apartment and I pay for the divorce." (He evidently intended the reverse.) To such proposal she replied: "No, that apartment cannot be given up; I will pay for the divorce." After gaining sole possession by his trick and devise appellant decided to remain permanently and thereafter denied respondent the privilege of crossing the threshold notwithstanding the facts established by respondent's testimony that she had paid the rent during his occupancy, kept her possessions there, occupied the apartment for five years prior to her marriage and had retained her lease on it for her sister's return from overseas service with the army. The court's finding of the truth of respondent's testimony is therefore amply supported. Its conclusion that she is entitled to occupy the apartment as against the claims of appellant is a logical sequitur.

If respondent had a property right in her tenancy it was either her separate property or a part of the community estate. It had been acquired by her prior to her marriage it was her own and its award to her was a proper exercise of the judicial function for the settlement of a controversy and for the tranquility of society. If it was the homestead or any part of the community property the court was warranted in awarding it to the innocent spouse under charges of extreme cruelty. Civil Code, secs. 146, 147, 148. And even though it had been the separate property of appellant the court had authority to award it as support for the wife since their agreement did not by its terms definitely assign the item to one of them. See Ettlinger v. Ettlinger, 3 Cal. 2d 172, 178, 44 P. 2d 540, and authorities there cited.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

75 Cal.App.2d 211

## SECURITY-FIRST NAT. BANK OF LOS ANGELES v. LEATART et al.

## LEATART v. LEATART et al.

Civ. 15286.

District Court of Appeal, Second District, Division 2, California.

July 1, 1946.

1. Deeds ⇐60, 124(1)

An unconditional grant deed from mother to sons which contained no condition or reservation was absolute and conveyed fee simple title to grantees and took effect upon delivery discharged of any condition upon which it was made and which was not expressed in deed since a grant cannot be delivered to grantee conditionally. Civ.Code, § 1056.

2. Deeds ⇐56(2)

If in parting with possession of conveyance grantor intends thereby to divest himself of title, there is an effective delivery of the deed, and grantor's intention is a question of fact to be determined on all the evidence bearing thereon.

3. Evidence ⇐390(4)

Oral testimony cannot be considered as against deed for purpose of qualifying the estate thereby granted. Code Civ.Proc. § 1971.

4. Deeds ⇐60
Evidence ⇐461(1)

The legal effect of deed delivered to grantee is to vest title in him free from any condition, and its operation cannot be defeated by parol evidence of intention of grantor that it would have an effect different from that apparent on its face. Code Civ.Proc. § 1971.

5. Deeds ⇐208(1)

Evidence did not sustain findings that grantor had intended that her sons who were grantees should hold title to land conveyed for benefit of grantor, and hence upon grantor's death grantees were entitled to equal shares as against contention that land conveyed belonged to grantor's estate. Civ.Code, § 1056.

6. Deeds ⇐178

An agreement by sons who had statutory duty to support their mother, that mother might occupy property which she had deeded to sons if mother returned from hospital, did not vest in mother any interest to property after delivery and recordation of deed nor any interest in proceeds of sale. Civ.Code, §§ 206, 1056.

7. Tenancy in common ⇐34

Where title to property conveyed by mother to seven sons became vested without reservation in grantees as tenants in common and there was no evidence that they made a gift to their mother of proceeds of sale, a son who was mother's administrator, by asserting right to payment of proceeds to him, repudiated the proposal made by him and accepted by cotenants to sell the property to him, so that each was the owner of a one-seventh interest in the fund which remained.

8. New trial ⇐65

When findings of fact are erroneous in any respect, appropriate proceeding is to have them set aside upon motion for new trial. Code Civ.Proc. § 656.

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Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action in interpleader by the Security-First National Bank of Los Angeles, a national banking association, against E. Robert Leatart and others, wherein named A. L. Leatart as administrator of the estate of Martha E. Leatart, deceased, filed a cross-complaint against defendant E. Robert Leatart and others. From an order granting a new trial, A. L. Leatart, as administrator of the estate of Martha E. Leatart, deceased, appeals.

Affirmed.

Russell H. Pray and Samuel J. Nordorf, both of Long Beach, for appellant.

Joseph A. Ball and Ben W. McLendon, both of Long Beach, for respondents.

WILSON, Justice.

This is a controversy among seven brothers, one being in opposition to the other

six, concerning the division of the sum of $5,000.02. Since it is conceded by all parties that the fund should be divided equally among the seven individual litigants, the final judgment in the action will merely determine whether (1) each party shall receive his share directly from the fund now on deposit in court or (2) the entire amount shall be paid to the administrator of the estate of the mother of the parties who, after first deducting his fees as administrator and the fees of his attorney and the other costs of administration, shall distribute the remainder in seven equal shares.

The litigants are the sons of Martha E. Leatart, who, on March 19, 1930, signed and acknowledged a grant deed to her seven sons conveying to them a parcel of real property in Los Angeles County. The deed contained no reservations, restrictions or conditions. She held the deed in her possession until July, 1944, when she delivered it to two of the grantees and at her request they had it recorded in the county recorder's office. She was taken to a hospital on August 18, 1944, where she remained until her death on October 16, 1944.

Some of her sons being unable to contribute their proportionate shares of the cost of her hospitalization and medical care, A. L. Leatart wrote a letter to his brothers, dated September 24, 1944, stating that he would "buy the property and pay $6,000.00 cash immediately and to pave the way for that deal and save time," he had had the property appraised. He suggested that the money be deposited in a bank in their mother's name "but with all seven boys as cotenants on the deposit and for only two of the boys as co-signers on all checks" drawn against the fund for the payment of bills incurred for their mother's benefit and "with the stipulation that in the event there is any moneys left that it shall be equally divided seven ways and subject to withdrawal by each beneficiary." The arrangement suggested in the letter was accepted by all of the brothers. They executed a grant deed to A. L. Leatart conveying the property to him. The bank refused to accept the deposit upon the terms suggested in the letter and it was arranged that the fund should be placed in the names of two of the brothers who were authorized to sign checks in payment of their mother's expenses. Upon her death the amount now in litigation remained in the bank.

After Mrs. Leatart's death plaintiff bank was notified that some difficulties might arise among her sons as to the distribution of the fund, whereupon a complaint in interpleader was filed naming the administrator and all the brothers individually as defendants. Pursuant to an order plaintiff paid the money into court and was discharged from further liability. A. L. Leatart, as administrator of his mother's estate, filed a cross-complaint against the other defendants alleging that the fund should be distributed to him as administrator and praying that his brothers be declared to have no interest therein except as to their respective distributive shares as heirs at law of their mother. Three of the brothers filed answers and cross-complaints, each asserting title to an undivided one-seventh interest in said fund, and the other three suffered their defaults to be entered upon the cross-complaint of the administrator.

The cause was tried and the court made findings of fact: (1) That the cross-defendants at all times treated and considered the money deposited with the bank as belonging to the decedent, Martha E. Leatart, and not otherwise; (2) that the cross-defendants had no right, title or interest in the fund except as to their distributive shares as heirs at law of the decedent; (3) that neither decedent nor her grantees intended that the deed should pass any beneficial interest during the lifetime of decedent; (4) that the grantees never claimed any right, title or interest whatsoever in or to the property or the proceeds of the sale thereof during the lifetime of decedent; (5) that prior to the commencement of the action cross-defendants were not the owners of an undivided one-seventh interest each in and to the fund on deposit and were not entitled to be paid from said fund. As conclusions of law the court found that the proceeds of the sale, which had been deposited by the bank with the clerk of the court, should be delivered to

A. L. Leatart as such administrator. Judgment was entered accordingly.

A timely motion for a new trial was made by cross-defendants and was granted on the ground that the decision was against law. From said order the administrator has appealed. The evidence as a whole is insufficient as a matter of law to support the findings and judgment and the order must therefore be affirmed.

[1-4] 1. The effect of the unconditional grant deed from mother to sons. Since the deed from Mrs. Leatart to her sons contained no condition or reservation and since a grant cannot be delivered to the grantee conditionally, it was absolute and conveyed the fee simple title to the grantees and took effect upon delivery, discharged of any condition upon which it was made and which was not expressed in the deed. Civil Code, sec. 1056; Blackledge v. McIntosh, 85 Cal.App. 475, 483, 259 P. 770; Lewis v. Brown, 22 Cal.App. 38, 43, 133 P. 331; Burkett v. Doty, 32 Cal.App. 337, 344, 162 P. 1042. If in parting with possession of a conveyance the grantor intends thereby to divest himself of title, there is an effective delivery of the deed, and the solution of the question is grounded on the intention of the grantor, which is a question of fact to be determined by the trial court on all the evidence bearing thereon. Williams v. Kidd, 170 Cal. 631, 638, 151 P. 1, Ann.Cas. 1916E, 703. Oral testimony cannot be considered as against the deed for the purpose of limiting or qualifying the estate thereby granted. Lewis v. Brown, supra; Code Civ.Proc., sec. 1971. The legal effect of a deed delivered to a grantee is to vest title in him free from any condition, and its operation cannot be defeated by parol evidence of an intention on the part of a grantor that it would have an effect different from that apparent on its face. Mowry v. Heney, 86 Cal. 471, 475, 25 P. 17.

[5, 6] Even if the grant deed could be qualified by an oral agreement, the evidence fails to establish any intent that the grantees would hold title for the benefit of their mother. There is no conflict in the evidence in reference to the intent of the decedent in executing her deed, to wit, that it should become effective upon delivery, and there is no evidence to sustain the finding that the grantees never claimed any interest in the property during the lifetime of the grantor. The deed remained in the possession of Mrs. Leatart until July, 1944, when, according to the evidence given by one of her sons who had resided with her for 14 years, she turned the deed over to him and one of his brothers and told them to have it recorded. He testified that she was not feeling well and "she wanted all that settled before she got so she couldn't attend to it." In response to a question as to whether the transfer of title was considered to take effect as a transfer at the time of her death he replied: "It was supposed to be transferred to us when she made the deed; that was the understanding with us. * * * At her death the property was ours to do as we pleased with. She would have the use of it * * * until her death. * * * As far as ownership was concerned, she [said she] considered us boys owned the property, but she reserved the right for the use of the property until her death. * * * [It was] my understanding" that the proceeds of the sale of the property were to be used "to help mother. * * * It [the property] was supposed to be transferred to us when she made the deed."

The evidence shows beyond a doubt that there never was any intent on the part of the grantor or of the grantees that appellant and his brothers should hold title for the benefit of their mother. There was no qualification of the absolute conveyance of the fee simple title. The sons' apparent intent that she was to have the use of the property during her lifetime is not incompatible with their ownership. In the performance of the filial obligation imposed upon them by section 206 of the Civil Code to support their mother they may have agreed to her occupancy of the property if she returned from the hospital. Such an agreement would not have vested in her any interest in the property after the delivery and recordation of her deed, nor any interest in the proceeds of the sale.

2. The effect of the deed by the six brothers to A. L. Leatart. This transaction was initiated by the letter from A. L.

Leatart to his brothers in which he offered to purchase the property and suggested that the amount paid by him therefor be deposited in a bank in his mother's name "but with all seven boys as co-tenants" and he stipulated that if any money was left after the payment of their mother's expenses "it should be equally divided seven ways and subject to withdrawal by each beneficiary." The other six brothers agreed to his proposal and joined in a deed conveying the property to him. He testified that he purchased the property from his six brothers in the circumstances and for the purpose set forth in his letter but that he regarded that he had a one-seventh interest in the distribution of the proceeds after his mother's death—that he purchased the interests of the other six brothers in the property.

[7] Since the fee title to the property became vested without reservation in the seven grantees as tenants in common, and since there is no evidence that they made a gift to their mother of the proceeds of the sale, each was the owner of a one-seventh interest in the fund which remained and, as proposed in said letter, it should be "equally divided seven ways and subject to withdrawal by each beneficiary." By asserting the right to payment of the money to him as administrator he is repudiating the proposal made by him and accepted by his cotenants. The fund did not become the property of Mrs. Leatart during her lifetime and was not a part of her estate upon her death.

The evidence does not sustain the finding that the cross-defendants considered the fund as belonging to the decedent, or the finding that they had no right, title or interest in the fund except as to their distributive shares as heirs at law of the decedent.

[8] When the findings of fact are erroneous in any respect the appropriate proceeding is to have them set aside upon a motion for a new trial. Pico v. Sepulveda, 66 Cal. 336, 337, 5 P. 515; Power v. Fairbanks, 146 Cal. 611, 614, 80 P. 1075. In granting the motion the court rightfully determined that there should be a re-examination of issues of fact which determined the judgment previously rendered (Code Civ.Proc. sec. 656) and that the judgment was against law.

The order granting a new trial is affirmed.

MOORE, P. J., and McCOMB, J., concur.




## FIELDS v. SANDERS et al.*

Civ. 15129.

District Court of Appeal, Second District, Division 3, California.

June 28, 1946.

Rehearing Denied July 26, 1946.

Hearing Granted Aug. 26, 1946.

**1. Master and servant ⇐332(4)**

Where plaintiff sought to hold members of oil company liable for assault committed upon him by driver of oil company's truck following an altercation as to whether truck struck plaintiff's automobile, and counsel for members of oil company stipulated that driver was an employee of oil company at time of the altercation but did not admit that he was an agent or was acting in scope of his agency at the time, an instruction that driver's conduct should be deemed to have been conduct of oil company was improper.

**2. Master and servant ⇐302(1)**

Where liability of employer to a third person for an assault committed by employee is predicated solely upon doctrine of respondeat superior, the test of liability is whether employee was acting within scope of his employment.

**3. Master and servant ⇐332(2)**

The question whether injurious or wrongful act of employee was or was not such as to be within employment's scope, so as to render employer liable to third party upon doctrine of respondeat superior is ordinarily one of fact for jury.

* Subsequent opinion 180 P.2d 684.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Ray W. Fields against Fred Sanders and members of the Krieger family, doing business as Krieger Oil Company, to recover damages for assault allegedly committed on plaintiff by defendant Fred Sanders. From a judgment for $3,000 against all the defendants, the members of the Krieger family, doing business as the Krieger Oil Company, appeal, and from judgment of $350 against defendant Sanders as exemplary damages, defendant Sanders appeals.

Judgment in accordance with opinion.

Sidney A. Moss, of Los Angeles, for appellants.

Shibley, Wanzer & Litwin, of Long Beach, for respondent.

DESMOND, Presiding Judge.

Plaintiff, Ray W. Fields, was awarded a jury verdict in the sum of $3,000 against various members of the Krieger family doing business as Krieger Oil Company and an employee of the Krieger Oil Company named Fred Sanders. An additional verdict assessed the sum of $350 against Sanders as exemplary damages. The members of the Krieger Oil Company have appealed from the $3,000 judgment entered upon the first verdict and Sanders has appealed from the $350 judgment entered against him.

The suit resulted from an altercation between Fields and Sanders on September 19, 1944. At approximately 1:50 o'clock a. m. of that date Sanders drove a truck, with tank trailer attached, belonging to the Krieger Oil Company, from the refinery yard at Clearwater. He had been instructed to drive to Camp Kearney near San Diego with a load of oil and started on this mission by driving in a southerly direction on Lakewood Boulevard. This boulevard connects with Highway 101 near the easterly boundary of the city of Long Beach where a traffic circle is located. At the same time that Sanders was driving south on Lakewood Boulevard, the plaintiff, accompanied by his wife, was driving his Dodge automobile in the same direction. According to his testimony the following events occurred: Just as he entered the circle a truck started to pass him. When he was on the west side, next to the curb, he noticed the truck was crowding him pretty closely and finally struck his car and knocked it over the curb. He continued on the highway within the circle until he overtook the truck, honked his horn and asked the driver, Sanders, to stop. Sanders did so, pulling over to the side of the road, and Fields parked a few feet in the rear of the truck. He left his automobile and went to the right side of the truck and addressed Sanders in the following language: "My God, what are you trying to do, kill a man? You ran me off the road, run me over the curb and struck my car. * * *" Sanders denied that he had done so and Fields then said, "* * * let us go back and see what damage is done." Sanders rejoined, "I didn't strike your car." Fields then said, "* * * we will talk that matter over but first let me get your number and your company and your driver's license, so if I want to file a complaint I can * * *," to which Sanders replied, "* * * you are a damn liar, I didn't strike your car." Fields then insisted, "* * * all I want is your number, the name of your company and your license. * * *" He thought Sanders was going to drive away, so he turned to the left to get Sander's number and "Just then the door flew open and he jumped out with a flashlight and struck at me, and missed me, and when he did that I told him if he wanted to play like that all right, if he wanted to fight, lay the flashlight down and fight like a man anyway." He stated that Sanders then jumped back into the truck, slammed the door and raced his motor. "I thought he was leaving, and I started back to the back to get his number again, and just then the door flew open and he jumped out with this large instrument and he struck me just as I turned, and hit me on the top of the head, and I sure went down on my knees—I went down part way. As I raised up he struck me again in the back of the head, knocking me to my knees, and I don't remember any more—I mean, I was knocked unconscious." The large instrument with which Fields claimed he was assaulted was described by his wife as a wrench approximately 2½ feet long. She corroborated, in the main, her husband's

description of the events and of the injuries which he received and stated that he recovered consciousness on the way to the hospital. According to her testimony, just as she and her husband were entering the traffic circle the truck and trailer passed them, struck their car and knocked it over the curb. Paul Keener, a Long Beach officer who arrived at the scene of action shortly after Sanders drove away, testified that he examined Fields' car and saw a small dent on the left-hand fender but could not say definitely whether it was new or old. Since, however, no proof was offered of any property damage arising from the collision, the court granted a nonsuit as to the first cause of action based thereon.

The defendant Sanders, in his recital before the jury, did not differ greatly from Mr. and Mrs. Fields in describing the sequence of events. He did state, however, that he was driving south at a slightly faster rate than Fields, who was preceding him. "I just pulled over to his left and went right on on that side into the circle. * * * I had slowed down to enter into the circle * * * this car came up on the side on the right, and he hollered to me, * * * he said, what do you mean, trying to run a man over the curb, you think you are awful smart driving a big truck. * * * I hollered back at him, I beg your pardon, I hadn't run nobody over the curb." Sanders testified that at the time Fields was driving alongside and calling him names he knew that he had not struck Fields car but he stopped his truck. "Then he began to cuss me, and I told him I says we have got to get out of this circle, out of the road here, we have got traffic blocked and we went on,—he pulled up then about 60 or 70 feet into the middle of the circle and stopped and got out and came over and got up on my running board on the right-hand side and he reached over to get ahold of me and drug me out of the truck, and cussed me," etc. "So I told him again that I was an old man and couldn't fight. * * * So he says you get off. I told him this time we had to get out of the circle because we still had traffic blocked. * * * So he got back in his car and pulled out of the circle, turned to the right on Ximeno and I thought he was gone, so, when I got started and came on out of the circle and turned around 101, he had done stopped his car and he came from the west side of Ximeno over 101, just a hundred feet, and he stepped off the curb right almost in front of my truck. I got stopped then and he stepped up on the running board again and he cussed me, and when he just kept cussing me and while we was standing there, he made a pass at me in the truck, so I just kicked the door open, right-hand door, —he was on the right, I just kicked the door open and he fell off on the ground. When he got up I was out. He made a swing at me and so I hit him, and he went down on his knees, and he got up and made another swing at me and I hit him again, and he went down then, and there *was* a few sailors there by that time and he was standing up still wanting me to lay the wrench down and fight. I told him I couldn't fight. So I pulled away to keep from having any trouble. * * *" He testified that Fields did not strike him at any time but he was frightened and stopped three times in all; the first time when "it looked like he was running—was going to run into me, or run me over the curb out into the middle of the circle"; the second time when "Mr. Fields came over and got up on my running board * * * I had to stop because I couldn't drive and him standing there arguing with me and cussing me. I might run over the curb or somewhere else. Q. Were you in the circle at the time? A. I was. * * * I told him we would have to get out of the circle, out of the highway because I had traffic blocked with my trailer and he says o.k., come on over here and I will take you out of there and beat you to death. Q. Did you pull up and stop? A. I did, again. Q. Did he come up to you again? A. He did. * * * Q. Did you stop another time after that? A. I stopped three times in all. * * * he stepped down off the curb almost in front of my truck so I stopped again." Sanders testified that he at no time made a pass at Fields with a flashlight, saying he had none in his possession that night.

It is claimed in support of the appeal that the court erred "in giving the follow-

ing instruction *offered by plaintiff* as modified by the Court: 'You are instructed that an employer, as principal, is liable for injuries to third persons resulting from the negligence, torts and wrongful and unlawful acts of their employees while acting within the general scope of their employment. *In the case before us the conduct of Fred Sanders shall be deemed by you to have been the conduct of Krieger Oil* Company of California.' (The italicized portion was not a part of the instructions as originally offered by plaintiff. It was added by the trial court.)" It is also claimed that error occurred when the court refused to give an instruction requested by the defendants bearing upon a situation where both principal and agent are sued and there is a contested issue as to agency and the scope thereof. Additional claims of error are based upon the court's denying motions for a nonsuit, for a directed verdict, for a judgment notwithstanding the verdict and for a new trial of defendants Krieger Oil Company.

It was stipulated at the trial that Sanders was an employee of the Krieger Oil Company at the time of the events heretofore related, but counsel for the defendants stated in the presence of the jury, "I am not admitting that he was an agent or acted in the scope of his agency at the time of this accident, no."

[1] By these words counsel reserved for determination the very question which the trial judge, in effect, decided when he, in charging the jury, said, "In the case before us the conduct of Fred Sanders shall be deemed by you to have been the conduct of Krieger Oil Company of California." We are of the opinion that this question should not have been decided by the judge and that, therefore, a reversal is in order.

[2, 3] In 35 Am.Jur. 1006 the principle upon which liability of an employer may be fixed as a result of an agent's act is stated as follows: "When, however, the liability of the employer to a third person for an assault committed by his employee is to be predicated solely upon the doctrine of respondeat superior, the test of liability is whether or not the servant was acting within the scope of his employment." At page 1040 of the same work, the statement is made that "the question whether the injurious or wrongful act was or was not such as to be within the employment's scope is ordinarily one of fact for the jury's determination." In Hiroshima v. Pacific Gas & Elec. Co., 1936, 18 Cal.App.2d 24, at page 29, 63 P.2d 340, at page 343, we find the following: "'Whether the act of a servant is within the scope of his duty, while acting in the furtherance of his master's business, is a matter of fact to be determined by the jury, and not by the court as a matter of law.'" The court makes a similar statement in Barty v. Collins, 1930, 109 Cal. App. 94, at page 96, 292 P. 979. In Dillon v. Prudential Ins. Co. of America, 1925, 75 Cal.App. 266, 271, 272, 242 P. 736, 738, the court holds that the question whether or not the agent is acting within the scope of his employment was one to be submitted to the jury under appropriate and explicit instructions and "with the determination of the jury upon these questions this court cannot interfere." In Gousse v. Lowe, 1919, 41 Cal.App. 715, at page 720, 183 P. 295, 297, cited by appellant, we find the statement that "ordinarily the question of whether or not the act was within the scope of the servant's employment should be submitted to the jury * * *." In Kruse v. White Brothers, 1927, 81 Cal.App. 86, at page 93, 253 P. 178, 181, also cited by appellant, we note the following: "Whether there has been a deviation so material or substantial as to constitute a complete departure is usually a question of fact. In some cases the deviation may be so marked, and in others so slight relatively, that the court can say that no conclusion other than that the act was or was not a departure could reasonably be supported; while in still others the deviation may be so uncertain in extent and degree in view of the facts and circumstances as to make the question of what inferences should be drawn from the evidence properly one for the jury [citing cases]."

The judgment of $3,000 entered against the members of the Krieger Oil Company is reversed and the cause, as to them, is

remanded for a new trial. Sanders has not appealed from that judgment entered against him jointly with the Krieger Oil Company. Judgment in the sum of $350 entered against Sanders as punitive damages is affirmed, no argument having been made that the alleged errors related to that cause of action or that the evidence was insufficient to support the implied finding of malice.

SHINN, and WOOD, JJ., concur.




75 Cal.App.2d 217

**In re CAZAURANG'S ESTATE.**
**THOMAS v. GRAY et al.**

Civ. 3375.

District Court of Appeal, Fourth District, California.

July 1, 1946.

Hearing Denied Aug. 29, 1946.

**1. Descent and distribution ⇐86**
**Wills ⇐743**

The provisions of the Probate Code conferring jurisdiction on probate court to approve or disapprove of assignments of interest in a decedent's estate are valid. Probate Code, §§ 530, 530.1, 531.1, 1020.1, 1201a; Const. art. 6, § 5.

**2. Descent and distribution ⇐86**
**Wills ⇐743**

Where assignees of interest in decedent's estate sought to enforce assignments in probate proceedings and assignor did not question the jurisdiction of probate court, the probate court had power to ignore assignment in part for purpose of distribution and recognition of assignments only to extent of 15 per cent. and 2 per cent. respectively on account of attorneys' fees which sums were found to be reasonable value of services rendered were sustained by evidence and supported decree. Probate Code, §§ 530, 530.1, 531.1, 1020.1, 1201a; Const. art. 6, § 5.

**3. Jury ⇐19(7)**

A proceeding in probate court to determine the validity and effect of a claimed assignment of an interest in decedent's estate is not one for money claimed as due upon contract so as to entitle any party to a jury trial. Probate Code, §§ 530, 530.1, 531.1, 1020.1, 1201a; Const. art. 1, § 7.

**4. Jury ⇐13(3)**

The constitutional guaranty of right to trial by jury has no application to cases coming within equity jurisdiction and a jury may not be demanded in such cases as a matter of right. Const. art. 1, § 7.

**5. Trial ⇐370(2), 374(2)**

In equity cases, court may in its discretion grant a trial by jury upon such conditions as it may see fit to impose but the verdict in such case is merely advisory and not binding on the court.

**6. Jury ⇐13(3)**

In determining whether an action is legal or equitable, and consequently whether a jury may be demanded as of right, court is not bound by the form of the action but rather by the nature of the rights involved as determined from the whole of the pleadings and the facts of the particular case. Const. art. 1, § 7.

**7. Jury ⇐19(7)**

Under the Probate Code, all issues of fact joined in probate proceedings must be tried in conformity with the rules of practice in civil actions, and the failure of the Probate Code to specifically authorize a trial by jury on whether assignments of interests in decedent's estate will be approved or disapproved is sufficient reason for holding that there is no right to a jury trial on such issue. Probate Code, § 1230; Const. art. 1, § 7.

**8. Courts ⇐202(5)**
**Venue ⇐32**

Where all parties submitted the issue of validity of assignments of interests in decedent's estate, the assignor could not contend that she was entitled to defend the action or proceeding in the county of her residence, and especially such contention should not be considered where made for

the first time on appeal. Probate Code, §§ 530, 530.1, 1020.1, 1081, 1230; Code Civ. Proc. § 592.

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Appeal from Superior Court, San Diego County; Franklin G. West, Judge.

Proceeding in the matter of the estate of Jean Cazaurang by Marie Lees Thomas against Gordon Gray, Walter Ames, J. G. Driscoll, Jr., Dorothy Richardson, as administratrix of the estate of E. W. Brewer, Jr., deceased, and another, for disapproval of assignments by petitioner of interest in estate, such assignees having filed objections to petitioner's final account as administratrix and petition for distribution. From the decree rendered, petitioner and the named respondents appeal.

Decree affirmed.

Marion P. Betty and Porter C. Blackburn, both of Los Angeles, for appellant and respondent.

Gray, Ames & Driscoll, of San Diego, for respondents and appellants.

James T. Phillips, of Pasadena, in pro. per.

GRIFFIN, Justice.

Some phases of this estate have been heretofore presented to our courts. In re Estate of Cazaurang, 1 Cal.2d 712, 36 P.2d 1069; In re Estate of Cazaurang, 69 Cal. App.2d 1, 158 P.2d 48. A reference thereto will more adequately present the background of the present proceeding. Marie Lees Thomas, appellant and respondent, hereinafter referred to as appellant, was named as the recipient of 90 per cent of the estate of Jean Cazaurang, deceased, under an oleographic will, which will was contested but finally admitted to probate over two other wills.

Respondents (A) the law firm of Gray, Ames & Driscoll, and E. W. Brewer, Jr., and respondent (B) James T. Phillips, an attorney at law, asserted their claims to 30 per cent and 2 per cent respectively of appellant's interest in that estate, by filing in the estate proceedings two written assignments executed to them by appellant. They then demanded that the court distribute to them through the decree of distribution the said portions of appellant's share of the estate so assigned. Several similar issues with regard to other assignments were tried at the same time. The assignment dated July 30, 1930, was for legal services to be performed and read in part as follows: "That I, Marie Lees, * * * do hereby * * * assign, transfer and set over unto E. W. Brewer, Jr., and Gordon Gray, Walter Ames and J. G. Driscoll, Jr., attorneys at law, an undivided thirty per cent. (30%) of all my right, title and interest in, to and of the estate of the above named decedent, and I do hereby authorize the Superior Court * * * to make distribution to said attorneys of said undivided interest * * *."

Respondent (B's) claim is based on a similar but later assignment dated October 23, 1931, by which appellant assigned to him and to whom the court accordingly awarded 2 per cent of appellant's distributive share. E. W. Brewer, Jr., died in March, 1932, and Dorothy Richardson was appointed administratrix of his estate.

Respondents (A) have appealed from the entire decree but complain about that portion awarding them only 15 per cent instead of 30 per cent of appellant's interest in her distributive portion of the estate. Appellant has appealed from that same portion of the decree and also that portion awarding James T. Phillips 2 per cent of her distributive share.

The controversy in this case arises out of a period of litigation that has gone on for more than 15 years. Jean Cazaurang was murdered in June, 1929. After his death three wills were produced. The first in point of time (June, 1927) made Marie Lees (Thomas) the principal beneficiary. To this will was attached a codicil dated February 2, 1929. The second will purported to leave the bulk of the estate to the widow (Marie Cazaurang). It was executed subsequent to the June, 1927 will, but prior to the date of the execution of the codicil. The third will devised the entire estate, in equal shares, to Mrs. Cazaurang, and to an attorney named Carrey. It was dated subsequent to the date of the execution of either of the prior wills and also the date of the codicil. Mrs. Thomas (nee

Lees) consulted several attorneys in regard to her rights. The first attorney agreed to handle her case for a 45 per cent interest in any recovery. Subsequently, another attorney was associated and their fee was cut to 30 per cent. On the contest of the Carrey will another attorney in San Diego was associated and their joint interest was increased to 35 per cent. After a trial by jury the Carrey will was set aside but a new trial was later granted. An appeal was perfected and a settlement was under consideration. Miss Lees became dissatisfied with her attorneys and on July 30, 1930, retained respondents (A) under the agreement above mentioned. By agreement, the former attorneys accepted an assignment of 17½ per cent in lieu of their 35 per cent interest, and were substituted out of the case. Respondents found themselves faced by an action filed by Mrs. Cazaurang to enjoin the probate of the Carrey will and the Lees will. This action was determined successfully to appellant on December 16, 1931. For several years thereafter respondents studied the problems presented and the question of establishing the Lees will over the Mrs. Cazaurang will and prepared for a new trial. Many consultations were had and the record discloses considerable legal problems that were handled by respondents in connection with the estate. Negotiations for settlement were still progressing. Appellant became anxious about the proceedings and employed respondent Phillips to advise her and check up on what was being done by respondents (A). Subsequently (in 1933) she employed another attorney, and in 1934, she moved to substitute him in place of respondents (A). See In re Estate of Cazaurang, 1 Cal.2d 712, 36 P.2d 1069, supra. The court there held that it had no power to weigh the reasons for a change of attorneys and that she had the right to make such a change unless the attorneys had a vested interest in the subject matter, even though a contingent fee had been agreed upon. It also held that the contract and assignment here involved were ineffectual to create a power coupled with an interest, as the interest and assignment were given as security for the payment of the contingent fee and reimbursement only, and such interest arose only from their employment.

Shortly thereafter, respondents were substituted out of the estate matter. Miss Lees quarreled with her then attorney and another attorney was employed who took a 50 per cent assignment of her interest and after five or six years, succeeded in probating the Lees will and brought the estate into a condition for distribution.

On May 26, 1941, appellant, after being appointed general administratrix with the will annexed, filed her final account and petition for distribution, in which she asked that the court refuse to recognize any assignments made by her except the one made for her present attorney. On June 5, 1941, respondents filed objections to the petition and set up their assignments. On July 2, 1941, appellant filed a petition for disapproval of respondents' assignments under secs. 530, 530.1 and 1201a of the Probate Code.

The petition contained five counts, all based on alleged negligence of respondents in conducting her affairs resulting in a claimed loss to her. One count contained some allegations bordering on undue influence and alleged that respondents had repudiated the agreement under which the assignments were made by failing to properly protect and prosecute to a successful conclusion the rights of the appellant.

Notice of hearing the petition on July 18, 1941, was mailed on July 3, 1941. Answers to the petition were filed on July 8, 1941. The minutes of the court show that on July 7, 1941, counsel for appellant "orally demanded trial by jury on petitions filed July 2nd, 1941" by appellant "for disapproval of assignment of distributive shares in estate." Objection was made thereto. After considerable argument the trial court, on July 9, 1941, denied the application for a jury trial. On December 30, 1941, the trial judge stated his findings in detail and rendered his decision in an oral opinion which was transcribed and incorporated in the record on appeal. A decree of distribution was signed on February 16, *1944,* which included many findings set forth in the oral opinion and more fully

described the allowances made to the several attorneys under their assignments, as well as the statutory fees and fees for extraordinary services.

It is first argued by respondents in support of their appeal, that the lower court, sitting in probate, was without jurisdiction to do anything but to approve the assignment in full, and was not permitted to reduce the percentages therein specified. Appellant argues that secs. 530.1 and 1201a of the Probate Code, in effect at the time of the hearing of the issues herein involved, as well as section 1020.1, were unconstitutional and void so far as they attempted to confer jurisdiction of such controversies upon the Probate Court.

In Re Estate of Lund, 65 Cal.App.2d 151, 150 P.2d 211, it was held that prior to the enactment of sec. 1020.1 of the Probate Code and its forerunner, the Probate Court had no jurisdiction to determine the issue of the validity of an assignment upon the distribution of an estate, citing In re Estate of Howe, 161 Cal. 152, 118 P. 515.

Secs. 530, 531.1 and 1201a of the Probate Code, added by the statutes of 1939, p. 1992, chap. 588, and p. 2431, chap. 852, were repealed by Stats.1941, p. 2893, chap. 1162, sec. 2. Those sections provided generally that every assignment of an interest in a decedent's estate must be in writing and shall be subject to the *approval* or *disapproval* of the Probate Court; that the filing thereof shall give "jurisdiction to such court" over the grantor of such assignment and every person acting thereunder; that such court shall have *power* to "inquire into and determine the validity [thereof]", and require proof of the amount of compensation to be charged by the person acting thereunder, and to *fix and determine* the validity and reasonableness of such compensation, whether or not the same has been fixed in the instrument so filed. Under the act no such instrument is enforceable until so filed, and no provision therein in reference to such compensation is binding until approved by the court as therein provided. The sections further provide that any party to such an assignment may file a petition in such probate court asking that court to examine such instrument and to *approve or disapprove* the same *in whole* or *in part*, or to make any proper order in relation to the validity thereof or the reasonableness of any compensation payable to the parties to such instrument. The sections provide that the court shall fix a time and place for hearing the same.

Sec. 1020.1 of the Probate Code was added by Statutes of 1941, p. 2893, chap. 1162. It adopted many of the same provisions of the former sections and enlarged the power of the court in some respects. It provides generally that the Probate Court, before making distribution of any property of the decedent to any assignee, pursuant to any agreement of a devisee, may, on the motion of any person interested in the estate, or on its own motion, "inquire into the consideration for such assignment * * * and into the amount of any fees * * * or consideration paid or agreed to be paid * * * and into the circumstances surrounding the execution of such assignment * * *" and if it finds that the fees, or consideration paid by such devisee is grossly unreasonable, or that any such assignment was obtained by duress, fraud or undue influence, it may *refuse* to make distribution pursuant thereto except upon such terms as it deems just and equitable.

[1] It becomes apparent that if the jurisdiction of the Probate Court, previous to the enactment of those sections, was limited, and it was not authorized by law to determine the validity of an assignment in the probate proceedings, as suggested in Re Estate of Howe, 161 Cal. 152, 118 P. 515, and other decisions cited by appellant, the Legislature has specifically conferred upon such courts the power and jurisdiction to hear and determine the issues specifically permitted in the above sections, and has provided a method of proceeding in such cases. In re Burton, 93 Cal. 459, 462, 29 P. 36; Art. VI, sec. 5, Constitution of California. See, also, In re Estate of Cohen, 66 Cal.App.2d 450, 458, 152 P.2d 485, hearing denied by the Supreme Court. In the last case cited, a similar assignment was involved. The appellant filed an answer to the petition

for approval, opposing the granting thereof. The grounds of opposition were that the assignment was illegal or void because of facts indicating undue influence and fraud, and appellant further denied ever having made it. The court found adversely to appellant on all issues and also found that the assignment was regular in form; that the contract for services rendered was reasonable, and approved it in whole. The court held on appeal that the question of the reasonableness of the compensation provided for in an instrument of that kind was one of fact to be determined by the court having jurisdiction of the probate proceedings.

In re Estate of Lund, supra [65 Cal. App.2d 51, 150 P.2d 213], is factually similar to the present action and involved an assignment of a one-third interest in the devisee's share of the estate. The court found that the assignee was entitled to $1,000, which amount was considerably less than the one-third interest of the devisee. In upholding the decree awarding only $1,000 the appellate court pointed out that the Probate Court was permitted by the sections of the Probate Code to "inquire into the consideration" for the assignment and into the amount of any fees or consideration paid or agreed to be paid by the devisee, and into the circumstances surrounding the execution of the assignment, and that the court had certain alternative findings it could make: (1) That such assignment was obtained by "duress, fraud or undue influence"; or (2) That "the fees [etc.] * * * is grossly unreasonable"; and that upon making of either finding the court "may *refuse* to make distribution pursuant thereto except upon such terms as it deems just and equitable." Whether the assignee might seek relief against the assignor in another independent action based upon the claimed assignment, if the Probate Court had refused to recognize the assignment at all and had refused to make distribution to the assignee but distributed the estate directly to the devisee is not before us, and that question is not necessary to determine in this proceeding.

[2] In the instant case the respondents sought to enforce the provisions of their assignment in the probate proceedings. Both respondents and appellant submitted themselves to its jurisdiction for the purpose of determining whether that court would or would not refuse to make distribution according to the assignment. The Probate Court did not rescind or set aside the assignment in its entirety for all purposes but it ignored the assignment in part for the purpose of distribution, which it had a right to do. In re Estate of Lund, supra, 65 Cal.App.2d at page 155, 150 P.2d 211. In other words, it recognized the assignment of appellant's interest only to the extent of 15 per cent and 2 per cent respectively, which sums were found to be the reasonable value of the respondents' services. The evidence supports the award. Despite the informality of the pleadings and particularly the findings which were mainly set forth in the decree of distribution, we are satisfied that such findings, on the issues presented, were sufficient to support the decree. In re Estate of Lund, supra.

The next point is raised by appellant. She discusses two rights of which she contends that she was deprived by the hearing in the Probate Court. One is that the trial court wrongfully deprived her of her constitutional right of a trial by jury of the controversies contained in the pleadings, citing Article I, sec. 7, Constitution of California; In re Anderson's Estate, 136 Misc. 110, 240 N.Y.S. 532; Hutchason v. Marks, 54 Cal.App.2d 113, 128 P.2d 573; People v. Bruneman, 4 Cal.App.2d 75, 40 P.2d 891; Sec. 1230 Probate Code; In re Estate of Baird, 173 Cal. 617, 622, 160 P. 1078; and In re Estate of Perkins, 21 Cal.2d 561, 134 P.2d 231.

Secondly, it is contended that appellant was entitled to a trial of the issues presented in a suit commenced in the County of Los Angeles, which is, she says, the place of her residence, citing section 592 of the Code of Civil Procedure.

[3] As we view the nature of this proceeding, it was one for the Probate Court to determine whether the assignment should be recognized and whether the distributive share should be distributed directly to the devisee, or whether the distribution

should be made to the assignee by virtue of the assignment. The action, strictly speaking, is not one "for money claimed as due upon contract". It is a proceeding to determine the validity and effect of a claimed assignment.

In Board of Education v. Mulcahy, 50 Cal.App.2d 418, 123 P.2d 114, it was held that there is no provision in the Constitution guaranteeing the right of a trial by jury in all cases. And quoting from Cline v. Superior Court, 184 Cal. 331, at page 339, 193 P. 929, at page 932, it is said: "It is a settled proposition of law in this state that the right of trial by jury there referred to is the right as it existed at common law, and that it does not secure the right to a trial by jury in any case which was not triable by a jury, as of right, under the common law of England."

[4, 5] Appellant does not cite us to any case in which an assignor could obtain a jury trial on the question of the validity of an assignment at common law. The constitutional guaranty of a right to trial by jury has no application to cases coming within the equity jurisdiction, and a jury may not be demanded in such cases as a matter of right. However, the court may in its discretion grant a trial by jury, upon such conditions as it may see fit to impose, but the verdict in such case is merely advisory and is not binding upon the court. Ballou v. Avery, 175 Cal. 641, 166 P. 1003; Davis v. Judson, 159 Cal. 121, 113 P. 147; Hudson v. Hudson, 129 Cal. 141, 61 P. 773; Holland v. Kelly, 177 Cal. 43, 169 P. 1000; 15 Cal.Jur. p. 331, sec. 11.

[6] In determining whether an action is legal or equitable, and consequently whether a jury may be demanded as a matter of right, the court is not bound by the form of the action, but rather by the nature of the rights involved, as determined from the whole of the pleadings, and the facts of the particular case. Cauhape v. Security Savings Bank, 127 Cal. 197, 59 P. 589.

Wheelock v. Godfrey, 100 Cal. 578, 35 P. 317, was an action to set aside an assignment by plaintiff's testator and to declare certain money the property of plaintiff. It was there held that plaintiff was not entitled to a jury trial.

[7] Under section 1230 of the Probate Code all issues of fact joined in probate proceedings must be tried in conformity with the rules of practice in civil actions. The right to a jury trial on the question of determination of heirship is specifically granted by statute, the same as in a will contest. Sec. 1081, Probate Code. The failure of the Probate Code to specifically authorize a trial by jury on such issues as are here presented is sufficient reason for holding that there is no right to a jury trial on those issues. In re Estate of Bell, 58 Cal.App.2d 333, 338, 136 P.2d 804. Sections 530 and 530.1 contain no express statutory authorization for issues being joined, or authorizing the formation of an "issue of fact" within the meaning of the several cases that allow issues of fact to be framed in probate proceedings where a jury trial is authorized. In re Estate of Baird, supra; In re Bundy, 44 Cal.App. 466, 186 P. 811.

Section 1020.1 of the Probate Code provides that the court might make the investigation "on its own motion" and does not contemplate a petition setting forth the grounds of the contest in relation to the assignments nor does it make mention of the necessity of any answer or other pleading in connection therewith.

[8] We therefore conclude that the appellant was not entitled to a jury trial, as a matter of right, on the issues presented. Both appellant and respondents submitted the issue in reference to the assignments to the Probate Court for decision, as required by sections 530 and 530.1 of the Probate Code. The filing of such assignments with the clerk of the court gave jurisdiction to the court "over the grantor of such * * * conveyance or assignment * * * and over every person acting thereunder." Appellant filed a petition in the probate proceeding to disapprove such assignments in whole and notice of hearing the petition was given. Appellant cannot now be heard to complain that she was entitled to defend the action or proceedings in the County of Los Angeles. Furthermore, this question

was not raised at the hearing and therefore should not be considered for the first time on appeal. We perceive no prejudicial error on the part of the trial court.

The decree of distribution is affirmed.

BARNARD, P. J., and MARKS, J., concur.

Hearing denied; CARTER, J., dissenting.




**WALKER v. DONOGHUE, Registrar of Voters.**

**Civ. 15496.**

District Court of Appeal, Second District, Division 3, California.

June 26, 1946.

Hearing Dismissed as Moot Aug. 15, 1946.

**1. Statutes ⇐35½**

The election precinct number must appear upon an initiative petition after the name and address of the signer, at the time the petition is filed, and the registrar of voters may not allow deviations from such requirement. Elections Code, § 46; Const. art. 4, § 1.

**2. Statutes ⇐35½**

Initiative petition and various sections thereof must remain in their condition as of the date of filing and if, when the time for filing expires, any of them is incomplete because of the absence of precinct designations, there is no method by which it can be completed thereafter. Elections Code, § 46; Const. art. 4, § 1.

**3. Statutes ⇐35½**

Where initiative petitions are incomplete when the time for filing expires, because of the absence of precinct designations, names which are not followed by precinct designations may not be included in the total number certified to the Secretary of State. Elections Code, § 46; Const. art. 4, § 1.

**4. Mandamus ⇐16(1), 182**

A peremptory writ of mandate may not be issued by the District Court of Appeal until expiration of 60 days after decision of the cause, and petition therefor must be denied where no purpose would be served by issuance of writ at that time.

Mandamus proceeding by Benjamin O. Walker against Michael J. Donoghue, Registrar of Voters of the County of Los Angeles, State of California, wherein alternative writ was issued.

Peremptory writ denied.

Fred M. Cross, of Los Angeles, for petitioner.

Harold W. Kennedy, Co. Counsel, and Charles C. Stanley, Jr., Deputy Co. Counsel, both of Los Angeles, for respondent.

B. W. Kemper, of Los Angeles, amicus curiæ.

SHINN, Justice.

Upon the filing of the petition herein, an alternative writ of mandate was issued, returnable on June 25, 1946, requiring respondent, as Registrar of Motors of Los Angeles County, to show cause why he should not be ordered to desist from allowing precinct numbers to be added after the signatures of voters upon original and supplemental sections of an initiative petition where, at the time of filing, no such numbers appeared after the names of the signers, and to show cause why he should not exclude such names in his count of signatures and in his certificate or certificates to the Secretary of State as to the number of total signers. The facts as developed at the hearing are that a great number of original and supplemental sections of a petition seeking to have placed on the ballot at the general election a measure to legalize greyhound racing and pari-mutuel betting thereon, have been filed in the office of respondent without any designation after the signatures of the numbers of the precincts in which the respective signers reside, and that respondent has allowed the same to be supplied by the proponents of the measure and their agents after the sections have been received and filed in his office. It appears from the answer of respondent that the practice complained of has been for many years the "uniform, impartial and un-

deviating practice of the office of the Registrar of Voters of Los Angeles County."

[1-3] The law on the subject is clear. It is required by section 1 of Article IV of the Constitution that the election precinct number must appear upon an initiative petition after the name and address of the signer. In Mayock v. Kerr, 216 Cal. 171, 13 P.2d 717, this requirement was construed to mean that the precinct designation must be upon the petition at the time it is filed. This also is the specific requirement of section 46 of the Elections Code. The Registrar of Voters is without authority to allow deviations from these strict requirements of the law. The times within which petitions and supplements thereto may be filed are limited by constitutional and statutory provisions. The records of the Registrar of Voters are available for public use in the securing of the information necessary to complete petitions by the addition of precinct names or numbers. This is required to be done before the petitions are filed, and if it cannot be done then it may not be done at all. The petitions and the various sections thereof must remain in their condition as of the date of filing and if, when the time for filing expires, any of them are incomplete because of the absence of precinct designations, there is no method by which they can be completed thereafter. Names which are not followed by precinct names or numbers are not to be included in the total number certified to the Secretary of State.

The petition to this court herein was filed June 19, 1946. Respondent is required to deliver his certificate to the Secretary of State as to supplements to the petition not later than June 27, 1946. It is alleged in his answer that a certificate has already been issued and forwarded to the Secretary of State as to the number of names upon the original sections of the petition and that there is no way to determine which names thereon did not have precinct numbers after them at the time said sections were filed.

[4] A peremptory writ of mandate may not be issued by this court until the expiration of 60 days after the decision of the cause. Noel v. Smith, 2 Cal.App. 158, 83 P. 167; People v. District Court of Appeal, 193 Cal. 19, 222 P. 353; People v. Walker, 76 Cal.App. 192, 244 P. 94; People v. Sonoqui, 1 Cal.2d 364, 35 P.2d 123; Moran v. District Court of Appeal, 15 Cal.2d 527, 102 P.2d 1079. No purpose would be served by the issuance of our writ at that time and the petition for a peremptory writ must therefore be denied.

The alternative writ was issued for the reason that there appears to be a prevalent misconception as to the effect of the action of the District Court of Appeal in denying an alternative writ under similar conditions in Hyans v. Donoghue, Civil No. 14624, June 23, 1944, and a like denial by the Supreme Court upon the same facts in Haggarty v. Donoghue, S. F. 17059, on June 28, 1944, both without opinion. In the situations there involved, the certificate of the Registrar of Voters was due to be issued not later than June 29, 1944. These rulings should not be relied upon as decisions of the questions of law involved. It would seem that the alternative writs must have been refused because insufficient time remained in which the acts complained of could be controlled by final judgment of the court. Green v. Jordan, 216 Cal. 318, 14 P.2d 297; Clementine v. Board of Civil Service Com'rs, 47 Cal.App.2d 112, 117 P.2d 369.

For the reasons stated, a peremptory writ is denied.

DESMOND, P. J., and WOOD, J., concur.

75 Cal.App.2d 169

**CAMP v. BROCK, Director of Agriculture.**

**Civ. 7261.**

District Court of Appeal, Third District, California.

June 27, 1946.

Rehearing Denied July 27, 1946.

**1. Mandamus ⇐1**

Where complete record of proceedings before Director of Agriculture was before District Court of Appeal in connection with return to writ of review and petition charged that Director breached his duty in arbitrarily and capriciously denying petitioner's application for a processor's license, in absence of any reason appearing why court should not entertain petition and determine whether petitioner was entitled to relief sought, court concluded to dispose of the matter by considering petition as and for a writ of mandate. Agricultural Code, §§ 1299.18(d), 1300.1, 1300.5; Const. art. 6, § 4.

**2. Agriculture ⇐2**

Where there was evidence to support finding of Director of Agriculture that applicant for a license as a processor of farm products had violated Agricultural Code by operating as a processor or processor's agent without having first obtained a license, which conduct alone is, within discretion of Director, a ground for denying a license, Director's denial of a license was not arbitrary or capricious, even though in other respects findings adverse to applicant could not be sustained. Agricultural Code, §§ 1299.18(d), 1300.1, 1300.4a.

**3. Licenses ⇐20**

Mere accusation of a crime cannot be countenanced as a reason for depriving a person, otherwise qualified, of his right to engage in a lawful business.

**4. Agriculture ⇐2**

An order of Director of Agriculture based solely on information contained in his files and not introduced in evidence at hearing will be set aside, but where record contains nothing to show that Director based order on such information, order will not be set aside on that ground.

**5. Agriculture ⇐2**

Proceeding before Department of Agriculture on hearing on application for a license as a processor of farm products is not governed by strict rules of evidence or procedure that obtain in court trials. Agricultural Code, §§ 1299.18(d), 1300.1, 1300.4a.

**6. Agriculture ⇐2**

Where there was introduced before hearing officer sufficient testimony properly admissible to support finding that applicant was not entitled to a license as a processor of farm products, alleged error on part of hearing officer in admitting incompetent evidence did not require the vacating of order. Agricultural Code, §§ 1299.18(d), 1300.1, 1300.4a.

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Original proceeding on the petition of Thomas F. Camp against A. A. Brock, as Director of Agriculture of the State of California, for a review of respondent's denial of petitioner's application for a license as a processor of farm products.

Writ discharged.

Clarence N. Riggins, of Napa, for petitioner.

Robert W. Kenny, Atty. Gen., and Paul M. Joseph, Deputy Atty. Gen., for respondent.

PEEK, Justice.

This is an original proceeding by which petitioner seeks to review the action of the respondent director in denying petitioner's application for a license as a processor of farm products as that term is defined by section 1299.18(d) of the Agricultural Code of the State of California.

In substance the petition alleges that petitioner is an applicant for a license as provided in said section, and has complied with the provisions of section 1300.1 of said Code; that an order to show cause was issued to petitioner commanding him to appear before the Assistant Chief of the Bureau of Market Enforcement, State Department of Agriculture, and to show cause, if any, why his application for said license

should not be denied; that at the hearing evidence was introduced by both parties, and thereafter respondent director entered his order denying petitioner's application; that the denial of said application was "arbitrary, capricious, and an abuse of discretion," in that there was a total lack of evidence to support the order; that said respondent acted upon information not introduced in evidence and which was contained in office files in the office of said respondent; that evidence was received of another proceeding wherein the processor's license of the Dried Fruit Distributors of California, a corporation, was suspended for failure to pay for fruit purchased from growers; that petitioner was an officer of said corporation but was not personally liable for its debts, nor was any fault or dishonest act in relation to the operations of said corporation shown to have been attributable to petitioner; and that all of said evidence was introduced over petitioner's objection and without opportunity on his part to examine said records or to cross-examine witnesses.

By his demurrer respondent challenges the issuance of the writ prayed for primarily upon the ground that, as he was not exercising judicial powers, therefore a writ of review may not issue even though specifically provided for by statute, in this case section 1300.5 of the Agricultural Code.

The answer and return of respondent in effect denies all material allegations contained in said petition. As a part of said return he has filed with this court a transcript of the record and proceedings relative to the application of petitioner, which includes, among other things, a transcript of the evidence and the proceedings wherein the license of said Dried Fruit Distributors was suspended, which proceedings were held before a hearing officer of the respondent director, at the City of Santa Rosa, on August 9, 1940, and certain papers and documents in a file of the Bureau of Market Enforcement of said Department of Agriculture in reference to petitioner herein.

[1] Even assuming that the jurisdictional grounds raised by respondent would be valid under other circumstances, a determination of that question becomes entirely immaterial to the present controversy. The substance of the allegations of said petition is that respondent breached his duty in arbitrarily and capriciously denying petitioner's application for a processor's license. Pursuant to such averments, and with the complete record of the proceedings before us, there would appear to be no reason why this court should not entertain the petition and determine whether or not petitioner is entitled to the relief sought. Board of Trustees, etc., v. State Board of Equalization, 1 Cal.2d 784, 37 P.2d 84, 96 A.L.R. 775. Therefore, under the facts and circumstances so presented, we have concluded to dispose of this matter under the provisions of Article VI, section 4, of the Constitution, vesting in this court original jurisdiction to issue writs of mandate, and to consider said petition as and for a writ of mandate.

[2] The "findings and order" herein which appear to be in the nature of a memorandum opinion are quite lengthy, and it would serve no useful purpose to detail the matters therein contained. Suffice it to say that in one respect, at least, said "findings" are supported by the evidence, viz., that petitioner, by his own admission, violated the act by operating as a processor or processor's agent during the year 1945 without having first obtained a license to do so. Since such conduct alone is, within the discretion of the director, a ground for denying a license (Agricultural Code, secs. 1300.1, 1300.4a), we cannot say that his action in so doing was arbitrary or capricious, even though in other respects the order could not be sustained.

By this we have reference in particular to the following language contained in said memorandum: "As this decision is written this Department, taking official notice of its own acts, observed and notes that there is now pending before the Superior Court of the State of California, in and for the County of Napa, a certain criminal proceeding entitled 'The People of the State of California, Plaintiffs, v. Thomas Camp, Defendant, Case No. 1556.'" And again, near the end of said memorandum, the reiteration that: "* * * and

that criminal proceedings are now pending against him on that point."

Although no mention of these statements by said hearing officer is made in the petition, nevertheless counsel for petitioner strongly attacked the same at the time of oral argument before this court.

[3] Certainly mere accusation of a crime should never be countenanced as a reason for depriving a person, otherwise qualified, of his right to engage in any lawful business. The patent injustice of any other rule is well illustrated by the fact that in the present case the petitioner subsequently was acquitted of the charge referred to by said hearing officer.

[4] We also have mentioned petitioner's charge that the respondent director acted upon information contained in his files and not introduced in evidence. Were it the fact that the order herein was based solely on such information, we should be required to set aside the same under the authority of La Prade v. Department of Water & Power, 27 Cal.2d 47, 51, 162 P. 2d 13. However, it does not appear that such was the situation here. While the record before us contains a file of the department consisting of various reports concerning the petitioner's activities, there is nothing in the record to show that the respondent based his order on said information.

In his points and authorities accompanying the petition herein, petitioner further attacks the constitutionality of the pertinent provisions of the Agricultural Code. However, on oral argument petitioner states that, having examined the adjudicated decisions cited by respondent on this point, he is content to waive this issue; and accordingly we shall not deal with it.

[5, 6] With regard to alleged error on the part of the hearing officer in admitting in evidence a transcript of a prior proceeding between fruit growers and the processor corporation of which petitioner was vice-president and general manager, it may be said, first, "* * * that proceedings of this character are not governed by the strict rules of evidence or procedure that obtain in court trials" Traxler v. Board of Medical Examiners, 135 Cal.App. 37, 40, 26 P.2d 710, 712; citing Suckow v. Alderson, 182 Cal. 247, 251, 187 P. 965, and Lanterman v. Anderson, 36 Cal.App. 472, 478, 172 P. 625; second, having read the transcript and having in mind the essential elements of the alleged violations of the Agricultural Code, we believe, as did the court in the Traxler case, supra, 135 Cal.App. at page 41, 26 P.2d at page 712, that there was introduced before the hearing officer "sufficient testimony properly admissible to support the finding that was made."

The writ is discharged.

ADAMS, P. J., and THOMPSON, J., concur.




75 Cal.App.2d 99

**In re FRASER'S ESTATE.**
**BEMIS v. COOMBS.**
**Civ. 13006.**

District Court of Appeal, First District, Division 2, California.

June 25, 1946.

Hearing Denied Aug. 22, 1946.

**1. Wills ⇐384**

On review of a judgment of nonsuit in a will contest, evidence presented to trial court by contestant must be viewed in light most favorable to him.

**2. Trial ⇐139(1)**

A motion for nonsuit must be denied if plaintiff has presented any substantial evidence to support his case, but motion must be granted when evidence, viewed in light most favorable to plaintiff, is legally insufficient to support a judgment in his favor.

**3. Wills ⇐326**

In will contest, evidence viewed in light most favorable to contestant was legally insufficient to support a judgment in his favor and warranted the granting of proponent's motion for nonsuit.

**4. Wills ⇐82**

Where testatrix and her brother saw each other infrequently and testatrix stated to attorney that she was not on friendly terms with brother and wanted to leave him a small of amount of money "so he can't cause any trouble", and since brother was only a collateral relative and hence not the natural or normal object of testatrix' bounty, will leaving bulk of estate to testatrix' closest friend was not unnatural. Probate Code, § 253.

**5. Wills ⇐166(1)**

Where testatrix instructed her attorney for preparation of will at a private conference, selected the witnesses, and executed will while principal beneficiary was not in the room, and where it was shown that testatrix' affliction was not painful, that she was mentally alert, and that relationship of patient and nurse did not exist between testatrix and principal beneficiary, undue influence was not established.

**6. Wills ⇐166(12)**

In action to set aside will for undue influence, evidence must be produced that pressure was brought to bear directly on testamentary act, but such evidence need not itself be direct.

**7. Wills ⇐166(12)**

Undue influence with respect to execution of will may be established by circumstantial evidence, but evidence must do more than raise a suspicion and it must amount to proof, and such evidence has force of proof only when circumstances are proven which are inconsistent with claim that will was spontaneous act of testator.

**8. Wills ⇐159**

Mere general influence, however strong and controlling, not bearing upon testamentary act, is not sufficient to establish undue influence, which must be influence used directly to procure will and must amount to coercion destroying free agency of testatrix.

**9. Wills ⇐166(7)**

A mere opportunity to influence testatrix' mind, even coupled with an interest or a motive to do so, is not sufficient to establish undue influence.

**10. Wills ⇐163(2)**

The presumption of undue influence arises from proof of existence of a confidential relation between testatrix and beneficiary coupled with an activity on part of beneficiary in preparation of will, the confidential relation alone not being sufficient.

**11. Wills ⇐166(1)**

The fact that will was prepared from directions given by testatrix to her attorney when no one else was present was strong evidence that will was testatrix' voluntary act.

**12. Wills ⇐384**

Where judgment of nonsuit in will contest case was affirmed, appeal from order denying contestant's motion to set aside decree of final distribution became moot.

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Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Proceeding in the matter of the estate of Bernice B. Fraser, deceased, on the contest of decedent's will by Samuel R. Bemis, opposed by Harriet Coombs, as executrix of decedent's estate. Upon the death of contestant, Richard H. Bemis, as administrator of the estate of Samuel R. Bemis, deceased, was substituted as contestant. From a judgment of nonsuit and from an order denying his motion to set aside the decree of final distribution, contestant appeals.

Judgment affirmed and appeal from order dismissed.

William Steinberg, of San Francisco, for appellant.

Reginald E. Foster, of Pacific Grove, John M. Thompson, of Monterey, and Chellis Carpenter, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The contestant of a will appeals from a judgment of nonsuit and from an order

denying his motion to set aside the decree of final distribution.

[1] Bernice B. Fraser, a 63 year old childless widow, died on March 27, 1944, at Carmel, leaving an estate consisting of real and personal property valued at $32,337.27. Her last will and testament, dated January 4, 1944, was filed for probate in the superior court of Monterey County on March 30, 1944, by Harriet Coombs, executrix and principal beneficiary. Under the will Mrs. Coombs received all of the estate except $2500 to Mrs. Jessie Joan Bever and $250 to Samuel R. Bemis, brother of the testatrix and contestant herein. The instrument was admitted to probate on April 10, 1944, and the decree of final distribution was granted on February 28, 1945. On October 2, 1944, Samuel R. Bemis instituted the present action contesting the will principally upon the ground that it was made and executed as a result of the undue influence of Mrs. Coombs. The contestant died prior to the trial and his son, Richard H. Bemis, was substituted as special administrator of his estate. The evidence presented to the trial court by the contestant, which must be viewed in the light most favorable to him, showed the following facts:

Bernice B. Fraser resided in her Carmel home alone for some years prior to her death. She suffered from a cancerous condition known as carcinomatosis which finally resulted in her death. The testatrix operated a weaving business in Carmel and maintained bank accounts with the Carmel Bank for more than twenty-two years. Her nearest relative was her brother, Samuel R. Bemis, who lived in San Francisco. Mrs. Coombs, the principal beneficiary of the will and proponent herein, is a graduate nurse and was a close friend of the testatrix for the fifteen years prior to the latter's death. She visited Mrs. Fraser frequently but never actually nursed her.

At the time she executed her will Mrs. Fraser was staying in Pacific Grove at the home of Mrs. Coombs for a ten day period. On January 3, 1944, the testatrix telephoned to Mr. Foster, an attorney, and asked him to come to the house for the purpose of redrafting her will. When the attorney arrived that afternoon Mrs. Fraser met him at the door and conducted him into the living room for a conference at which no other person was present. The testatrix discussed each paragraph of the will and instructed the attorney to draft the instrument so that the bulk of her estate would go to Mrs. Coombs. She stated to Mr. Foster that she wanted to leave only $250 to her brother because she was not on friendly terms with him. According to the attorney, Mrs. Fraser was "very familiar with legal terminology and provisions of wills and very definitely understood just what she wanted." The next day the will was executed in the dining room of Mrs. Coombs' home. It was witnessed by two women whom the testatrix had selected and instructed her attorney to contact. The record shows that at the hearing prior to the admission of the will to probate Mrs. Coombs testified, in answer to a routine question by the court, that she was present in the room at the time the will was signed. In the instant action, however, the proponent testified that she went into another room while the will was being executed, and this testimony was corroborated by the attorney and both witnesses to the instrument. All persons present when the will was executed testified that after signing her name the testatrix struck the table with her hand and stated: "This is the way I want it and this is the way it shall be." Mrs. Fraser's doctor, her attorney, the vice-president of the bank and both testamentary witnesses testified that she was of sound mind, mentally alert, extremely intelligent and possessed of a strong will power at all times up to the day of her death.

[2, 3] It is well settled that if the plaintiff presents any substantial evidence to support his case it is the duty of the trial court to deny a motion for nonsuit. Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, 837, 161 P.2d 673, 675, quoting 9 Cal. Jur. 558, 559. However when the evidence viewed in the light most favorable to the plaintiff is legally insufficient to support a judgment in his favor the motion should be granted. Nicholas v. Jacobson, 113 Cal.App. 382, 389, 298 P. 505; Zito v. Weitz, 62 Cal.App.2d 161, 164, 144 P.2d

409; 9 Cal.Jur. 557. There is no doubt that the present case falls within the latter category.

[4] Appellant's contention that the will is unnatural is not supported by the evidence or by law. Samuel Bemis lived in San Francisco and saw his sister so infrequently that even the closest friends of the decedent did not know that she had a brother. The testatrix stated to her attorney that she was not on friendly terms with her brother and wanted to leave him a small amount of money "so he can't cause any trouble." Under the law Bemis was a collateral relative (Probate Code, sec. 253) which relationship would not in itself cause him to be the natural or normal object of the testatrix' bounty. In re Estate of McGivern, 74 Cal.App.2d 150, 168 P.2d 232; In re Estate of Nolan, 25 Cal.App. 2d 738, 742, 78 P.2d 456; In re Estate of Easton, 140 Cal.App. 367, 377, 35 P.2d 614. In view of the fact that respondent had been Mrs. Fraser's closest friend for many years the will cannot be said to be unnatural.

[5] It is claimed that a confidential relationship existed between respondent and testatrix which together with the latter's condition resulting from her illness afforded Mrs. Coombs the opportunity to control the testamentary act. The evidence presented to the trial court did not support this contention. It was shown without contradiction that the relationship of nurse and patient never existed between the parties, that the testatrix' instructions to her attorney for the preparation of the will were given at a private conference, and that the witnesses were selected by Mrs. Fraser and contacted initially by her attorney although respondent may have telephoned to them at a later time. The testatrix was sitting at the dining room table when she signed the will and everyone present testified in this action that the respondent was not in the room at that time. It was also established that Mrs. Fraser's illness was not painful and that mentally she was exceptionally clear and active. In view of this state of the evidence the rules set forth in Re Estate of Shields, 49 Cal.App.2d 293, 121 P.2d 795, are controlling. In that case this court quoting from In re McDevitt's Estate, 95 Cal. 17, 30 P. 101, and In re Estate of Arnold, 16 Cal. 2d 573, 107 P.2d 25, said (49 Cal.App.2d at page 300, 121 P.2d at page 799):

[6, 7] "'Evidence must be produced that pressure was brought to bear directly upon the testamentary act, but this evidence itself need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator.' In re McDevitt's Estate, 95 Cal. 17, 33, 30 P. 101, 106; In re Estate of Leahy, 5 Cal.2d 301, 304, 54 P.2d 704.

[8, 9] "'In an action to set aside a will of a deceased person on the ground of undue influence, it is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. In re Estate of Motz, 136 Cal. 558, 583, 69 P. 294. Evidence must be produced that pressure was brought to bear directly upon the testamentary act. In re McDevitt's Estate, 95 Cal. 17, 33, 30 P. 101. Mere general influence, however strong and controlling, not brought to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to coercion destroying free agency on the part of the testator. In re Estate of Keegan, 139 Cal. 123, 127, 72 P. 828. It is further held that mere opportunity to influence the mind of the testator, even coupled with an interest or motive to do so, is not sufficient. In re Estate of Easton, 140 Cal.App. 367, 371, 35 P.2d 614.'"

[10] In the Shields case the contestants argued, as does appellant herein, that a confidential relationship was shown to exist which shifted the burden to the proponents of the will to show a lack of undue influence. In answer to that contention this court stated (49 Cal.App.2d at page 300, 121 P.2d at page 799): "We do not agree that such a confidential relationship was shown but conceding that it was this did

not, standing alone, shift the burden to the proponents." We then quoted from In re Estate of Arnold, supra, as follows:

"'In the [In re] Estate of Baird, 176 Cal. 381, 384, 168 P. 561, we find the applicable rule stated in the following concise language: "As suggested in Re Estate of Higgins, 156 Cal. 257, 261, 104 P. 6, 8, a 'presumption of undue influence' arises from proof of the [existence] of a confidential relation between the testator and such beneficiary, *'coupled with activity on the part of the latter in the preparation of the will.'* The confidential relation alone is not sufficient. There must be activity on the part of the beneficiary in the matter of the preparation of the will".'"

[11] The final rule set down in Re Estate of Shields, supra, also controls the instant appeal. In that case this court held (49 Cal.App.2d at page 301, 121 P.2d at page 799):

"The fact that the will was prepared from directions given by the testator to his attorney when no one else was present is very strong evidence that it was the testator's voluntary act. In re Estate of Unger, 188 Cal. 714, 206 P. 1003; 26 Cal. Jur. 728."

[12] Appellant concedes that if the judgment of nonsuit is affirmed herein the appeal from the order denying his motion to set aside the decree of final distribution becomes moot. The question, therefore, is not reviewable on appeal. 2 Cal.Jur. 803, and authorities there cited.

The judgment is affirmed and the appeal from the order is dismissed.

GOODEL and DOOLING, JJ., concur.

28 Cal.2d 602

## STRUDTHOFF et al. v. YATES et al. In re STRUDTHOFF'S ESTATE.

L. A. 19270.

Supreme Court of California, in Bank.

July 23, 1946.

**1. Trusts ⇐231(1)**

A trustee may not deal with himself nor place himself in position antagonistic to interests of cestui que trust.

**2. Executors and administrators ⇐144**

An administrator's foreclosure of mortgage, made in his favor to secure loan of money borrowed from him by decedent's estate with probate court's approval, is not within statutory prohibition of administrator's purchase of property or claim against estate. Probate Code, § 583.

**3. Executors and administrators ⇐144**

Whether money loaned to decedent's estate by administrator's wife was community or separate property was immaterial in determining whether administrator's compromise of estate's indebtedness to wife violated statute prohibiting administrator from purchasing property of or claim against estate or being interested in such purchase and authorizing credit in his accounts only for amount actually paid by him in settlement of claim for less than its full amount, as probate court's order approving compromise was in effect a foreclosure decree and administrator himself might have made loan to estate and later foreclosed lien securing it without violating statute. Probate Code, § 583.

**4. Executors and administrators ⇐269**

Where no appeal was taken from probate court's order approving administrator's compromise of estate's indebtedness to administrator's wife for money loaned by her, such determination became final and was not subject to attack by decedent's heirs, where facts pleaded by them showed no intrinsic fraud and evidence supported trial court's finding that there was neither fraudulent representation nor concealment constituting intrinsic fraud. Probate Code, § 583.

**5. Executors and administrators ⇐269**

In support of probate court's order, approving administrator's compromise of estate's indebtedness to administrator's wife for money loaned by her, Supreme Court must assume, on appeal, that all facts showing estate's financial inability to meet overdue indebtedness were fully disclosed to probate court at time of hearing on administrator's final account. Probate Code, § 583.

**6. Executors and administrators ⇐506(3)**

Evidence concerning payments of proceeds of orange crops on decedent's land to crop mortgagees directly by packing house supported judgment settling administrator's final account showing only receipts from sources other than crops and granting his petition for termination of probate proceeding.

**7. Executors and administrators ⇐510(8)**

An administrator's failure to furnish vouchers supporting credits claimed by him in final account for attorney's fees and title charges paid by him did not amount to prejudicial error justifying reversal of judgment settling account and terminating probate proceeding, in absence of assertion by decedent's heirs that such payments were not in fact made.

**8. Appeal and error ⇐717**

The trial judge's opinion cannot be substituted for, nor used to modify, his findings or judgment.

**9. Appeal and error ⇐931(3)**

The trial judge's fact findings must be taken as embodying trial court's conclusions on all fact questions submitted to it for decision.

**10. Trial ⇐404(5)**

A trial judge's absolute power to declare his final conclusion by filing his fact findings and conclusions of law cannot be restricted by any antecedent expression of such judge, whether casual or in form of opinion.

**11. Appeal and error ⇐1050(1)**

Error, if any, in admission of testimony of administrator's attorney as to conversation concerning administrator's sale of

estate's property for purpose of rebutting charge of intrinsic fraud, which would not justify equitable relief in suit by decedent's heirs against administrator to impress trust on realty and require accounting, was harmless.

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Suit in equity by Adolph William Strudthoff and another against Sydney Yates, as administrator of the estate of John D. Strudthoff, deceased, and Edith H. Yates, to impress a trust on realty and require an accounting, consolidated with a petition for revocation of the administrator's letters, appointment of petitioner as successor administrator, and rendition of a more complete and final account and report by the administrator, in which defendant Edith Yates filed a cross-complaint to quiet title. From a judgment allowing, settling, and granting the administrator's account and petition for termination of further proceedings and his discharge and denying the petition for revocation of letters of administration, plaintiffs appeal.

Affirmed.

Prior opinion, Cal.App., 162 P.2d 845.

William L. Waters, of Fullerton, for appellants.

Mize, Kroese & Larsh and R. C. Mize, all of Santa Ana, and Stephen F. Gallagher, of Anaheim, for respondents.

EDMONDS, Justice.

The two sons of John D. Strudthoff sued Sydney Yates, the administrator of the estate of their father, and his wife, Edith H. Yates, to impress a trust upon real property and for an accounting. Consolidated with this suit is a petition for revocation of letters of administration, the appointment of a successor administrator and a demand that Yates be ordered to render a more complete final account of his management of the estate. The principal charge of the heirs is that, pursuant to a fraudulent conspiracy and in violation of section 583 of the Probate Code, Yates transferred certain property of the estate to his wife. Complaint is also made of his asserted failure to account to the estate for certain income from that property.

John D. Strudthoff died testate in 1936, leaving four adult children. At the time of his death he owned a 40-acre orange grove in two parcels, each of which contained 20 acres. The sons' suit is based upon the asserted mismanagement of the estate by Yates whereby this property was conveyed to its creditors and thereby lost to the heirs.

The complaint is in five counts. The first of them alleged that one of the sons and Evelyn, his sister, were appointed administrators of the estate and served as such for three years. They then resigned, and Yates was appointed in their stead. He is the father-in-law of Amelia, also a daughter of Strudthoff. Their resignations, it was charged, were brought about by the false representations of Yates to the heirs that if he were appointed as administrator, he would so manage the groves and the affairs of the estate as to gradually liquidate the outstanding indebtedness, thereby saving the property from foreclosure. He also falsely represented to the heirs, the complaint continued, that he would do this without cost to them because of the family connection and the desire to have them inherit the property free of incumbrance.

In 1939, upon the nomination of the four heirs, Yates was appointed administrator with the will annexed. According to the complaint, Yates and his wife, having familiarized themselves with the affairs of the estate and its property, entered into a conspiracy to defraud the heirs out of their respective interests in the groves by obtaining loans from her and, later, a conveyance to her of 30 acres of the property in satisfaction of those loans. As a part of their plan, the sons pleaded, since the date of his appointment, Yates continually concealed from the plaintiffs all information regarding the administration of the estate, and because of his false promises, they made no investigation of the facts concerning the operation of the orange groves.

Upon information and belief, it was alleged that annually Yates sold the crops of oranges produced from the groves and collected the proceeds therefrom. These amounts, together with the income from the

sale of water produced on the land, at all times during his administration were much more than sufficient to pay all interest, taxes and reasonable operating expenses of the groves. In order to conceal these facts from the court, it was charged, Yates purposely failed to render an annual account as required by law, and rendered no account since the date of his appointment.

Without disclosing the true financial condition of the estate to the court, the sons also asserted, Yates falsely represented that, for the best interest of all concerned, 10 acres of the orange grove should be conveyed to the beneficiary of the deed of trust securing an indebtedness incurred during the administration of the estate. Pursuant to an order of court, the property was conveyed to the creditor notwithstanding the fact that Yates then had, or should have had, on hand money of the estate sufficient to have made a substantial payment upon the incumbrance "and thereby could well have secured the extension of the balance due thereon." In accordance with the fraudulent conspiracy, Yates, "in violation of his duty as administrator, did not take advantage of the right to protect the estate from any threatened foreclosure by filing a petition under * * * the Frazier-Lempke Act, and by such designed neglect fraudulently caused the sacrifice and loss of the ten acres of land and the deed to himself and his wife of the remaining 30 acres."

The complaint then stated facts concerning the conveyance to Mrs. Yates. This deed, said the sons, was also obtained by fraudulently concealing from the court the true financial condition of the estate. Yates falsely represented to the court that it was necessary and for the best interests of the estate to borrow $11,350. The court, in reliance upon the fraudulent representations, made an order authorizing him to obtain the loan from his wife and, as security therefor, to give a note and deed of trust. The estate was not then in need of money and the loan was made for the financial benefit of Yates and his wife as part of the conspiracy to thereafter obtain the 30 acres of land for themselves.

The later history of the loan was then related. In June, 1942, a little more than one year after the note and deed of trust were executed and delivered, Mrs. Yates demanded immediate payment of $11,350 together with an additional $2,500 claimed to have been advanced by her. Upon information and belief, it was alleged, no part of these amounts was ever paid to or received by the estate, but they were pretended loans for the consummation of the fraudulent conspiracy. Yet Yates petitioned the court for an order authorizing him to accept a proposed compromise offered by his wife whereby she agreed to pay the estate $1,000 and cancel the indebtedness in consideration of the conveyance to her of the 30 acres of land. In this petition, Yates falsely represented to the court that the property was worth "not to exceed $30,000" and the acceptance of the offer of compromise would be to the best interest of the estate.

When Yates filed his petition, the complaint continued, the orange crop on the 30 acres had fully matured and was worth about $22,000. Yates had that amount on hand when he made the conveyance, and the market value of the land was then more than $45,000, as he well knew, but he concealed all of these facts from the court. During the summer of 1942, Yates and his wife could have sold the land for $1,500 an acre, but they took the groves off the market and refused to consider any offer between June and October, 1942, when they obtained title to the land. Its worth at the date of the conveyance was $47,500.

Other allegations in connection with the conveyance to Mrs. Yates were that the petition for authority to compromise her indebtedness did not disclose her relationship to the administrator and the concealment was intentionally made for fraudulent purposes. The cause of action concluded with the demand for a declaratory judgment that 20 acres of the land conveyed to Mrs. Yates is held by her as trustee for the plaintiffs.

The other counts of the complaint incorporated by reference substantially all of the allegations of the first cause of action. By

the second and fourth counts, the plaintiffs sought an accounting of oranges assertedly sold by Yates. The purpose of the third count was to obtain a declaratory judgment that Mrs. Yates holds 10 acres of the land conveyed to her in trust for the plaintiffs. In the fifth count, the plaintiffs pleaded that by reason of the neglect and mismanagement of Yates, damages in the sum of $20,000 have been sustained.

The separate demurrers of Yates and his wife were overruled as to the first four counts of the complaint, but sustained as to the fifth one, with leave to amend. Upon failure to amend, the fifth count was dismissed.

By answer, Yates denied generally, and sometimes specifically, all of the material allegations of the complaint. As a further and separate defense to the first four counts, he alleged that in October, 1940, the plaintiffs assigned to him all of their interest in the estate of John D. Strudthoff and, since that time, they have had no rights in it. Also, in defense of each of the first four causes of action, Yates pleaded that during all of the time he acted as administrator, the assets of the estate were heavily incumbered and there was insufficient money to finance the production of crops and pay the costs of administration. At all times, he asserted, he acted upon the advice of competent counsel.

So far as the issues now before the court are concerned, the answer of Edith Yates was the same as that of her husband. By cross-complaint, she sued to quiet title against the four children of John D. Strudthoff and certain defendants sued under fictitious names. Adolph and Arthur Strudthoff answered the cross-complaint, denying most of its allegations but admitting that they claim an interest in the property. The cross-defendants Evelyn Strudthoff and Amelia Yates disclaimed any interest in the property.

At the time the complaint in equity was filed, Adolph Strudthoff also petitioned for revocation of Yates' letters of administration and the appointment of a successor administrator, stating, as grounds therefor, neglect of the estate and the refusal to annually account as required by law. The assertedly false representations made to the court in regard to the compromise with Mrs. Yates, their fraudulent conspiracy, his failure to file a petition under the Frazier-Lempke Act, and other allegations of the complaint were also pleaded. The petitioner prayed that the letters of administration with the will annexed, which had been granted to Yates be revoked, that petitioner be appointed his successor, and that Yates be required to render an account and report.

In his answer to this petition Yates denied all of the material allegations. Referring to the suit in equity, he asserted that as the issues there presented by the sons of Strudthoff were the same as those tendered by the petition for revocation of letters, the two proceedings should be consolidated. This motion was granted.

The evidence presented in support of the positions of the respective parties shows that about two years after the son and daughter of Strudthoff commenced their administration of his estate, Southern County Bank, a creditor, filed a petition asking the court to remove them upon the ground that they were neglecting the management of the orange grove. Unquestionably, the property presented many difficulties. It was heavily encumbered and required a considerable outlay for care and carrying charges. The final account of these administrators, which was settled and allowed by the court, showed that the assets of the estate consisted of the real estate, appraised at $75,000, and $85.78 in cash. The total indebtedness of the estate was said to be $42,662.29, and the administrators stated that most of the obligations were delinquent. They also reported that John D. Strudthoff had filed a petition under section 75, sub. s, of the Federal Bankruptcy Act, 11 U.S.C.A. § 203, sub. s, that a composition of creditors had been made, and that the terms of the composition were in default.

Shortly after his appointment, Yates, upon the advice of counsel, entered into contracts with his wife for the care of the orange groves owned by the Strudthoff estate. Mrs. Yates owned an adjoining grove and she had the necessary ranch equipment to do the work. She agreed, by the first of these contracts, to cultivate, irrigate, fertilize, and care for the 40 acres during the crop

year 1939 for the sum of $4,000. The contract for 1940 was at the rate of $4,500, and in the following year the price was raised to $5,250. All of them were subject to the condition that the work be done to the satisfaction of Southern County Bank and Federal Land Bank, creditors of the estate. None of these contracts was approved by the court. However, an expert testified that the charges were reasonable and that under the management of Yates the groves greatly improved.

At the time of his death, John D. Strudthoff was indebted to W. C. Endicott for money borrowed from him. This loan was secured by a deed of trust to a portion of the Strudthoff land. In October, 1939, the property, which comprised 10 acres, was deeded to Endicott for $250 and a satisfaction of the indebtedness, then amounting to more than $11,000, pursuant to an offer of compromise which, by order of the probate court, the administrator was authorized to accept.

In December, 1939, Federal Land Bank, holder of a trust deed as security for a loan of over $11,000, demanded that past due payments be brought up to date. This notice stated that unless payment of the delinquent indebtedness in full was received within 30 days, foreclosure proceedings would be commenced.

A little more than a year later, the administrator petitioned the court for an order authorizing him to borrow from Edith H. Yates, his wife, $11,350 and additional amounts not exceeding $2,500, to be repaid within one year, and to be secured by a trust deed and a crop mortgage, subject to prior incumbrances of record. This petition stated that the proceeds of the loan were to be used for the purpose of paying off certain delinquent indebtedness of the estate, including amounts due to the Federal Land Bank, Southern County Bank, Anna Strudthoff and the administrator's attorneys. At that time, the estate also owed Mrs. Yates $13,750 for care of the orchards for three years. An order was made in accordance with the petition and the estate obtained the money.

In April, 1942, Yates filed a petition for authority to compromise the indebtedness due to his wife. The petition recited that the principal and interest of the loan were past due, that she had demanded payment, that the estate was unable to pay any portion of the debt, and that she agreed to satisfy the obligation in full and to pay the estate $1,000 in consideration of a conveyance to her of the 30 acres of land, subject to the prior incumbrances. In connection with a statement of the amount of the senior liens, it was alleged that the value of the property was then only $30,000.

Upon a hearing of this petition, the court made its order authorizing the compromise. Shortly afterward, the court set that order aside because of a discrepancy in the description of the land. According to the testimony of Mrs. Yates, the second order of compromise was made after she had paid the consideration of $1,000 and received the administrator's deeds. At that time, she stated, the indebtedness of the estate to her was about $39,500.

When called as a witness, Arthur Strudthoff, for the most part, denied any knowledge of the facts alleged in the complaint. He did not know the income of the orange groves, the amount of the incumbrances, nor the amount of interest and principal due each year. He did not know that there were crop mortgages on the groves. He had no information as to the amount of care given the groves during the Yates administration, nor the reasonable value of that care. Apparently he based his charge of fraudulent conspiracy upon the fact that Yates told him "everything was all right." He also quoted the statement of a neighbor, who apparently knew nothing of the difficulties of the estate, to the effect that the income from the groves should have been sufficient to pay all interest, taxes and reasonable operating expenses and leave a substantial cash balance. However, he testified that, in his opinion, in June, 1942, the reasonable market value of the 30 acres was $45,000. But, contrary to his complaint, he declared that the compromise with Endicott was for the best interests of the estate. The testimony of Adolph Strudthoff, the other plaintiff, added nothing to that of his brother.

Concerning the compromise of the indebtedness due to Mrs. Yates, the attorney for the administrator testified in the pres-

ent suit concerning the representations which had been made by him in support of the petition to compromise the claim of Mrs. Yates. At that time, he stated, he told the judge the amount due her was in excess of the value of the property, and for that reason, the compromise was "for the best interest of the estate." He also then expressed the opinion that the value of the property was $30,000.

There is no evidence showing that Yates had any special interest in the property of the estate prior to his appointment as administrator. According to the testimony, the contracts for the care of the grove were reasonable and were performed to the satisfaction of the creditors. Nor is there any proof that the income of the estate was sufficient to meet the delinquencies. On the contrary, considering the entire history of the administration, from the time the son and daughter acted as administrators until the compromise of the indebtedness to Mrs. Yates, it appears quite conclusively that the income of the estate was insufficient to meet the pressing obligations. Indeed, the record shows that all of the proceeds from the sales of oranges were taken by the crop mortgagees.

The evidence also tends to show that Yates, in good faith, attempted to sell the property at a reasonable price, but was unable to do so. The testimony of real estate appraisers as to the value of the 30 acres ranged from $28,500 to $50,290, but the record also discloses that, at the time the compromise was approved, the indebtedness against the property amounted to $39,550. And there is no evidence whatever to support the charge that material facts were not disclosed to the court.

Yates testified that continually he tried to explain the whole matter to the Strudthoff sons, including the fact that "Mrs. Yates was foreclosing." He also said that, at the time the indebtedness to Mrs. Yates was due, he asked Adolph Strudthoff to endeavor to raise the money to pay it. Moreover, according to his testimony, he even offered to pay an attorney to be chosen by Arthur and Adolph Strudthoff to check the proceedings in the estate, particularly in regard to the threatened foreclosure.

Upon this evidence, the court found that the only reports made by Yates concerning the condition of the estate are included in certain petitions filed in 1939 through 1942 and the final account; that the appraised value of the 40 acres in 1936 was $75,000; that it is not true that since 1936 the groves produced about 12,000 to 15,000 boxes of oranges annually; nor that either Yates or his wife, prior to his appointment as administrator became interested in or familiarized themselves with the affairs of the estate or of the orange groves.

Further findings are that Yates and his wife did not enter into a conspiracy to defraud the Strudthoff sons, or any of the heirs; that the defendants did not by any misrepresentation or fraud secure either the order authorizing the loans by Mrs. Yates or the one approving the compromise with her, and that Yates was not appointed administrator in reliance upon any representations or promises made by him.

Concerning the administration of the estate by Yates, the court concluded that the net returns from the sale of oranges, and for water sold, were not sufficient to pay the pressing charges of the estate. Yates did not purposely fail to render an annual account in order to conceal facts, and the conveyance to Endicott was for the best interests of the estate. Neither the relationship of Edith Yates and the administrator, nor the financial condition of the estate was concealed from the court and it was necessary and for the best interests of the estate to secure the loan from her. The full amount of the principal of the trust deed note was paid to the estate; the loan was not made for the financial benefit of the defendants, or as part of any conspiracy to obtain title to the orange groves. The defendants made no petition, nor did they procure any order or compromise or execute any deed upon any misrepresentation, fraud, or fraudulent concealment of any facts or under any conspiracy to defraud the plaintiffs. Finally, the court found that the plaintiffs have sustained no damage by reason of any acts

of defendants. However, it made no finding in regard to the assignments pleaded by Yates in defense of the action.

As conclusions of law from the findings of fact, the court determined that Edith Yates is the owner, as her separate property, of the 30 acres of land in controversy, the cross-defendants having no interest therein. Upon the issues presented by the petition in the probate proceeding, the court decreed that there is no property of any kind belonging to the estate, that the final account filed by Yates included all of the receipts and disbursements of the administrator and is full and correct. Accordingly, his account, and also his petition for termination of further proceedings and for his discharge of administrator pursuant to provisions of section 1068 of the Probate Code were allowed, settled and granted. The petition for revocation of letters of administration was denied.

As grounds for attacking the judgment rendered in accordance with these conclusions, the sons contend that, because under section 583 of the Probate Code, the court exceeded its authority in approving the compromise with Mrs. Yates, the administrator's deed to his wife is void. For that reason, they argue, the order is subject to collateral attack by a suit in equity. They also assert that the money loaned to the estate was the community property of the administrator and his wife. Furthermore, the findings do not support the judgment since the sale was fraudulent in fact, and there is no finding that the administrator was not interested in the purchase of the estate property. Another point relied upon is the amount of indebtedness canceled as compared with the average valuation the expert witnesses placed upon the 30 acres and the price at which the groves were listed by Yates.

The sons also urge that the final account filed by Yates should not have been entertained or settled because it omits all crop receipts and numerous other items and was submitted in accordance with the procedure specified for the termination of administration of an estate having no property. If considered as an account submitted in the usual course of administration, they say that it does not meet statutory requirements because no supporting vouchers were filed.

A charge of prejudicial error is based upon the trial judge's oral opinion which, it is claimed, discloses that he did not base his findings as to value upon the evidence in the case. They also rely, as a ground for reversal, upon the admission, over objection, of a conversation between the attorney for the administrator and a real estate broker, in regard to an extension of a listing of the estate property. Lastly, the sons argue that the court erroneously limited the cross-examination of Mrs. Yates concerning records of the amount of money paid out for the care of the groves.

[1, 2] Section 583 of the Probate Code, recast from sections 1576 and 1617 of the Code of Civil Procedure, provides: "No executor or administrator may purchase any property of the estate, or any claim against the estate, directly or indirectly, nor be interested in any such purchase; and if he pays any claim for less than its full amount he may have credit in his accounts only for the amount actually paid." This statute is a codification of the well established principle that a trustee may not deal with himself, nor place himself in a position antagonistic to the interests of the cestui que trust. Baker v. Miller, 190 Cal. 263, 269, 212 P. 11; Jones v. Hanna, 81 Cal. 507, 510, 22 P. 883; O'Connor v. Flynn, 57 Cal. 293, 295; United States Fidelity & Guaranty Co. v. Postel, 64 Cal. App.2d 567, 573, 149 P.2d 183; 34 C.J.S., Executors and Administrators, § 599, p. 563. However, the foreclosure by an administrator of a mortgage made in his favor to secure the loan of money borrowed by the estate from him, with the approval of the probate court, does not come within the legislative prohibition.

The statute "is not even remotely applicable" to such a situation, said the court in Corporation of America v. Bank of America, 7 Cal.App.2d 470, 478, 46 P.2d 262. In that case, the transferee of Bank of America sued to foreclose a mortgage which had been given to secure the payment of a note evidencing a loan made by the bank to the estate of which it was the executor.

The money was borrowed and the mortgage executed and delivered by the bank to itself in accordance with an order of the probate court approving the transaction. In affirming the decree of foreclosure and order of sale, the charge of invalidity made against the decree of foreclosure and order of sale upon the ground that the mortgage violated section 1576 of the Code of Civil Procedure was answered as follows: "Certainly the execution of the mortgage did not amount to a sale of the property described in the mortgage (Murphy v. Farmers' etc. Bank, 131 Cal. 115, 120, 63 P. 368, [371], 731) and we know of no statute or rule of law which prohibits an executor or administrator from advancing to the estate which he represents money to be used in the payment of pressing claims against the estate or in payment of expenses of administration." (Page 478, 46 P.2d at page 266.)

The plaintiffs principally rely upon O'Connor v. Flynn, supra; Jones v. Hanna, supra; Santos v. Santos, 32 Cal.App.2d 62, 89 P.2d 164; and Burton v. Compton, 50 Okl. 365, 150 P. 1080. In the first of these cases, real property of the estate was sold under order of court, but prior to the report and confirmation of sale the executor bought the land from the purchaser. The facts concerning the agreement between the purchaser and the executor were not made known at the time of the confirmation of the sale and this court declared that the executor held the land as trustee for the heirs. In Jones v. Hanna, supra, the executrix entered into an agreement with third persons whereby they should buy on commission certain estate property at a probate sale for the executrix's account, risk and personal profit. The sale was set aside as void under the statute which is now embodied in section 583 of the Probate Code. The plaintiff in the Santos case was the administratrix of her husband's estate. The administratrix and the defendant, with whom she was living under the belief that they were legally married, bought certain real property at probate sale and the transaction was held to be voidable. Burton v. Compton, supra, concerned the sale of property owned by a minor. The wife of the minor's guardian was the purchaser and the court set aside the deed to her as void notwithstanding the defense of lack of fraud and adequacy of consideration. None of these cases is authority in the present controversy; each of them concerned a sale of property, a situation quite different from the foreclosure of a lien to secure the loan of money borrowed by an estate.

[3] The order approving the compromise of the indebtedness of the Strudthoff estate to Mrs. Yates was, in effect, a decree of foreclosure and as Yates himself might have made the loan to the estate and later foreclosed, the lien to secure its payment without violating section 583 of the Probate Code, the question as to whether the money loaned by Mrs. Yates was community or her separate property is quite immaterial.

[4] Moreover, as no appeal was taken from the order approving the compromise, that determination became final. Estate of Lucas, 23 Cal.2d 454, 463, 144 P.2d 340. Of course it is subject to attack upon the ground of extrinsic fraud, but the facts pleaded by the Strudthoff sons do not come within that category. They charged intrinsic fraud, in that Yates and his wife procured the offer of compromise upon the misrepresentation to the probate court of material facts and the fraudulent concealment of information in connection with the value of the orange groves and the financial condition of the estate. But the finding of the trial court upon these issues is that there was neither fraudulent representation nor concealment, and its conclusions are fully supported by substantial evidence.

[5] Yates answers the criticism leveled against his final account and petition for termination of the administration proceedings with the statement that an administrator is chargeable only with the estate which comes into his possession. His testimony and other evidence shows that some substantial amounts were realized each year from the sales of oranges, but the total income from crops and other sources was very much less than the sums pleaded by the plaintiffs. The petition for compromise filed by Yates would have been more satisfactory had it included some statement of

the crop and water sales and the disposition of the money. But from the evidence in the present case, it appears, without conflict, that all of the income from the oranges was paid by the packing house directly to the crop mortgagees and did not come into the possession of the administrator. And in support of the order approving the compromise, it must be assumed that all of these facts were fully disclosed to the probate court at the time of the hearing. Certainly the order, which recites that the "compromise appears to be just and for the best interests of the estate," would not have been made without any inquiry as to the financial ability of the estate to meet the overdue indebtedness.

[6] The evidence concerning the payments of the crop money also supports the present judgment settling the administrator's final account and granting his petition for termination of the probate proceedings. The account shows receipts totaling $1,566.28 from sources other than crops or water sales and justifies the implied determination of the court that no other income was received by the administrator.

[7] All but $300 of the $1,500 in credits claimed by the administrator in his final account were for attorney's fees and title charges. The plaintiffs do not assert that the payments were not in fact made, and, under these circumstances, the failure to furnish supporting vouchers for them does not amount to prejudicial error justifying a reversal.

[8-11] The long established rule that the opinion of the trial judge cannot be substituted for nor used to modify the findings or judgment (De Cou v. Howell, 190 Cal. 741, 751, 214 P. 444) is a complete answer to the plaintiffs' contention concerning the determination as to the value of the orange groves. "The findings of fact * * * must be taken as embodying the conclusions of the trial court on all questions of fact submitted to it for decision." Goldner v. Spencer, 163 Cal. 317, 320, 125 P. 347, 348. "No antecedent expression of the judge, whether casual or cast in the form of an opinion, can in any way restrict his absolute power to declare his final conclusion * * * by filing the 'decision' (findings of fact and conclusions of law) provided for by * * * the Code of Civil Procedure." Scholle v. Finnell, 173 Cal. 372, 376, 159 P. 1179, 1181. And assuming that the testimony of the administrator's attorney in regard to a conversation concerning the sale of the property should not have been received in evidence, the error is of no consequence. The only purpose of that testimony was to rebut the charge of intrinsic fraud which, if proved, would not justify equitable relief in the present suit. The ruling limiting the cross-examination of Mrs. Yates falls within the same category.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.






28 Cal.2d 618

**MARTIN et al. v. LOPES et al.**

Sac. 5730.

Supreme Court of California, In Bank.

July 23, 1946.

**1. Judgment ⇐707**

A judgment quieting plaintiffs' title to land in accordance with their claim binds only parties to action, not adjoining landowners not joined as defendants.

**2. Boundaries ⇐46(2)**

Agreements between landowners respecting property lines do not affect adjoining landowners not parties thereto.

**3. Boundaries ⇐37(5), 46(3)**

Adjoining landowners, acquiescing for considerable time, at least equal to period prescribed by statute of limitations, in agreed location of uncertain division line, are precluded from saying that it is not true line according to calls of their deeds, but agreed location must be clearly proved.

**4. Boundaries ⇐37(5)**

Adjoining landowners' undisputed lack of knowledge of location of boundary be-

tween their parcels, their joint endeavors in locating boundary lines, their agreement to accept jointly constructed fence thereon as boundary, and mutual acquiescence therein for period exceeding statutory limitation, clearly proved agreed location, so as to preclude them from claiming subsequently that such location was not true line according to calls of their deeds.

**5. Boundaries ⇐46(1)**

Intention of adjoining landowners to mark true line between their lands by agreement is necessary element, but not sole factor, in forming intention essential to establish agreed boundary, and additional element is intention to accept marked boundary as true boundary.

**6. Boundaries 48(7)**

Adjoining landowners' lack of knowledge of location of boundary line between their lands is all that need be considered in determining uncertainty of line in ascertaining true boundary by calls of their deeds, as required to render applicable the rule that such owners' acquiescence for considerable time in agreed location of division line precludes them from saying that such line is not true line according to such calls.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action to quiet title by John C. Martin and others against Joe R. Lopes and wife. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Prior opinion, Cal.App., 164 P.2d 321.

Gilbert Moody, of Turlock, for appellants.

Preston, Braucht & George and H. C. George, all of Merced, for respondents.

SHENK, Justice.

The defendants appeal from a judgment for the plaintiffs in an action to quiet title. The controversy involves the location of the north-south and east-west boundaries between their respective lands.

In February, 1924, Frank C. Martin and John C. Martin, brothers, purchased and became tenants in common of land in Merced County described as the East half of the Southeast quarter of Section 28, Township 5 South, Range 11 East, M. D. B. & M. In 1932 they decided to partition the land equally between them. They engaged a surveyor and instructed him to divide the tract so that each would share in a hilly portion in the northwest and in the level areas. The brothers assisted in the survey and set the stakes as directed by the surveyor. Accordingly an approximate rectangular area was laid out for Frank in the southwest portion of the tract, and John was allotted the remainder lying to the north and east. Each brother received and recorded a deed containing a description of 40.3 acres, more or less. They shared the labor and expense of constructing a fence along the east-west and north-south division lines indicated by the stakes and after 1932 each occupied the land set apart to him up to the fence lines as so constructed. The evidence is that they believed that the fences were built on the lines as called for by the deeds, and that they accepted the fence lines as the boundaries described in the deeds.

In June, 1941, Frank conveyed his 40-acre tract to Joe R. Lopes and Mary M. Lopes, his son-in-law and daughter, the defendants herein. In 1943 Lopes caused a survey to be made by County Surveyor Bedesen. This later survey purported to show that the fences were not constructed in accordance with the measurements stated in the deeds. It revealed that the east-west fence line built by the parties was apparently about twenty feet north of the line called for by the deed; and that the north-south fence line built by them was westerly by about eleven feet at the south boundary, converging to about a foot from the northerly end of the line called for by the deeds. Thus, there is supposedly enclosed within the Lopes land a portion at the northerly end thereof intended for John Martin, and within the latter's land along the north-south line between them a portion which should have gone to Frank. According to the Bedesen survey the net result is the gain to the plaintiffs of .11 of an acre, and a loss to the defendants of .02 of an acre, over the quantity stated

in the deeds; or to John .13 of an acre more than to Frank, each still receiving slightly more than forty acres.

[1, 2] The respective net gain and loss figures are taken from the Bedesen survey which was based on monuments located by Bedesen. The monuments on the westerly boundary and the line drawn by Bedesen as the true westerly boundary line of the 80-acre tract lie easterly of an existing fence line. At the south boundary the fence line runs 3 feet westerly from the point selected by Bedesen as the southwest corner of the 80-acre tract; and its northerly continuation is increasingly away from the westerly boundary line found by Bedesen until at the east-west fence line built by the Martins the distance is 21.5 feet, and at the northerly line of the plaintiffs' (John Martin's) land the distance is 23.76 feet. Nevertheless, these graduated distances between the Bedesen survey line and the existing westerly fence line were claimed by both parties, and the claims were asserted in this action although adjoining landowners were not joined as defendants. However, since the court's judgment quieting title in the plaintiffs in accordance with their claim expressly and in law binds only the parties to the action, this discrepancy is immaterial except as hereinafter noted. Furthermore, adjoining owners are not affected by agreements respecting property lines to which they are not parties. Sneed v. Osborn, 25 Cal. 619, 625. The discrepancy demonstrates the fact that without including the westerly strip between the fence line and the true westerly boundary as found by Bedesen, each party still is in actual possession of more than the 40 acres intended by the voluntary partition.

The only testimony regarding the ascertainment of the boundaries by the calls and measurements contained in the deeds was given by the plaintiffs' witness, County Surveyor Bedesen. He testified that not only the fence lines between the Lopes and Martin properties, but also other fence lines in that region (notably the fence line along the westerly boundary of the Lopes and Martin tract) were out of line according to the actual corner monuments which he used in making his survey; that by using such corner monuments, the fences on the north and "especially" the fence on the west would be off the lines; that he discovered that the west fence line was not on the true legal subdivision line when he made a survey at the request of the adjoining owner, Rapp; and when that discovery was made Mr. Lopes asked him to make a survey and diagram showing how the fences on their property corresponded with the metes and bounds descriptions in the parties' deeds. He found the southeast corner, but established the southwest corner of the 80-acre tract by dividing the distance between the quarter section corners. He found an established quarter section corner at the northeast corner of the 80-acre tract which was distant 2,658.66 feet measured between the southeast and the northeast corners. He discovered that the fence along the northerly boundary line of the 80-acre tract was south of the section line. Neither party complains that by the judgment the plaintiffs' (John C. Martin's) land is decreed to extend to the north section line (as claimed), although the fence line is south thereof and the deed calls for a less distance by 18.66 feet. Mr. Bedesen expressed the opinion that all the existing fence lines would have to be shifted in order to enclose the several properties in that region according to existing monuments or the calls in the deeds. The parties adopted descriptions in their deeds which called for easterly and westerly boundary lines of the 80-acre tract of equal distance when, according to the Bedesen survey, such lines were not equal in distance, and both distances as measured were greater than the equal distance called for by the deed. Mr. Bedesen said: "Well, those descriptions in the deed are so very bad no one could survey them on the ground. What they purported to do was to describe the east half of the southeast quarter of section 28, but they did it in the office, I presume, and assumed that the quarter section was a half mile north and south, which it wasn't, and they assumed that east and west the property went to the north fence and they got the distance of 1349 feet instead of about 1322 feet;

so the description went outside of the land they owned."

The plaintiffs sought to quiet title in accordance with the east-west and north-south fence lines dividing the parties' properties. The defendants by cross-complaint alleged the partition boundary line in accordance with the calls in the deeds.

The trial court found that the brothers agreed to divide the property between them; that in order to give effect to their agreement and "being uncertain as to the line between their agreed parcels," they jointly employed a surveyor and assisted him in locating the line; that they jointly constructed a fence along the line so located; that the fence was agreed by them to be the boundary line and was accepted and treated as the boundary line between their properties; that the agreement occurred about the year 1932, and that the plaintiffs have been in possession and paid taxes accordingly ever since.

[3] The case of Sneed v. Osborn, supra, 25 Cal. 619, 627, laid down the rule in this state in accordance with what was said to be abundantly supported by the authorities, that when owners of adjoining lands have acquiesced for a considerable time, at least equal to the period prescribed by the statute of limitations, in the location of a division line between their lands, although it may not be the true line according to the calls of their deeds, they are thereafter precluded from saying it is not the true line. In that case boundary lines were drawn by the parties in accordance with stakes set by them at the direction of a surveyor. It appeared that the position of the initial point called for by the deed was uncertain. The court observed that probably no two men would take the deed, and going upon the land separately, would fix upon the same place for the starting point. Relying on that case and others the court in Biggins v. Champlin, 59 Cal. 113, 116, said that it made no difference that the parties, in making the location, acted under a mistake as to the true line. In Helm v. Wilson, 76 Cal. 476, 485, 18 P. 604, the theory that there must have been a dispute as to the true line was rejected as a false quantity.

In Young v. Blakeman, 153 Cal. 477, 95 P. 888, the plaintiff sought to recover a strip 9⅜ inches wide at Geary Street, running through to a width of 13⅜ inches at what was then Morton Street (now Maiden Lane), between Dupont (Grant Ave.) and Kearny Streets in San Francisco. A judgment for the defendant was affirmed. The court observed that experience showed that measurements, made at different times by different persons with different instruments, would usually vary somewhat; also that if the position of the line always remained to be ascertained by measurement alone, the result would be that it would not be a fixed boundary, but would be subject to change with every new measurement. It was said at pages 481, 482, of 153 Cal., at page 889 of 95 P.: "Such uncertainty and instability in the title to land would be intolerable. For these and other reasons the rule has been established that when such owners, being uncertain of the true position of the boundary so described, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed, and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements. * * * The object of the rule is to secure repose, to prevent strife and disputes concerning boundaries, and make titles permanent and stable. * * * If a measurement is made and the line agreed on and acquiesced in as required by this rule, it is binding on and applicable to all parties to the agreement and their successors by subsequent deeds. It is stated by the authorities that the line so agreed on becomes in legal effect the true line; that the agreement as to the line may be in parol and that it does not operate to convey title to the land which may lie between the agreed line and the true line,

but that it fixes the line itself and the description carries title up to the agreed line, regardless of its accuracy; that the agreement as to the line is not in violation of the statute of frauds, because it does not transfer title; that the parties hold up to the agreed line by virtue of their original deeds, and not by virtue of the parol agreement; that 'the division line, when thus established, attaches itself to the deeds of the respective parties, and simply defines, not adds to, the lands described in each deed'; and that, if more is thus given to one than the calls of his deed actually requires, he 'holds the excess by the same tenure that he holds the main body of his lands.'" (Citing Sneed v. Osborn, and other cases.)

The rule was followed in Loustalot v. McKeel, 157 Cal. 634, at pages 642, 643, 108 P. 707, 710, where the court stated: "When they entered into the agreement, both had equal knowledge of the facts and no deception or fraud was practiced. Under these circumstances, it is entirely immaterial whether the parties were right or wrong in believing that the true line was exactly where it should be as they established it. They were certainly in doubt as to where it should run. * * * Courts have always looked with favor on the settlement of questions of this character by the parties in interest themselves, and when it appears that an agreement adjusting a disputed boundary line has been fairly and definitely made between them, and they have occupied their lands accordingly for a period longer than the statutory period of limitation, such agreement is conclusive, no matter whether they were mistaken or not in their belief that they were locating it along the true line. It is quite obvious that, if the fact merely that the parties were mistaken as to where the true line lay could invalidate their agreement, there never could be any stability attached to such an agreement unless the line agreed on was in truth the exact line. The policy of the law, however, is to give stability to such an agreement as a method adopted in good faith by the parties themselves to settle the controversy, and because it is the most satisfactory way whereby a true boundary line may be determined, and tends to prevent litigation."

Many other cases are to the same effect, some of which may be cited: Thaxter v. Inglis, 121 Cal. 593, 54 P. 86; Dierssen v. Nelson, 138 Cal. 394, 71 P. 456; Price v. De Reyes, 161 Cal. 484, 119 P. 893; Schwab v. Donovan, 165 Cal. 360, 132 P. 447; Silva v. Azevedo, 178 Cal. 495, 173 P. 929; Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 200 P. 651; Muchenberger v. City of Santa Monica, 206 Cal. 635, 642, 275 P. 803; Vowinckel v. N. Clark & Sons, 217 Cal. 258, 18 P.2d 58; Moniz v. Peterman, 220 Cal. 429, 31 P.2d 353; Park v. Powers, 2 Cal.2d 590, 42 P.2d 75; Hannah v. Pogue, 23 Cal.2d 849, 147 P.2d 572; Perich v. Maurer, 29 Cal.App. 293, 155 P. 471; Wagner v. Meinzer, 38 Cal.App. 670, 177 P. 293; Howatt v. Humbolt Milling Co., 61 Cal.App. 333, 214 P. 1009; Raney v. Merritt, 73 Cal.App. 244, 238 P. 767; Todd v. Wallace, 25 Cal.App.2d 459, 77 P.2d 877; Schneider v. Pascoe, 47 Cal.App.2d 709, 118 P.2d 860; see, also, 4 Cal.Jur. 432 et seq. and cases cited; cases collected in note, 69 A.L.R. 1430; Thompson on Real Property (Perm.Ed.), vol. 6, p. 482 et seq.

[4] Whether the period of acquiescence may be shortened by the construction of valuable improvements on the theory of estoppel or otherwise, or whether an agreement may be implied from long acquiescence, are not questions involved in this case. Nor is it necessary to detail the elements of adverse possession which may or may not be involved. As hereinabove shown the rule applies when the requisite uncertainty, the agreement and the prescribed acquiescence are present, the only other requirement being that proof of the agreed location must be clear. Grants Pass Land & Water Co. v. Brown, 168 Cal. 456, 459, 143 P. 754. Clarity of proof of an agreed location is present by virtue of the undisputed lack of knowledge of the location of the boundary to be drawn between the parcels, the owners' joint endeavors in locating the line, their agreement to accept a jointly constructed fence thereon as the boundary, and mutual acquiescence therein for a period in excess

of the statutory limitation. Those facts without more call for the application of the rule settled by the foregoing authorities.

The defendants contend that the evidence does not support the finding of uncertainty. They assert that it was the intention of the parties to set the boundary along the true line called for by their deeds, that their failure to do so was merely the result of mistake, and that the application of the rule in such a case permits a conveyance of land in a mode not countenanced by law, namely, by a parol agreement which is contrary to the statute of frauds. Reliance is placed on Clapp v. Churchill, 164 Cal. 741, 130 P. 1061, and similar cases.

In Clapp v. Churchill there was merely an assumption on the part of the plaintiffs when they purchased the property that an existing pomegranate hedge marked the southern boundary of their land. There was no agreement and no attempt to ascertain the true boundary from the deed which presented no uncertainty on its face. Manifestly, the elements of agreed boundary, or practical location, as it is sometimes designated, were not present. In stating the elements of an agreed boundary the court said (164 Cal. at page 745, 130 P. at page 1062), that an "agreement to fix a boundary line is not valid, indeed is void, if the parties know, or one of them knows, that the agreed line is not the true line, or, in other words, if there be not an actual or believed uncertainty as to the true line." Likewise, in other cases it was held that at least one of the requirements to evidence an agreed boundary was missing. See Nathan v. Dierssen, 134 Cal. 282, 66 P. 485; Grants Pass Land & Water Co. v. Brown, supra, 168 Cal. 456, 143 P. 754; Friedman v. Southern Cal. T. Co., 179 Cal. 266, 176 P. 442; Huddart v. McGirk, 186 Cal. 386, 199 P. 494; Dauberman v. Grant, 198 Cal. 586, 246 P. 319, 48 A.L.R. 1244; Janke v. McMahon, 21 Cal.App. 781, 133 P. 21; Cosgrave v. Donovan, 52 Cal.App. 625, 199 P. 808, 810; Agmar v. Solomon, 87 Cal. App. 127, 261 P. 1029; Pedersen v. Reynolds, 31 Cal.App.2d 18, 87 P.2d 51.

[5] The defendants' contention reveals their misapprehension concerning the intention essential to establish an agreed boundary. They assume that the governing intention is to mark the true line. That is a necessary element, but it is not the sole factor in forming the intention. An additional element is the intention to accept the marked boundary as the true boundary. The effect of the authorities is that the intention of the parties not to claim except in accordance with the true line is entirely consistent with the doctrine of agreed boundaries. The application of the doctrine is not prevented by their belief that the fence was upon the line fixed by the deed, nor by the circumstance that the line of the deeds could be determined by a survey.

[6] Likewise, the defendants misconceive the extent of the uncertainty which should be present at the time of agreement. In cases applying the doctrine, as well as those denying its application, it is shown that lack of knowledge by both parties of where the line is or should be drawn, is all that need be taken into consideration. If it be assumed that some degree of uncertainty in ascertaining the true boundary by the calls of the deed is required, there is evidence of such uncertainty in the record. It is not clear whether the deeds followed the survey or the survey followed the deeds. However, discrepancies did appear. If, as Mr. Bedesen suggested, the survey was made first, and the draughtsman in formulating the descriptions indulged certain assumptions which did not exist in fact, the discrepancies are easily explained. If the deeds were drawn before the survey was made, then discrepancies among the then existing fence lines, established corners, and calls in the deeds create the uncertainty which supports the trial court's finding under the doctrine as urged by the defendants. There is no charge or showing of bad faith. In whatever light the facts are viewed, the trial court correctly declined to disturb the boundaries established by the parties.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

28 Cal.2d 616

**GUE, Deputy Labor Commissioner, v. DENNIS.**

**L. A. 19703.**

Supreme Court of California, In Bank.

July 23, 1946.

**1. Contempt ⇐66(2)**

A superior court order, directing public works contractor to comply with subpoenas duces tecum, issued by deputy labor commissioner, within prescribed time or be adjudged in contempt, is intermediate and hence nonappealable, and review thereof should await subsequent adjudication in contempt. Labor Code, §§ 92, 93.

**2. Contempt ⇐67**
**Habeas corpus ⇐22(2)**

Review of adjudication of public works contractor's contempt in disobeying subpoenas duces tecum issued by deputy labor commissioner may be had by either certiorari or habeas corpus, whichever is appropriate. Labor Code, §§ 92, 93.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Proceeding by Stanley M. Gue, as Deputy Labor Commissioner, for an order directing V. R. Dennis to show cause why he should not be punished for contempt in failing to comply with subpoenas duces tecum issued by petitioner. From an order directing defendant to obey the subpoenas within a prescribed time or be adjudged in contempt, he appeals. On respondent's motion to dismiss the appeal.

Motion granted, and appeal dismissed.

Prior opinion, see 165 P.2d 958.

Wright, Thomas, Dorman & Fox and LeRoy A. Wright, II, all of San Diego, for appellant.

Thomas Whelan, Dist. Atty., and Carroll H. Smith, Chief Trial Deputy Dist. Atty., both of San Diego, and Pauline Nightingale and William Kaplan, both of Los Angeles, for respondent.

GIBSON, Chief Justice.

Respondent Labor Commissioner filed an affidavit in the Superior Court of San Diego County and prayed for an order directing appellant Dennis to appear and show cause why he should not be punished for contempt in failing to comply with certain subpoenas duces tecum issued by respondent, under section 92 of the Labor Code, in connection with his investigation of reports that appellant, a contractor engaged in public works, was not paying required wage rates. It was further averred that appellant had wilfully refused to obey the subpoenas and that his testimony and examination of his records were essential for the proper performance of respondent's duties.

Section 93 of the Labor Code provides, in part, that "Obedience to subpoenas issued by the Labor Commissioner, or his deputies or agents shall be enforced by the courts."

Based on the affidavit of respondent, the superior court made an order directing appellant to show cause why he should not be required to comply with the subpoenas. Following a hearing, appellant was ordered to obey the subpoenas duces tecum within a prescribed period of time "or be adjudged in contempt." He has appealed from this order.

[1, 2] Respondent moves to dismiss the appeal on the ground that the order is nonappealable. Appellant concedes that an appeal will not lie from an order adjudging a person in contempt. He contends, however, that the present situation is distinguishable, in that the order appealed from was entered in a separate proceeding preliminary to an adjudication in contempt, and that it is therefore appealable.

Section 93 of the Labor Code has as its objective an adjudication in contempt if noncompliance persists. This being so, an order directing compliance, which expressly contemplates a further order, is intermediate in character, and any review thereof should await a subsequent adjudication in contempt. Cf. Frost v. Superior Court, 41 Cal.App. 580, 183 P. 206; Ahrens v. Evans, 42 Cal.App.2d 738, 109 P.2d 991. In the event appellant is adjudged in contempt, review may be had either by certiorari or habeas corpus, whichever is appropriate. Brunton v. Superior Court, 20 Cal.2d 202,

204, 124 P.2d 831; Kreling v. Superior Court, 18 Cal.2d 884, 887, 118 P.2d 470.

The motion is granted and the appeal is dismissed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.




28 Cal.2d 488

## SULLIVAN v. STATE BAR.
## L. A. 19549.

Supreme Court of California.

June 26, 1946.

**1. Attorney and client ⇐38, 45**

Under statute, conduct involving moral turpitude, dishonesty, or corruption, whether the act is committed in the course of an attorney's professional relations or otherwise, is ground for discipline of attorney by the state bar. Business and Professions Code, § 6106.

**2. Attorney and client ⇐52**

The requirement of a verified complaint in a disciplinary proceeding against an attorney applies only to a disciplinary proceeding commenced in a court and not to a state bar disciplinary proceeding. Business and Professions Code, §§ 6076–6087, 6108.

**3. Attorney and client ⇐42**

The transfer of title to attorney's nephew, who was a member of armed forces protected by Soldiers' and Sailors' Civil Relief Act, after decree of district court of appeal that execution, levy, and sale for benefit of attorney were invalid as to owner, was insufficient to show that purpose of transfer was solely to cloud title and to harass the owner so as to amount to an act of moral turpitude and dishonesty which would justify state bar disciplinary proceeding against attorney. Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 301 et seq.; Business and Professions Code, § 6106.

**4. Attorney and client ⇐38**

The act of an attorney which reasonably may be reconciled with the pursuit of a legal remedy invoked under a misconception of rights is not an act of "moral turpitude, dishonesty, or corruption" justifying disciplinary proceedings against attorney. Business and Professions Code, § 6106.

See Words and Phrases, Permanent Edition, for all other definitions of "Moral Turpitude, Dishonesty, or Corruption".

**5. Attorney and client ⇐38**

Conduct falling below the conduct of an ethical lawyer endeavoring to uphold the high principles of an honorable profession is not always ground for disciplinary action against attorney, and, to justify suspension or disbarment on recommendation of the state bar, the act complained of must come clearly within the causes specified by the Legislature for suspension or disbarment. Business and Professions Code, §§ 6103, 6106.

**6. Attorney and client ⇐42**

The taking of appeal by client's attorney from order quashing writ of execution and setting aside levy against realty which was awarded, in action for annulment of marriage, to client's wife subject to lien in favor of client, did not support a recommendation of board of governors of the state bar for disciplining the attorney, where the attorney could have honestly, although mistakenly, believed that the order should have contained some affirmance of client's right to the lien. Business and Professions Code, §§ 6068(c), 6106.

**7. Attorney and client ⇐42**

An attorney's appeal from order granting preliminary injunction was not frivolous and made for purpose of delay so as to justify disciplinary proceeding against attorney, where appeal did not delay a determination of ultimate rights of the parties, and one member of local administrative committee of the state bar believed that the appeal presented a substantial question of law for decision. Business and Professions Code, § 6106.

**8. Attorney and client ⇐42**

In action to foreclose husband's lien against realty awarded to wife in action for

annulment of marriage, the demand of husband's attorney for payment of expenses of prior litigation involving enforcement of lien was not ground for disciplinary action against attorney, where evidence did not disclose that attorney made the demand with knowledge that attorney was not entitled to any recovery for the expenses of such litigation. Business and Professions Code, §§ 6068(c), 6106.

**9. Attorney and client ⇐42**

In action to foreclose husband's $1,250 lien against realty awarded to wife in action for annulment of marriage, failure of husband's attorney, who had collected rents through void execution sale to husband who had conveyed realty to attorney's nominee, to reveal that attorney had collected over $1,400 as rental from the realty, was not such "moral turpitude, dishonesty, or corruption," as warranted disciplinary action against attorney. Business and Professions Code, § 6106.

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In Bank.

Proceeding by Barry Sullivan against the State Bar of California to review a recommendation of suspension of an attorney for three months.

Proceeding dismissed.

Barry Sullivan in pro. per., and John F. Poole, both of Los Angeles, for petitioner.

Jerold E. Weil, of Los Angeles, for respondent.

PER CURIAM.

By writ of review, Barry Sullivan has challenged a recommendation of discipline by suspension from practice which was made by the Board of Governors of The State Bar after the adoption of the findings of fact of a local administrative committee.

The notice to show cause which initiated the proceeding charged Sullivan with violation of his oath and duties as an attorney within the meaning of section 6103, and with the commission of acts involving moral turpitude and dishonesty within the meaning of section 6106 of the Business and Professions Code. The acts specified in the notice concern his asserted failure to account for money and transfers of title to certain real property made for his benefit.

Following a hearing, the local committee made findings and conclusions and recommended suspension for three months. Later, the Board of Governors re-referred the matter to the committee and an amendment to the notice to show cause was issued. By the amendment, it was alleged that two appeals taken by Sullivan were frivolous, that he commenced an action for foreclosure of a lien without disclosing the receipt by him of certain rentals from the property, and that the foreclosure suit was filed for the purpose of harassment. After a hearing upon the amended notice, the local committee made further findings and conclusions and recommended that Sullivan be suspended from practice for one year. The Board of Governors adopted the findings and amended findings, but recommended suspension for three months.

From the record of the proceeding it appears that, in 1939, Sullivan represented Charles Wellborn, who was the defendant in an action for annulment brought by Nada Wellborn. Judgment was in favor of the plaintiff; the marriage was annulled and she was awarded certain real property, subject to a lien in favor of Sullivan's client in the amount of $1,250. The court imposed no requirement upon her for the payment of this lien, nor did it fix any procedure for the enforcement of it.

Following entry of the decree, Sullivan obtained execution and levied upon the real estate. At the sheriff's sale it was bought by Wellborn for $1,000, and for the purpose of securing his fees and advances, Sullivan then had Wellborn execute to D. E. McGregor a grant deed conveying a one-fourth interest in the property.

Thereafter, Mrs. Wellborn unsuccessfully moved to quash the execution, vacate the levy and recall the sale. Upon an appeal, the order denying the motion was reversed. In its opinion the court said: "In this case, as there was no provision for a personal judgment or for enforcement of the lien, execution will not lie, and the motion to quash the writ of execution and to

vacate the execution levy and sale should have been granted." Wellborn v. Wellborn, 55 Cal.App.2d 516, 131 P.2d 48, 53.

While the appeal was pending, Wellborn conveyed the remainder of his interest in the land to McGregor. Admittedly, this transaction was for the benefit of Sullivan, he being the real party in interest. As consideration for the deed, Sullivan paid Wellborn $750 in cash and applied $250 upon his fee.

After the decision of the District Court of Appeal, and with full knowledge of its conclusions, Sullivan procured a deed executed by McGregor which conveyed to S. A. Sullivan the property which Wellborn had purchased at the execution sale. S. A. Sullivan, who was then in military service, is the nephew of Barry Sullivan. It is conceded that in the transfer of title made by this deed, Barry Sullivan was the real party in interest. About 10 months later, the superior court made an order quashing the writ of execution and recalling the sale. In affirming it, the District Court of Appeal said: "* * * The appeal is frivolous and without doubt was taken for the purpose of delaying a trial on the merits. * * * Undoubtedly plaintiff has been sorely harassed by unfounded litigation, including the appeals in this and the companion case, but we think it is not incumbent upon this court to enter into an inquiry whether the attorney concerned throughout the litigation, has observed the requirement of section 6068c of the Business & Professional Code [sic] * * * which makes it the duty of an attorney 'to counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense.'" Wellborn v. Wellborn, 67 Cal.App.2d 545, 155 P.2d 99, 100.

For about two years following the issuance of the sheriff's deed, and continuing after the decision adjudging that the sale was invalid, Barry Sullivan collected rents from the property amounting to more than $1,400. He made no accounting for this sum. When certain tenants refused to pay him, he caused several actions in unlawful detainer to be filed in the justice's court in the names of McGregor, S. A. Sullivan and himself as plaintiffs.

Immediately after the superior court made its order quashing the execution sale in conformity with the decision of the District Court of Appeal, Mrs. Wellborn sued Barry Sullivan, McGregor, S. A. Sullivan and Charles Wellborn. The action was brought to quiet title, and for an accounting. Barry Sullivan appeared for himself and filed a disclaimer for McGregor. S. A. Sullivan did not appear and, although requested to do so, Barry Sullivan refused to divulge his whereabouts to Mrs. Wellborn's attorney.

In this suit, Mrs. Wellborn was granted a temporary injunction restraining the defendants from continuing the prosecution of the unlawful detainer action. The question as to the propriety of that order was then presented to the District Court of Appeal which declared: "The fact that Barry Sullivan has taken the present appeal, instead of going to trial in the superior court, and has thereby delayed the trial of the action on the merits is worthy of notice, in view of the fact that the injunction in question was issued under the equitable power of the court to try in a single action the issues involved in a multitude of actions at law, in order to put an end to unnecessary and vexatious litigation. * * *" Considering the merits of the appeal, the court also criticized Sullivan's action in defending Mrs. Wellborn's suit, saying: "He had actual knowledge of the proceedings to vacate the execution and the sale; he and S. A. Sullivan and McGregor call themselves successors to Charles Wellborn in the ownership of the property but they * * * allege no facts in denial of plaintiff's title and none tending to prove that they had a right to the possession or to the income. They did not deny that the occupants of the premises were plaintiff's tenants; they alleged only that the same tenants had agreed to pay and had paid rent to them. From the affidavits it would appear that the defendants were claiming the right of possession and were collecting rents solely through the void execution sale to Charles Wellborn and without any right whatsoever.

Upon the evidence which was before the court they appeared as mere interlopers who had been collecting rents from plaintiff's tenants and were seeking to oust them. If they had succeeded in their unlawful detainer actions they would have had judgment for possession as against the tenants without any adjudication of their right to possession as between themselves and plaintiff, Nada Wellborn. It appeared that the tenants were being harassed by groundless litigation, to their detriment and to that of plaintiff." Wellborn v. Wellborn, 67 Cal.App.2d 540, 543, 155 P.2d 95, 97.

After this decision, Barry Sullivan filed an action in the name of S. A. Sullivan to foreclose the lien given Wellborn by the decree of annulment. In this complaint it was alleged that Mrs. Wellborn had refused to pay the lien, and by reason of such refusal Charles Wellborn was "forced" to obtain an execution sale, which has been set aside; "that a reasonable sum for costs of appeal to the said Charles Wellborn, due to the refusal of said defendant to honor said judgment is $250.00; that a reasonable charge for the litigation to enforce the order of the writ of execution and possession is $150.00; * * * That in addition to refusing to honor said judgment lien the defendant interfered with the occupancy of said premises after the sheriff's deed was recorded, thereby making further litigation and expenditures necessary; that a reasonable sum to be allowed therefor is $300.00." So far as the record in the present proceeding shows, this action is still pending.

The local administrative committee, at the conclusion of the first hearing, found "that said conveyance from D. E. McGregor to S. A. Sullivan was procured and caused to be made by respondent with knowledge of the decision of the District Court of Appeal, * * * and with knowledge of the fact that by virtue of said decision that neither respondent's client nor respondent's nominees, D. E. McGregor and S. A. Sullivan had or attained any real interest in the said property; and that the said conveyance was procured by respondent only for the purpose of clouding title to the said property and to hinder and delay the plaintiff in said action in her efforts to procure a clear title thereto." The conclusions drawn by the committee from the findings made upon these hearings were that Sullivan had violated his oath and duties as an attorney. It also declared that he had committed acts of moral turpitude and dishonesty. These were specified as the procuring of a deed to a person in the armed forces for the sole and exclusive purpose of clouding title and harassing and interfering with the owner of the property, and the taking of frivolous appeals for the purpose of harassing the respondents and unnecessarily and unjustifiably delaying trials upon the merits.

In challenging the recommendation of suspension, Sullivan contends: (1) The State Bar acted without and in excess of jurisdiction; (2) The findings of fact and recommendations are wholly without support in the evidence; and (3) The findings of fact do not show any violation of section 6103, 6067, 6068, or 6106 of the Business and Professions Code. Amplifying the first point, it is said that as between Mrs. Wellborn and himself, he was acting in his individual capacity and not as her attorney, hence she may not complain of his conduct and The State Bar has no authority to discipline him. Sullivan also asserts: "The State Bar has no jurisdiction to make an order under section 6106 of the Business and Professions Code without first having received a verified complaint" as required by section 6108 of the code.

The position of The State Bar on the jurisdictional claim is that although Sullivan did not act as counsel for Mrs. Wellborn, he is an attorney and is bound by the requirements of Section 6068(c) of the Business and Professions Code which includes, as a duty of one practicing law, "To counsel, or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense." Another duty relied upon is that specified in section 6068(g) as: "Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest." Emphasis is also laid upon section 6106,

which declares that, "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise," is caused for disbarment or suspension. In answer to Sullivan's contention that an attorney may be disciplined only in a proceeding initiated by a verified complaint, The State Bar points out that there is no such requirement insofar as an investigation by that body is concerned. And the charges leveled at the findings are broadly justified upon the ground that the evidence clearly shows a general course on the part of Sullivan which was motivated by his own personal financial interest. The various legal proceedings taken by him, says The State Bar, were designed not only to harass Mrs. Wellborn but also to "delay and prevent an early and proper determination of her rights."

[1, 2] The attack upon the jurisdiction of The State Bar is entirely without merit. By statute, conduct involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of an attorney's professional relations or otherwise, constitutes ground for discipline. Bus. & Prof. Code, § 6106. And the "complete alternative and cumulative" procedure specified for the hearing by an administrative committee and the Board of Governors of charges against an attorney makes no mention of a verified complaint. Bus. & Prof. Code, §§ 6076–6087. That requirement applies only to a disciplinary proceeding commenced in a court. Bus. & Prof. Code, § 6108.

[3-5] Considering the sufficiency of the evidence to support the findings of the Board of Governors, the fact that S. A. Sullivan is the petitioner's nephew, and, at the time the deed was executed, a member of this country's armed forces protected by the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 301 et seq., provides the basis for an inference as to the reason for the conveyance to him. But the testimony concerning this transfer of title does not so clearly establish the purpose as being solely and exclusively to cloud title and harass Mrs. Wellborn as to amount to an act of moral turpitude and dishonesty within the meaning of the Business and Professions Code. The act of an attorney which reasonably may be reconciled with the pursuit of a legal remedy invoked under a misconception of rights may not be characterized as one of those denounced by the statute. Conduct falling below that of an ethical lawyer endeavoring to uphold the high principles of an honorable profession is not always ground for disciplinary action; to justify suspension or disbarment on recommendation of The State Bar, the act complained of must come clearly within the causes specified by the Legislature.

[6] Sullivan's reason for taking an appeal from the order quashing the writ of execution and setting aside the levy, as stated to the committee, was that he could not find his client but felt "responsible as attorney of record." In view of the fact that his nominee then held title to the property, his action is difficult to reconcile with right motives. On the other hand, if Sullivan honestly, although mistakenly, believed that the order should have contained some affirmance of his or Wellborn's right to the lien in its original amount, his action does not support a recommendation for discipline. The duty of an attorney includes a qualification which allows the exercise of professional opinion for the statute requires him "to counsel or maintain such actions, proceedings or defenses only as appear to him legal or just." Bus. & Prof. Code, § 6068(c).

[7] The finding of The State Bar in regard to the appeal from the order granting a preliminary injunction is also not supported by the evidence. Justification for the determination that it was frivolous and made for the purpose of delay is placed upon the ground that the chain of Sullivan's acts established his evil purpose, and good faith may not be inferred from them. But the appeal did not delay a determination of the ultimate rights of the parties, and one member of the local administrative committee declared that, in his opinion, a substantial question of law was presented for decision.

[8] The complaint to foreclose the lien which was filed by Sullivan was not based, as the committee found, upon an asserted debt owed by Mrs. Wellborn. Foreclosure is the remedy which should have been invoked at the outset. So far as the demand for payment of the expenses of litigation is concerned, at the time the complaint was filed, Barry Sullivan may have believed that it was based upon legal principles. There is no evidence that he made these allegations with the knowledge that neither he nor his nominee was entitled to any recovery for the enumerated items. Very often the line between a fraudulent claim and one having slight, if any, legal foundation is difficult to draw but neither ignorance nor incompetence is a ground for disciplinary action. The duty laid upon an attorney in regard to litigation has an important qualification. It is: "To counsel or maintain such actions, proceedings or defenses only as appear to him legal or just * * *" Bus. & Prof. Code, § 6068(c).

[9] In defense of his omission to state in the complaint that he had collected over $1,400 as rental from the property, Barry Sullivan told the committee that he does not know whether S. A. Sullivan or Wellborn owns the lien. In explanation of this statement, he expressed the opinion that, because the sheriff's sale had been vacated and the conveyance to Wellborn declared void, the deeds to S. A. Sullivan were ineffectual to convey title but possibly effected a transfer of the lien. He also said that as the right to the $1,400 was in issue in the action brought by Mrs. Wellborn, it was not a question for determination in the foreclosure suit. Unquestionably, the complaint for foreclosure might well have included some mention of the amount of rentals which had been collected. But the omission to state that fact may not be characterized as "moral turpitude, dishonesty, or corruption" within the meaning of the State Bar Act.

The State Bar argues that Sullivan has failed to sustain the burden placed upon him to show wherein the decision of the board is erroneous or unlawful. It takes the position "that the whole conduct of petitioner was directed at attempting, even after the first appeal which determined that the execution levy and sale should have been vacated, to hold and secure the fruits of the illegal sale, including the possession of the property and the collection of rents therefrom." But as he did only those things which the law allows, the record shows no basis for disciplinary action. Particularly in his own concerns, no attorney should engage in what the profession knows as "sharp practice," nor do anything which does not measure up to those ethical standards which reasonably may be expected of members of the bar. However, discipline may be imposed only for an act which clearly comes within the conduct denounced by the State Bar Act as justifying that penalty.

The proceeding is dismissed.




28 Cal.2d 627

**JONES v. MORTIMER et al.**

**S. F. 17174.**

Supreme Court of California, in Bank.

July 23, 1946.

**1. Judgment ⇐622(2)**

An assessment against stock of building and loan association in liquidation and stockholder's claim against association for services rendered to association did not arise out of same "transaction", so that failure of building and loan commissioner to set up the assessment in stockholder's action for services would bar commissioner's right to set-off the assessment after stockholders recovered judgment and sought to enforce it in full. Code Civ. Proc. § 439.

See Words and Phrases, Permanent Edition, for all other definitions of "Transaction".

**2. Judgment ⇐883(13)**

The fact that a right of action in favor of commissioner of building and loan association in liquidation accrued for collection of assessment against stock of the as-

sociation when it was imposed did not establish that collection by action was the only method for taking the additional step of collecting the assessment, and did not preclude commissioner from offsetting the unpaid assessment against stockholder's judgment for services rendered. Code Civ. Proc. §§ 438, 439; Gen.Laws Act 986, §§ 7.01 to 7.05.

**3. Judgment ⇐883(13)**

Permitting commissioner of building and loan association in liquidation to offset unpaid assessment on stockholder's stock against stockholder's judgment for services rendered would not deprive stockholder of his opportunity to present any defense he might have to the assessment. Code Civ. Proc. §§ 438-440.

**4. Limitation of actions ⇐41**

Where claims are compensated under statute providing that when cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, the counterclaim could have been set-off, the two demands shall be deemed compensated so far as they equal each other, the statute of limitations cannot be a bar to either claim. Code Civ. Proc. § 440.

**5. Limitation of actions ⇐41**

The statute of limitations is not available to plaintiff as to defendants' counterclaim if the period has not run on it at time of commencement of plaintiffs' action even though it has run on counterclaim when counterclaim is pleaded.

**6. Set-off and counterclaim ⇐40**

Fact that defendants' counterclaim did not arise until after commencement of plaintiff's action did not make it improper as a counterclaim.

**7. Judgment ⇐883(9, 13)**

A judgment debtor who has become the owner of a judgment or claim against his judgment creditor may go into court in which judgment against him was rendered and have his judgment offset against the first judgment.

**8. Limitation of actions ⇐129**

The commencement of plaintiff's action to compel commissioner of building and loan association in liquidation to pay a judgment which plaintiff had secured against association for services rendered without setting off against it an assessment on plaintiff's stock in association tolled running of statute of limitations on commissioner's counterclaim for the assessment, where statute had not run on the counterclaim at time of commencement of plaintiff's action.

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Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Proceeding on the application of Herbert C. Jones against Frank C. Mortimer, as Building and Loan Commissioner, etc., and others, to compel Commissioner to pay a judgment without setting off against it an assessment on plaintiff's stocks. From an order denying the petition, the plaintiff appeals.

Affirmed.

Prior opinion, 162 P.2d 492.

Kenneth R. Malovos and Herman J. Mager, both of San Jose, for appellant.

Robert W. Kenny, Atty. Gen., and John J. Dailey, Roy D. Reese, and Lenore D. Underwood, Deputy Attys. Gen., for respondents.

CARTER, Justice.

This is an appeal from an order denying plaintiff's petition to enforce the payment of a judgment. The appeal is upon an agreed statement.

In February, 1933, the California Mutual Building and Loan Association became insolvent and was taken over by the state Building and Loan Commissioner (a successor commissioner is defendant herein) and since that time has been in the process of liquidation. In December, 1933, plaintiff commenced an action against the association and commissioner to recover for services rendered to the association. In 1938, the commissioner levied an assessment against all of the stockholders of the association of $100 per share for the purpose of paying the debts of the association. Plaintiff, being the holder of four shares, was assessed $400. The assess-

ment became payable in December, 1938, and was not paid by plaintiff. During the period from December, 1935, to December, 1939, the commissioner paid creditors' claims to the extent of 50 per cent of the amount approved by him against the association. In 1940 plaintiff obtained a judgment, which has become final, against defendant commissioner and the association in his action commenced in 1933 for services in the sum of $1,536.10 and costs, the judgment being payable in the course of liquidation. The assessment of $400 levied against plaintiff was not pleaded as a counterclaim by the commissioner in that action. A claim based upon the judgment was set up in the records of the liquidation proceeding as an approved claim payable in the course of liquidation. The commissioner set off the assessment of $400 against the liquidating dividends of 50 per cent theretofore declared, leaving a balance on his records of $368.05 and costs, as payable to plaintiff on his judgment from such dividends. Upon being notified of the set-off plaintiff refused to accept it. In 1941 the commissioner commenced an action against the stockholders including plaintiff to recover the assessment levied but it has not been prosecuted. In 1944 plaintiff filed the proceeding here involved in the action in which he obtained judgment asking for a writ of execution or other relief to obtain enforcement of the judgment.

[1] To support his claim that the commissioner may not set off the assessment against his judgment, plaintiff contends that the right was lost by virtue of the commissioner's failure to file a counterclaim for the amount of the assessment in plaintiff's action, relying upon section 439 of the Code of Civil Procedure. That section provided in 1940 (the time that plaintiff obtained judgment in his action), and at the present time: "If the defendant omits to set up a counterclaim upon a *cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim,* neither he nor his assignee can afterwards maintain an action against the plaintiff therefor." (Emphasis added.) Aside from any other reason the italicized portion of that section prevents its application here. As far as appears from the record, the transaction involved in plaintiff's action was for services rendered to the association, whereas the assessment against plaintiff was based on his liability as a stockholder of the corporation. Giving the word *"transaction"* its broadest meaning we cannot bring the two claims here involved within its meaning. They arose out of two separate and wholly independent transactions. Indeed plaintiff's only argument to support his contention is that the transaction which is common to both claims is the liquidation of the association. That liquidation led to the assessment because of plaintiff's stockholder's liability, but there is no apparent connection between it and plaintiff's claim for services.

[2] It is asserted that by reason of a provision in the Building and Loan Association Act (Stats.1931, p. 483, as amended, 1 Deering's Gen.Laws, 1944, Act 986), the assessment levy cannot be offset against plaintiff's creditor's claim, and in that connection, that to permit such offset would deprive plaintiff of his right to attack the validity and to resist the collection of the assessment or present whatever defenses he might have to it. The act provides that the stockholders of a building and loan association shall be individually liable equally and ratably for the debts of the association. (Stats.1931, p. 483, § 7.01). The liability so imposed "shall be *enforced exclusively* pursuant to this section and the next succeeding three sections of this act." (Emphasis added.) (Id., § 7.02.) When an association is in the hands of an appropriate officer for liquidation he may enforce the imposed liability and to that end may levy assessments "without previous judicial ascertainment of the necessity for such action and the action of such officer in levying such assessment shall be conclusive on the stockholders as to the necessity for such assessment." (Id., § 7.02.) If the stockholder fails to pay the assessment on the date due "a right of action shall immediately accrue to the commissioner * * * to recover the amount of said assessment or the amount remaining unpaid thereon from the stockholder or stockholders failing to pay said assessment in full. *Such officer shall have*

*full power to maintain an action* or actions in this state, or in any other state or country, to enforce and collect any sum or amounts due and payable and remaining unpaid upon any such assessment from any stockholder or stockholders failing to pay the same in full; and in any such action such officer may join as defendants one or more stockholders; and in any such action such officer shall have the right of attachment as in other actions upon unsecured debts;* * *." (Emphasis added.) (Id., § 7.03.) The other two of the three sections to which reference is made refers to matters not here pertinent. (Id., §§ 7.04, 7.05.) Properly interpreted those provisions do not exclude the right of the commissioner to set off a claim on his records against an assessment. The liability that is to be enforced exclusively as therein provided is that of the stockholders for the debts of the association. The *method* of enforcement that must be followed is the ascertainment of the necessity therefor and the levying of an assessment on the stockholders by the commissioner, that is, he is not required to resort to court action to levy the assessment and the use of the word exclusive eliminates that method. The mere fact that a right of action accrues for the collection of the assessment when it is imposed does not indicate that collection by action is the only method for taking the additional step of collecting the assessment. The reference to maintaining an action for the enforcement of the assessment after it is levied is merely an empowering and permissive provision and does not purport to be exclusive of other methods of collection. There can be no doubt that the commissioner could undertake to collect the assessment by making a demand on the stockholder. He is not compelled to bring an action. Nor can it be doubted that the commissioner could have set up the assessment by way of counterclaim against plaintiff in his action on his claim. (Code Civ.Proc. § 438.) Indeed, plaintiff so asserts in his argument that the claim to the assessment is lost by the failure of the commissioner to set it up, but as above seen, section 439 of the Code of Civil Procedure providing for the loss of a counterclaim is more restricted than section 438 which authorizes counterclaims inasmuch as it requires that the claim be based on the transaction in the complaint as the foundation of plaintiff's claim while the latter section imposes no such limitation. There is no reason why the setoff should not be permitted on the books of the commissioner when he may set it up as a counterclaim. The only difference would be the lack of opportunity, when there is no court action, of contesting the assessment, a matter later discussed herein.

[3] There is authority in the general law for a setoff in the instant case. It is provided that: "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other." (Code Civ.Proc. § 440.) The cross-demands in the instant case are of such a character.

Plaintiff complains however that if a setoff is permitted he is denied the opportunity to present any defense he may have to the assessment. He had such opportunity in the instant proceeding. He endeavored to force the commissioner to pay his judgment without deducting the assessment of $400. Neither his pleading in this proceeding nor the answer of the commissioner is before this court, but presumably the latter set up the assessment and the claim of offset. Manifestly, the plaintiff's petition was an attack upon the offset. Nothing appears from the agreed statement of facts which would justify a refusal to recognize the assessment.

[4] There is the matter of the statute of limitation having run on the assessment. Assuming that to be true the assessment is still a proper setoff. It has been held generally or assumed without discussion that a counterclaim in its setoff aspects may be defeated by the defense of the statute of limitation. Bliss v. Sneath, 119 Cal. 526, 51 P. 848; Lyon v. Petty, 65 Cal. 322, 4 P. 103; Curtiss v. Sprague, 49 Cal. 301; Griffin v. Porter, 54 Cal.App.2d 254, 128

P.2d 820; Estate of Clifford, 16 Cal.App.2d 123, 60 P.2d 302; Andrade v. Azevedo, 9 Cal.App.2d 495, 50 P.2d 80; Murphy v. Davids, 55 Cal.App. 416, 203 P. 802; see Estate of Cates, 195 Cal. 319, 232 P. 972; In re Smith's Estate, 108 Cal. 115, 40 P. 1037; Estate of Schaeffer, 53 Cal.App. 493, 200 P. 508; Peterson v. Feyereisen, 203 Wis. 294, 234 N.W. 496, 73 A.L.R. 574; Huggins v. Smith, 141 Ark. 87, 216 S.W. 1, 16 A.L.R. 326. On the other hand it has been intimated that where claims are compensated under section 440 of the Code of Civil Procedure the statute of limitations is not a bar. Moore v. Gould, 151 Cal. 723, 91 P. 616. But none of these cases, holding the statute to be a bar, except Lyon v. Petty, supra, mention section 440 of the Code of Civil Procedure heretofore quoted. The cross-demands here, in the language of section 440, "*have existed* between persons"—plaintiff and defendant. They existed between them at least at the time the assessment became due and plaintiff's action on his claim was pending. They have existed under circumstances where if either brought an action thereon the other could have set up a counterclaim. Defendant could have set up the assessment as a counterclaim when the two coexisted and there was no question about the statute of limitation on either claim. The next step is that the demands are *compensated*. That can mean nothing more or less than that each of the claimants is *paid* to the extent that their claims are equal. To the extent that they are *paid*, how can the statute of limitation run on either of them? There is no outstanding claim upon which the statute may run. It is discharged. In Lyon v. Petty, supra, the court was concerned with section 438 requiring that the cross-demands coexist at the time of the commencement of the action. Since the amendment of that section that is not necessary. Bond v. Farmers & Merchants Nat. Bank, 64 Cal.App.2d 842, 149 P.2d 722. Of course, if there is some defense to one of the claims, that is a matter which the one having the defense is entitled to have determined. The instant proceeding afforded plaintiff such an opportunity.

[5-8] There is an additional principle which prevents the statute of limitations from defeating defendants' setoff. The statute of limitations is not available to plaintiff as to defendants' counterclaim if the period has not run on it at the time of commencement of plaintiff's action even though it has run when the counterclaim is pleaded. Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273; Whittier v. Visscher, 189 Cal. 450, 209 P. 23; McDougald v. Hulet, 132 Cal. 154, 64 P. 278; Perkins v. West Coast Lumber Co., 120 Cal. 27, 52 P. 118; Estate of Schaeffer, 53 Cal.App. 493, 200 P. 508. Defendants' counterclaim here did not arise until after the commencement of the action, but that did not make it improper as a counterclaim. Bond v. Farmers & Merchants Nat. Bank, supra. The proceeding instituted by plaintiff, although after final judgment, was *in his action*—to enforce the judgment without regard to the counterclaim. "* * * A judgment debtor who has * * * become the owner of a judgment or claim against his judgment creditor, may go into the court in which the judgment against him was rendered and have his judgment offset against the first judgment. * * * The fact that the demand of the plaintiff has not been reduced to judgment is no obstacle to its allowance as a set-off against a judgment." Harrison v. Adams, 20 Cal.2d 646, 649, 128 P.2d 9, 11. Hence, for the purpose of the running of the statute of limitations, where the procedure followed is like that in the instant case, the commencement of plaintiff's action tolled the running of the statute on defendants' counterclaim. In a sense the procedure pursued is a continuation of plaintiff's action.

Plaintiff asserts that because the payment of dividends to him was withheld wrongfully by reason of the improper off-set, he is entitled to interest. Inasmuch as we hold the off-set proper that issue need not be decided.

The order is affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.

28 Cal.2d 525

## SUTTER et al. v. GENERAL PETROLEUM CORPORATION.

L. A. 19346.

Supreme Court of California, in Bank.

June 26, 1946.

1. Corporations ⇐204

Generally, a stockholder may not maintain an action in his own behalf for a wrong done by a third person to the corporation on the theory that such wrong devalued his stock and the stock of other shareholders.

2. Corporations ⇐204

Under proper circumstances a stockholder may bring a representative action or derivative action on behalf of the corporation, but if injury is one to the plaintiff as a stockholder individually and not to the corporation, as where the action is based on a contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly, the action is an individual action.

3. Corporations ⇐207½

An action is "derivative" if gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets.

See Words and Phrases, Permanent Edition, for all other definitions of "Derivative Action".

4. Corporations ⇐202

A stockholder who is directly and individually injured may sue as an individual though the corporation may also have a cause of action for the same wrong.

5. Fraud ⇐41

A complaint charging that by reason of the fraudulent representations of defendants, the plaintiff was induced to abandon his own oil development projects, devote his time to project whereby artificial steel island and other facilities would be used and to form and invest in a corporation to carry on new oil production project, stated a cause of action.

6. Fraud ⇐47

A complaint charging that plaintiff was induced by the fraudulent representations of defendant to abandon his own oil development project and to form and invest in a corporation to carry on new project, that plaintiff invested a stated sum in the venture and stock and that stock and investment became valueless, sufficiently alleged damages. Civ.Code, § 3343.

7. Damages ⇐162

Whether precise and correct measure of damages was pleaded is not important in face of a general demurrer.

8. Fraud ⇐47

A complaint which charged that plaintiff was induced to form and invest in a corporation to carry on a project which failed because of defendant's fraud and that plaintiff was induced by defendant's fraud to expend his efforts and time in developing the property and drilling operations, that the reasonable value of his services was a certain amount and that he expected to be reimbursed from profits of the project, alleged proper claim for damages, though realization of profits was speculative, and an agreement to pay for services was not alleged. Civ.Code, §§ 1709, 3333.

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Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Austin P. Sutter, and others, against the General Petroleum Corporation, and others, to recover damages for alleged fraud. From a judgment of dismissal on ground that complaint failed to state a cause of action, the plaintiffs appeal.

Reversed.

Prior opinion see 161 P.2d 817.

Haight, Trippet & Syvertson, of Los Angeles, for appellants.

Martin J. Weil, J. M. Jessen, and Mortimer Kline, all of Los Angeles, for respondents.

CARTER, Justice.

After the introduction of evidence by plaintiffs the trial court sustained the previously made objection of defendants to the

introduction of any evidence by plaintiffs on the ground that none of the purported causes of action stated facts sufficient to constitute a cause of action. Judgment of dismissal was entered.

The first of the remaining twenty-seven causes of action (three of the plaintiffs having dismissed their actions) is by plaintiff Sutter. Each of the remaining twenty-six causes of action is by one of the remaining plaintiffs. The defendants (the action as to six of them was dismissed) are the General Petroleum Corporation, hereinafter referred to as the corporation, Pauson Bros., Inc., a corporation, hereinafter referred to as Pauson Brothers, and J. W. Pauson. According to the first cause of action, prior to January 12, 1942, Rincon Oil Company, a corporation, hereinafter referred to as Rincon Company, held an oil and gas lease as lessee from the State of California, of certain tide and submerged lands in Ventura County consisting of about 160 acres. The stock in Rincon Company was, prior to February 15, 1939, owned by defendants Pauson and Pauson Brothers and the other defendants as to whom the action was dismissed. In 1932 Rincon Company constructed a steel island and derrick off shore and on the leased property for drilling and prospecting for oil. Tanks and drilling equipment were maintained thereon by the corporation and Rincon Company. In November, 1938, defendants, knowing that plaintiff Sutter was interested in projects for the development of oil land in the same area as the leased lands, entered into "a common plan and conspiracy, for the purpose, by fraudulent means, of persuading and inducing plaintiff [Sutter] to abandon the above mentioned project and to organize a corporation for the purpose of taking over from said Rincon Oil Company said State Oil and Gas Lease No. 82 and purchasing said steel structure and derrick, together with the appurtenances, machinery and equipment situated thereupon, and drilling an oil well or wells upon said property." That plan was executed by false representations made by defendants to Sutter, concealment of material facts concerning the steel island, and making promises they did not intend to perform. The alleged fraud consisted of the following: In January of 1939, defendants represented that the steel island was constructed according to plans and specification exhibited to Sutter. They asserted numerous times that the personnel of the corporation, being peculiarly and especially conversant with such structures, had inspected it and it was in all respects "good, safe and sound," and properly designed for oil drilling equipment. Prior to the time these representations were made a portion of the steel structure had collapsed unknown to Sutter. It had been repaired, but defendants knew of weaknesses in the structure and concealed them from Sutter. In January, 1939, the corporation promised Sutter that it would rent to the proposed corporation to be organized by Sutter, its drilling equipment on the steel island at $75 per day of actual use, purchase the oil produced, and supply water and expert advice for operations. Without the use of such equipment the development of the field would not be possible. Sutter charges that the statements were untrue and the promises were made with no intent to perform. The representations and promises were made "for the purpose of inducing plaintiff to participate in the organization of and in financing a corporation for the purpose of taking over said lease, purchasing said steel island structure, together with the appurtenances, machinery and equipment situated thereon and to drill one or more wells upon said property." In reliance thereon Sutter was induced to and did form a corporation, named Rincon Development Company, hereinafter referred to as Development Company. In the early part of 1939 the Development Company took possession of the property and commenced drilling upon the steel island, and also entered into contracts with the corporation and Rincon Company for the purchase of the island and use of the equipment. Defendants were unable, contrary to their promise, to obtain the consent of the state to an assignment to the Development Company of the lease of the tide lands held by the Rincon Company. As a result the Development Company was unable to proceed with drilling operations or issue or sell its stock. The impassé being called to defendants' attention they agreed to and

did deliver all of the stock of the Rincon Company to be reissued by that company to the subscribers of stock of the Development Company. Certain assets of Rincon Company were to be transferred to Pauson Brothers and by them resold to Rincon Company under the same arrangements theretofore existing between that company and Development Company. The corporation was likewise to make similar arrangements. The foregoing arrangement was consummated. Thereafter, the corporation refused to supply expert assistance and water, rent the drilling equipment, or agree to purchase oil from Rincon Company, and otherwise repudiated its representations and promises. The steel island collapsed and the state cancelled the lease. For damages Sutter claims that he was "induced to and did invest * * * $33,440.00 in said venture and in the stock of the said Rincon Oil Company. By reason of the collapse of the said structure and the cancellation of the said lease, as aforesaid, plaintiff's investment in said property and in the stock of said corporation has been rendered worthless and of no value, all to plaintiff's damage in the sum of * * * $33,-440.00.

"* * * [and] plaintiff was induced to and did devote all of his time and attention, for a period of eighteen (18) months from and after on or about January 8, 1939, to the promotion and development of said property and to the drilling and operation of said well. Plaintiff is an oil operator of many years' experience and the reasonable value of said services is One Thousand Dollars ($1,000) per month. Plaintiff received no compensation for said services, but expected and intended to be compensated therefor out of profits to said corporation to be brought about by his efforts, but by reason of said false and fraudulent statements, representations and promises on the part of defendants, plaintiff was prevented from obtaining or realizing and did not obtain or realize any compensation whatever for said services, all to plaintiff's damage in the sum of * * * $18,000.00."

In the other twenty-six causes of action each of the remaining plaintiffs makes substantially the same allegations as Sutter, and claims, for illustration in the second cause of action: "During the month of November, 1938, for the purpose of selling and disposing of that certain steel structure, derrick machinery and equipment and of relieving themselves of liability under State of California Oil and Gas Lease No. 82, all as described in paragraphs II and III of the complaint of plaintiff Austin P. Sutter herein, defendants and each of them entered into a common plan and conspiracy to persuade and induce plaintiff, by fraudulent means, to subscribe to and agree to purchase and to purchase stock in a corporation to be organized by plaintiff Sutter, which said corporation was to be organized for the purpose of purchasing said structure, derrick, machinery and equipment and to assume and take over said State of California Oil and Gas Lease No. 82. * * * In reliance upon the false and fraudulent representations, statements and promises, and each and all of them, made by defendants, as hereinabove alleged, plaintiff [Banks] was induced to and did invest the sum of * * * $500.00 in said venture and in the stock of said Rincon Oil Company, but by reason of the collapse of said structure and the cancellation of said lease, as aforesaid, plaintiff's investment in said property and in the stock of said corporation has been rendered worthless and of no value, all to plaintiff's damage in the sum of * * * $500.00."

In support of the trial court's conclusion that no cause of action was stated, defendants contend that there are not sufficient allegations of any injury suffered by plaintiffs, the main complaint being that the only injury suffered was by the Development Company and its successor, Rincon Company, rather than plaintiffs, and that the causes of action as stated are not derivative or representative in which the stockholders are suing in behalf of the corporation. They contend that the damages for loss of time claimed by plaintiff Sutter are not recoverable. And finally, that as to all the plaintiffs, there are no allegations showing damages suffered by them.

[1-4] Plaintiffs do not purport to state a derivative action. Generally, a stockholder may not maintain an action in his own behalf for a wrong done by a third person to the corporation on the theory that

such wrong devalued his stock and the stock of the other shareholders, for such an action would authorize multitudinous litigation and ignore the corporate entity. Under proper circumstances a stockholder may bring a representative action or derivative action on behalf of the corporation. Klopstock v. Superior Court, 17 Cal.2d 13, 108 P.2d 906, 135 A.L.R. 318; Nessbit v. Superior Court, 214 Cal. 1, 3 P.2d 558; Difani v. Riverside County Oil Co., 201 Cal. 210, 256 P. 210; Gorham v. Gilson, 28 Cal. 479; 6A Cal.Jur. § 456, et seq. But "If the injury is one to the plaintiff as a stockholder and to him individually, and not to the corporation, as where the action is based on a contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly, it is an individual action. * * * The action is derivative, i. e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets." Fletcher Cyc. Corps. (perm. ed.) § 5911. See Shenberg v. De Garmo, 61 Cal.App.2d 326, 143 P.2d 74. And a stockholder may sue as an individual where he is directly and individually injured although the corporation may also have a cause of action for the same wrong. Coronado Development Corporation v. Millikin, 175 Misc. 1, 22 N.Y.S.2d 670; Hammer v. Werner, 239 App.Div. 38, 265 N.Y.S. 172; Witherbee v. Bowles, 201 N.Y. 427, 95 N.E. 27; Von Au v. Magenheimer, 126 App.Div. 257, 110 N.Y.S. 629, affirmed 196 N.Y. 510, 89 N.E. 1114; Stinnett v. Paramount-Famous Lasky Corporation, Tex.Com.App., 37 S.W.2d 145; White v. First Nat. Bank, 252 Pa. 205, 97 A. 403; Brachman v. Hyman, 298 Mich. 344, 299 N.W. 101; 18 C.J.S., Corporations, § 559.

[5] In the instant case the essence of plaintiff Sutter's charge is that by reason of the fraudulent representations of defendants, he was induced to do several things, namely, abandon his own oil development projects, devote his time to the project whereby the steel island and other facilities would be used and to form and invest in a corporation (the Development Company) to carry on the new oil production project. The formation of the corporation and investing therein was only one of the several things which he did in reliance upon defendants' representations. The fraud was committed by defendants, and plaintiff Sutter took steps in reliance upon the misrepresentations including the formation of the Development Company before that company was formed. The tort was completed except as to the injury suffered. It is true that the promises made by defendants with no intent to perform were to run also to the Development Company when formed and that company and its successor Rincon Company was to use the defective island. In that fashion the defect in the island and the failure to perform the promises injured the Development Company and Rincon Company but there was also a direct individual injury to plaintiff Sutter, and as we have seen, the dual nature of the injury does not necessarily preclude an action by the stockholder as an individual. Defendants, by their promises and representations induced plaintiff to form the corporation and invest his money therein, and then breached their duty of honest dealing with him. By way of damages plaintiff Sutter asserts that because of the false representations he invested $33,440 in the venture and the Rincon Company, and that as the result of the fraud of defendants the stock in the Rincon Company became valueless.

While ordinarily a stockholder may not sue individually for impairment of a corporation's assets rendering the stock worthless, yet here that result is merely one method of ascertaining the amount of damages suffered by Sutter. He lost his investment which was represented by the stock, and its reduction in value would be the extent of his loss. The damages all flowed from the tort of defendants.

Defendants urge that the property of the Development Company and Rincon Company suffered the injury, that is, their business was injured because of the collapse of the structure (steel island) and made oil operations impossible. From that it is reasoned that the only cause of action would be in the Rincon Company, relying upon authorities involving an injury to the assets

of a corporation which is actionable by the corporation and not the stockholders individually. See Anderson v. Derrick, 220 Cal. 770, 32 P.2d 1078; Difani v. Riverside County Oil Co., 201 Cal. 210, 256 P. 210; Shenberg v. DeGarmo, 61 Cal.App.2d 326, 143 P.2d 74; 6A Cal.Jur. § 456. It is true that the corporations suffered injury, inasmuch as they were conducting the oil drilling operations and had contracts for the use of the structure, but the fraud was practiced on Sutter in the first instance and he was induced to form the corporation (Development Company) and invest his money by reason of that fraud. When the fraud finally came to light and the falsity of the representations manifested itself in the collapse of the structure (steel island), the injury from that fraud occurred. The injury resulted from the formation of a corporation and investments therein to carry on a project that could not be conducted because of the fraud. The whole series of events up to and including the injury was a part and parcel of the fraud practiced on plaintiff. Particular reliance is placed upon American Trust Co. v. California Western States Life Insurance Co., 15 Cal.2d 42, 98 P.2d 497, and Nighbert v. First National Bank of Bakersfield, 26 Cal.App.2d 624, 79 P.2d 1105, 1109. In the Nighbert case the charges of fraud were against the officers of the corporation in buying property for more than its value with the plan that it would later be taken back by the purchaser upon default in the payments and that the corporation's assets were dissipated by the directors. The court pointed out that "any fraud in connection with the purchase of these lands by the corporation was made possible by the acts of the directors of that corporation" and then stated the rule that negligence or mismanagement of the officers of a corporation is not a basis for an individual suit by a stockholder. Moreover, it was stated that "the allegation is that these plaintiffs were induced to purchase stock by false representations as to the value thereof without stating what, if any, representations were made and there are neither allegations to the effect that they were induced to purchase stock by the general acts of the defendants nor allegations showing what the stock was actually worth, nor what they received therefrom." In the American Trust Company case the fraud clearly related to and affected the assets of the corporation. There was no fraudulent scheme to induce the formation of and investment in a corporation. The fraud there was in incurring by the officers of a corporation, liability on the part of the corporation; and the misrepresentations were for the purpose of achieving a transfer of the assets of the corporation to induce action by the corporation. Here the representations were to induce Sutter to organize and finance the Development Company.

The pleading of the damages suffered could have been more precise in its causal aspects. It was alleged that by reason of the collapse of the steel island plaintiff's investments and the stock in Rincon Company became worthless. Preceding that, however, is the charge of fraud with regard to its condition and the inducement of plaintiff to form the corporation and invest the stated sum therein.

The injury claimed by the other twenty-six plaintiffs is substantially the same as that of Sutter. All of the allegations of fraud were incorporated by reference. They claimed that, for the purpose of selling the defective steel island and escaping the obligations under the oil lease from the state, defendants entered into a plan to fraudulently induce subscriptions to the stock in the to be organized Development Company. In reliance on the defendants' fraudulent conduct plaintiffs invested a certain amount in the property and stock of the Development Company and the investment and stock became worthless. In other words, defendants fraudulently represented what they would do for such corporation and thereby caused plaintiffs to subscribe to stock therein. Again it is true that the corporation suffered injury but plaintiffs individually were wronged and were injured by defendants' action and the comments made in regard to Sutter's cause of action are applicable.

[6, 7] Defendants further urge that plaintiffs have not pleaded properly any damages in that there is no allegation of the value of the property (stock in the Rincon Company) at the time of its purchase

in conformity with the statute reading: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction." Civ.Code, § 3343. It is alleged that plaintiffs invested a stated sum in the venture and stock of Rincon Company and that the stock and investment became valueless because of the cancellation of the lease and collapse of the steel island. Assuming section 3343 is applicable, at least as against a general demurrer, these allegations are sufficient. It may be that the complaint indicates that the stock had some value at the time the representations were made and the money invested, still where the fraud consists, as it does here, of the false representations as to the condition of the steel island and the availability of the lease, the consequences of the fraud—manifestation of the injury to plaintiff—did not occur until the collapse of the steel structure and the loss of the lease. Certainly it cannot be doubted that there is a sufficient showing of injury to plaintiffs. Whether the precise and correct measure of damages was pleaded is not important in the face of a general demurrer. Dyer v. Hunter, 133 Cal.App. 267, 23 P.2d 1049, is not contrary to these views. The court there merely stated that subsequent events which had no connection with the fraud (bankruptcy) did not supply a defect in the pleadings and proof with reference to the value of the stock.

[8] With regard to plaintiff Sutter, defendants urge that his claim for $18,000 damages is improper. He alleged, as heretofore stated, that he was induced by defendants' fraud to expend his efforts and time in developing the property and drilling operations; that the reasonable value of his services during the time he was engaged in developing and operating the project which failed because of defendants' fraud, was a certain amount and that he expected to be reimbursed for his efforts from the profits of the project. Defendants assert that he cannot be allowed such a recovery because the possible realization of profits is speculative and Sutter does not allege that he had any agreement with either the Development Company or Rincon Company to pay him for his services. The general rule with reference to damages is stated: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Civ. Code, § 3333. And "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." Civ.Code, § 1709. In the instant case it was by reason of defendants' fraud that Sutter expended his time and efforts on the project. Hence the loss of that time and effort was proximately caused by the fraud. In Rowland v. Columbia Mining, Water and Power Co. of California, 2 Cal. App.2d 410, 38 P.2d 418, plaintiffs were fraudulently induced to enter into a lease to mine property and were permitted to recover the salary they would have earned if they had not given up their positions to engage in the venture. It is immaterial that he did not have an agreement with the Development Company or Rincon Company to compensate him for his services. He claimed the amount as the reasonable value of his services and it was by reason of the fraud that his efforts and time were expended. Nor is it important that he claims that he "expected" to be compensated "out of the profits to said corporation." That is not sufficient basis for concluding that that was the only source from which he was to be paid or that the profits are the sole basis for computing the compensation. He pleaded the reasonable value of his services and the loss of time was the proximate result of the fraud. But even if the loss of the time is to be measured by the profits from the enterprise there is no such uncertainty that precludes the consideration of profits. It is a matter of proof—that is, whether the evidence establishes the claim that is important. The oil well had been in operation some time and it may well be

that proof of the profits could be made. See Steelduct Co. v. Henger-Seltzer Co., 26 Cal.2d 634, 160 P. 804; Continental Car-Na-Var Corporation v. Moseley, 24 Cal.2d 104, 148 P.2d 9; Caminetti v. Pacific Mut. Life Ins. Co., 23 Cal.2d 94, 142 P.2d 741.

Defendants rely upon Ramsey v. Penry, 53 Cal.App.2d 773, 128 P.2d 399, but in that case the chief issue was whether or not the evidence was sufficient to establish prospective profits, a matter with which we are not concerned, and the sole source of the payment to plaintiffs for their efforts was from the profits. Here we do not have the evidence before us and Sutter sets forth the reasonable value of his time which he spent in pursuing the course induced by defendants' fraud.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.




28 Cal.2d 569

## KENNEDY v. ROSS.

S. F. 17298.

Supreme Court of California, in Bank.

July 5, 1946.

1. Mandamus ⇐163

Where respondent's demurrer to petition for writ of mandamus constituted his return to the alternative writ, the allegations of the petition were admitted and only issues of law were presented.

2. Mandamus ⇐102(1)

If petitioner's contract with director of public works of City and County of San Francisco to furnish engineering and architectural plans for proposed sewage and sludge treatment and disposal plant were legal, mandamus to compel controller of City and County of San Francisco to issue a warrant on city treasurer for payment of sum due pursuant to the contract was proper remedy. Code Civ.Proc. § 1085.

3. Municipal corporations ⇐177

"Positions" in departments and offices of the City of San Francisco, within provision of city charter establishing Civil Service Commission and civil service employment, connote an employment to render services at a salary paid periodically and are governed by the salary standardization and related provisions of the charter. St.1931, p. 3059, § 140 et seq., as amended; pp. 3021, 3023, 3060, 3065, 3066, §§ 71, 73, 141, 150, 151; St.1937, pp. 2795, 2796, § 142(4).

See Words and Phrases, Permanent Edition, for all other definitions of "Position".

4. Municipal corporations ⇐177

The provisions of the charter of the City and County of San Francisco establishing a Civil Service Commission and civil service employment system do not foreclose the authorized agency from entering into contracts with individuals for the performance of professional service as independent contractors. St.1931, p. 3059, § 140 et seq., as amended.

5. Municipal corporations ⇐178

A consulting engineer who entered into contract with director of public works of City and County of San Francisco to furnish engineering and architectural plans for proposed sewage and sludge treatment and disposal plant and his assistants were "independent contractors" and not "city employees", so as to be subject to classified civil service. St.1931, p. 3059, § 140 et seq., as amended; St.1937, p. 2796, § 142(4).

See Words and Phrases, Permanent Edition, for all other definitions of "City Employee" and "Independent Contractor".

6. Municipal corporations ⇐48(2)

A city which has availed itself of 1914 amendment to Constitution has full control over its own affairs regardless whether the city charter specifically provides for particular powers sought to be exercised, so long as the power is constitutionally exercised within limitations placed in the charter, and mere enumeration of powers conferred does not constitute a limitation. Const. art. 11, § 6.

**7. Municipal corporations ⇐229**

Under charter of City and County of San Francisco, director of public works of the city and county could enter into contract with consulting engineer for him to furnish engineering and architectural plans for proposed sewage and sludge treatment and disposal plant, and contract was not required to be authorized by board of supervisors pursuant to an appropriate resolution or ordinance. St.1931, p. 3019 et seq., § 69 et seq., as amended; pp. 2978, 2989, 2991, 2992, 2997 et seq., 3013, 3014, 3029, 3030, 3035, 3041, §§ 2, 20, 22, 23, 25, 35 et seq., 59, 60, 61, 85, 86, 95; St.1935, p. 2416, § 72; St.1943, p. 3139, § 9; Const. art. 11, § 6.

**8. Municipal corporations ⇐178**

The provision in charter of City and County of San Francisco providing that all examinations, plans and estimates required by board of supervisors in connection with any public improvement, exclusive of those to be made by Public Utility Commission, shall be made by director of public works, and he shall, when requested to do so, furnish information and data for use of supervisor, placed additional duties upon director to perform those things when required or requested by supervisors, and did not impose a limitation upon power otherwise clearly vested in the director. St.1931, p. 3041, § 106.

**9. Municipal corporations ⇐229**

Where director of public works of City and County of San Francisco had the unquestioned express power to let contracts for the construction of a sewage and sludge treatment and disposal plant, the power of the director to obtain the plans and specifications therefor followed therefore as a necessary incident. St.1931, pp. 2978, 2980, 3035, 3041, §§ 2, 3, 95, 107; Pol.Code, § 4041.34.

**10. Officers ⇐107**

The mode prescribed for exercise of power by public officer is the measure of the power.

**11. Municipal corporations ⇐236**

Strict compliance with provisions in charter of City and County of San Francisco requiring that contracts for construction of public works shall be subject to competitive bidding is not required to be maintained in procuring expert services to furnish plans and specifications for the construction. St.1931, pp. 2991, 3035, §§ 22, 95.

**12. Municipal corporations ⇐236**

Under charter of City and County of San Francisco, director of public works of the city and county had authority to enter into contract with a consulting engineer to furnish engineering and architectural plans for proposed sewage and sludge treatment and disposal plant without advertising for bids. St.1931, pp. 2991, 3035, §§ 22, 95.

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Proceeding in mandamus by Clyde C. Kennedy against Harry D. Ross, as Controller of the City and County of San Francisco, to compel the respondent to issue a warrant.

Writ issued.

John L. McNab and Walter E. Hettman, both of San Francisco, for petitioner.

Allen G. Wright and S. J. McAtee, both of San Francisco, amici curiae on behalf of petitioner.

John J. O'Toole, City Atty., and Walter Peddicord, Deputy City Atty., both of San Francisco, for respondent.

Harold Ropers and H. Ward Dawson, Jr., both of San Francisco, amici curiae on behalf of respondent.

SHENK, Justice.

The petitioner, Clyde C. Kennedy, seeks the writ of mandate directing the respondent, as Controller of the City and County of San Francisco, to issue a warrant on the city treasurer in the sum of $10,000.

The Director of Public Works of the City and County of San Francisco on September 24, 1945, entered into a written contract with the petitioner, a consulting engineer, whereby the latter, employing and maintaining a staff of professional engineers and operating a chemical and biological testing laboratory in San Francisco, agreed to prepare and furnish engineering and architectural plans, specifications, estimates of cost, and contract documents re-

quired for a proposed North Point Sewage and Sludge Treatment and Disposal Plant, and appurtenant works and buildings, to be located in the Islais Creek district. Under the contract compensation for the petitioner's services is to be $77,000 payable in installments, a first payment of $10,000 to be made upon completion of the plot, circulation and landscaping drawings. All architectural and clerical services are to be furnished by the petitioner and the assistants in his employ. The contract was approved by the chief administrative officer of the city, and by the city attorney as to form.

On October 30, 1945, the respondent controller certified that he had set aside the sum of $77,000 from the unexpended and unapplied balance in a total appropriation of $1,355,000 to the Department of Public Works for the North Point sewage replacement and construction, to be applied to the expenditure called for by the contract.

On January 26, 1946, the petitioner completed the portion of the plans which called for the payment of $10,000. The director of public works approved the plans and the claim, and a request for the payment of $10,000 was presented to the respondent. In the meantime, in December, 1945, a complaint had been filed against the respondent to restrain him from making any payment under the Kennedy contract on the ground that the contract had not been authorized by the board of supervisors, and that the petitioner had not been exempted by the civil service commission pursuant to certain provisions of the city charter. The respondent refused payment because of the pendency of the injunction suit. Thereupon this proceeding was commenced.

[1] The respondent's demurrer to the petition constitutes his return to the alternative writ. The allegations of the petition are therefore admitted and only issues of law are presented.

[2] It is conceded by the respondent that if the contract is legal mandamus is the proper remedy. Puterbaugh v. Wadham, 162 Cal. 611, 613, 123 P. 804; see City and County of San Francisco v. Boyd, 17 Cal.2d 606, 110 P.2d 1036; Code Civ. Proc. § 1085. The problems involved have been fully presented by the parties and amici curiae.

It is contended by the respondent and supporting amici curiae that the contract is invalid for failure to comply with section 142(4) of the 1932 Charter of the City and County of San Francisco, Stats.1931, p. 2973, as amended. Section 140 et seq. of the charter establish a civil service commission and civil service employment system. Section 142, St.1937, p. 2795, requires that all positions in the several departments and offices of the city be included in the classified civil service and be filled from lists of eligibles. Subdivision (4) exempts "persons employed in positions in any department for expert professional temporary services," provided the exemption for the specified period of temporary service is by an order of the civil service commission. Prior to October 30, 1945, the respondent submitted the contract to the civil service commission of the city for an order of exemption. The commission submitted the matter to the city attorney for advice. The latter rendered his opinion to the effect that under the terms of the contract the petitioner was an independent contractor, and that neither he nor his assistants would be subject to the civil service provisions of the charter. He expressly reserved his opinion concerning the power to engage engineering services outside the office of the city engineer and his staff. The commission thereupon transmitted to the respondent in writing its conclusion that the petitioner was an independent contractor, that he and his staff and employees were not subject to the civil service provisions of the charter, that the commission was without jurisdiction in the matter, and that an order of exemption was unnecessary.

[3] The conclusions of the city attorney and the commission are correct. Section 142 of the charter refers to and includes in the classified civil service "all positions in all departments and offices" of the city, and exempts "persons employed in positions in any department for expert professional temporary services." Under the contract, the petitioner was not appointed to nor does he hold a position in any department or

office of the city. The contract calls for his expert professional services on other than a permanent basis, but it does not follow that he is thereby employed in a position in any department of the city. The fact is otherwise. No position, temporary or permanent, in any department, was thereby created as contemplated by section 143 of the charter. The petitioner was engaged to do a specific expert professional task for a stated consideration. "Positions" in "departments and offices" of the city connote an employment to render services at a salary paid periodically and are governed by the salary standardization and related provisions of the charter, also invoked by the respondent. §§ 71, 73, 141, 142, 150 and 151.

[4, 5] The provisions of the charter do not foreclose the authorized agency from entering into contracts with individuals for the performance of professional services as independent contractors. Employment at a fixed salary or per diem basis is not the exclusive method by which the city may exercise its power to procure the services of experts. Miller v. Boyle, 43 Cal.App. 39, 43, 184 P. 421. Section 142(4) and related sections were examined in City and County of San Francisco v. Boyd, supra, 17 Cal.2d at page 619, 110 P.2d at page 1043, where this court said: "A reading of the entire text of said several sections indicates clearly that it was the intention of the framers of the charter that civil service should apply only to persons *employed in permanent positions* in municipal departments to the end that public service should be free from political shifting and control resulting from changes in administration. If section 142 were to be given the literal application suggested by respondent, it would be impossible for the municipality to make an independent contract with any person or corporation to render an extraordinary service or to make surveys with a view of legislation on behalf of the municipality." Here the conclusion must be that the petitioner and his assistants do not by the contract become city employees in either permanent or temporary positions in the sense intended by the charter provisions. They are therefore not subject to classified civil service, nor to the charter provisions standardizing salaries, wages or compensation for permanent or temporary employment, and an order of exemption was not required.

The foregoing conclusion is based on the assumption that the engagement outside the list of eligibles otherwise is legal and that the services for which the petitioner was engaged are not such as could adequately be rendered by an existing department of the city. In State Compensation Ins. Fund v. Riley, 9 Cal.2d 126, 131, 69 P.2d 985, 111 A.L.R. 1503, this court rejected as a conclusive test of the lawful exercise of the power to make an independent contract that the person involved was an independent contractor. It was held in the Boyd case and recognized in the Rily case that the appropriate agency is empowered in proper cases to engage the services of an expert in a field covered by an existing department without a resulting illegal duplication of the functions and duties of existing officers and departments.

In this proceeding it appears that the sewage disposal problem was of much concern to the people of San Francisco prior to the outbreak of the recent war. The influx of people, with the consequent overcrowding and shortage in housing, greatly overtaxed the already inadequate sewage system. The existing disposal system is stated to be obsolete and a menace to the public health and welfare. The designing of modern sewage disposal plants has developed into a matter of scientific treatment, involving an understanding of chemistry and bacteriology, as well as modern scientific mechanical methods. The designer of such a plant operates in a specialized field and is a scientist and expert having a high degee of training in that field. The record shows that the petitioner, who is duly licensed under the laws of this state, is a skilled engineer, outstanding in his specialized field, and his services cannot be duplicated; that, with his associates, he is best qualified to furnish the plans and specifications for the sludge treatment and disposal plant. The qualifications and foundation for competence are highly individualized and from the showing they may be said to be not generally within the scope of any existing civic department.

The city engineer is an appointee of the director of public works and holds office at the pleasure of the latter. He has such power in making surveys, plats and certificates as is given by law to city engineers and to county surveyors, with the same validity, force and effect. Charter, § 106. Apart from those duties, the city engineering staff has designed, constructed and supervised the construction of many of the city's engineering projects, including the Richmond-Sunset Sewage Treatment Plant, construction of which commenced in 1937. It also appears that the sewage reduction plant which will be a part of the North Point system will be planned by the city engineer. But this is not to say that scientific progress up to the present time, through the period of a second world war, has not developed a specialized technical training for the preparation of plans for modern sewage treatment and disposal which is not available in the existing city engineering staff. If the procurement of such expert services was within the proper sphere of action by the director of public works, it must be concluded on the facts presented that the responsibility rested upon that official and the chief administrative officer to whom he is answerable to determine the qualifications and requirements of the expert who should undertake the preparation of plans and specifications for the proposed improvement. There is no showing of lack of good faith or of arbitrary exercise of the power and discretion vested in the appropriate agency. No ground for interference in the selection of the petitioner to perform such services as an independent contractor has been shown. See, also, Reid v. Boyle, 43 Cal.App. 34, 184 P. 423, and Miller v. Boyle, supra, 43 Cal.App. 39, 184 P. 421.

[6] But it is claimed that action by the board of supervisors was necessary to authorize the contract pursuant to an appropriate resolution or ordinance. This contention necessitates an examination of the division of powers among the boards and departments of the city and the nature of the power exercised in the particular case.

By section 2 of the charter the city possesses all rights and powers appropriate to autonomous rule, subject only to the restrictions and limitations expressly included in the charter. That section provides that the specification or enumeration of particular powers shall not be exclusive. A city which has thus availed itself of the 1914 amendment of section 6, article XI, of the Constitution, has full control over its own affairs whether or not the charter specifically provides for the particular power sought to be exercised, so long as the power is constitutionally exercised within the limitations or restrictions placed in the charter; and the mere enumeration of powers conferred does not constitute a limitation or restriction. West Coast Adv. Co. v. City and County of San Francisco, 14 Cal.2d 516, 521-523, 95 P.2d 138.

It is apparent from the provisions of the new charter that the framers intended to and did formulate a change in the usual concentration of control in the administration of municipal affairs, and thereby provided for a decentralization of powers. Only those powers of the city which are not reserved to the people or delegated to other officials, boards or commissions, are vested in the board of supervisors, to be exercised as provided in the charter. § 9, St.1943, p. 3139. That section also provides that the supervisors may, by ordinance, confer on any officer, board or commission such other and additional powers as may be deemed advisable.

The mayor is the chief executive officer (§ 25), but a chief administrative officer is appointed by him (§ 59), who has the duty to exercise supervision and control over all administrative departments placed under his jurisdiction (§ 60), among which are the Department of Finance and Records, the Purchasing Department, the Real Estate Department, the Department of Public Works, and others (§ 61). Certain other departments, boards and commissions, such as police, fire, library, art, park and recreation, are placed under the jurisdiction of the mayor (§ 35 et seq.).

The Department of Public Works is in charge of the director of public works. The director of public works succeeded to the powers and duties of the board of public works, which latter was abolished. §§

61, 106. Section 23 continued the powers and duties of the various departments as established prior to the execution of the new (1932) charter, except as otherwise provided; and section 61 provides that the Department of Public Works as so continued shall be administered by the director of public works, who shall be appointed by the chief administrative officer and hold office at his pleasure. By section 20 the director of public works is responsible to the chief administrative officer for the administration of his department.

Section 95 of the charter relates to "Contracts. Public Works and Purchasing Contracts." It provides that the construction, reconstruction or repair of public buildings, streets, utilities or other public works or improvements, with exceptions not material here, shall be done by contract. The section also states that "Any public work or improvement executed by the city, other than routine repair work, shall be authorized by the chief administrative officer or by the heads of departments not under the chief administrative officer, only after detailed estimates have been prepared and submitted by the head of the department concerned. * * * The head of the department in charge of or responsible for the work for which a contract is to be let * * * shall let such contract to the lowest reliable and responsible bidder * * *. The officer responsible for the awarding of any such contract shall require from all bidders information * * *. The department head * * * shall have power to sign such contract * * *. If such contract is for any public work or improvement, it shall require the joint approval of the department head and the chief administrative officer relative to departments under his jurisdiction, or the signature of the department head and the approval by resolution of the board or commission concerned for departments not under the chief administrative officer."

From the foregoing it is seen that the framers of the charter intended a division or separation of powers as between the board of supervisors, and the executive and administrative heads and departments. To make the matter more explicit, section 22 provides that except for the purpose of inquiry the mayor and the supervisors shall deal with the administrative service for which the chief administrative officer is responsible, solely through such officer, and that except for the purpose of inquiry, each department, board or commission, in the conduct of the administrative affairs under its control, shall deal with such matters solely through its chief executive officer. "Neither the board of supervisors," the section provides, "nor its committees, nor any of its members shall dictate, suggest or interfere with appointments, promotions, compensations, disciplinary actions, contracts, requisitions for purchases or other administrative recommendations or actions of the chief administrative officer, or of department heads under the chief administrative officer, or under the respective boards and commissions. * * *" Interference is deemed to be official misconduct.

The intention of the framers is emphasized in Francis V. Keesling's "San Francisco Charter of 1931" (April, 1933), page 45, where, in reporting the debate of the Freeholders regarding the limitation of the powers of the supervisors it is stated: "It was the definite intention to effectively deprive the Board of Supervisors of all administrative powers." This is further borne out by the provisions governing the budget and appropriations.

Section 69 et seq. provide for the budget and fiscal procedure. The fiscal year commences on the first day of July. The executive of each department or office of the city is required to prepare an annual budget estimate to be acted on by the board or commission not later than the first of March. The chief administrative officer obtains the budget estimates from the heads of departments subject to his control, and after adjustments or revisions, transmits them to the controller, who in turn submits them to the mayor. Public hearings are held by the mayor and he may make changes within specified limits. Not later than the first of May the mayor is required to transmit a consolidated budget estimate to the board of supervisors, together with a draft of the annual appropriation ordinance based on the proposed budget which is thereupon published as required for ordinances. Af-

ter public hearing, and between the 15th of May and the first of June, the board of supervisors is required to adopt the budget estimates as submitted or amended and pass the necessary appropriation ordinance. An amended budget is required to be readvertised prior to final passage. Veto power is given the mayor, and power to act thereon to the supervisors. § 72, St.1935, p. 2416.

Section 72 then provides: "Subject to the restrictions hereinbefore in this section included, the several amounts of estimated revenue and proposed expenditures contained in the annual appropriation ordinance as adopted by the board of supervisors shall be and become appropriated for the ensuing fiscal year to and for the several departments, bureaus, offices, utilities, boards or commissions, and for the purposes specified, and each department for which an expenditure appropriation has been made shall be authorized to use the money so appropriated for the purposes specified in the appropriation ordinances, and within the limits of the appropriation. The appropriation ordinance shall constitute the authority for the controller to set up the required revenue and expenditure accounts. * * *"

[7] The foregoing provisions do not of course authorize an expenditure pursuant to a contract which otherwise is not in compliance with charter requirements. Section 85 permits the controller to withhold approval of any claim on the ground of its illegality, and section 86 subjects him to liability for the amount of a claim illegally approved, allowed or paid. As pointed out in Millholen v. Riley, 211 Cal. 29, 293 P. 69, the duty to function includes by implication of law the power to properly apply the funds appropriated for the purpose in the absence of provision to the contrary. The provisions of section 72, together with the provisions of the charter vesting sole control for the administration of the functions delegated to the Department of Public Works subject to the authorization of the chief administrative officer, are persuasive that no further control is vested in the supervisors over the expenditure of funds appropriated to that department after the appropriation ordinance has been adopted. All of the budget procedure was duly complied with in the present instance and $1,355,000 was appropriated for sewers including North Point Sewage, Disposal Plant and Outfall. The contract here involved was the first to be entered into looking to the fulfillment of the purposes for which the appropriation was made. There is no question of the validity of the appropriation, and the controller has duly set aside the amount required by the contract from unapplied funds in the appropriation.

The respondent points out that in the case of City and County of San Francisco v. Boyd, supra, 17 Cal.2d 606, 110 P.2d 1036, the contract for the services of the expert was made by the board of supervisors. The subject matter of the contract was the engagement of an engineering expert to investigate and report to the supervisors on the transit problem of the city. No construction work or improvement was contemplated thereby. It was solely a matter of inquiry by the board. This court upheld the exercise of the general power of the board in that regard although it was recognized that such power had possibly been specially delegated to another board or officer. It was said, 17 Cal.2d at page 617, 110 P.2d at page 1042: "While it is true that the charter provides for an independence of the various departments of the city in the performance of their respective duties, and while it is true that to the various commissions certain duties have been delegated, yet there is nothing in the language delegating such duties and functions * * * which suggests a limitation upon the powers of the board of supervisors to plan, study and legislate for civic betterment and improved conditions of municipal affairs." No contract had been made by any department to which power in respect to the matter had been delegated by the charter, and no question of unlawful interference by the supervisors was raised.

[8] The respondent also relies on section 106, cf. § 112, providing that "All examinations, plans and estimates required by the supervisors in connection with any public improvement, exclusive of those to be made by the public utilities commission,

shall be made by the director of public works, and he shall, when requested to do so, furnish information and data for the use of the supervisors." The respondent would apply those provisions as a limitation upon the power otherwise clearly vested in the director of public works. But properly applied they place additional duties upon the director to perform those things when required or requested by the supervisors so to do. Any intention to curtail the powers otherwise delegated to the director of public works may not be read into that section.

[9] The foregoing sufficiently answers the respondent's contention that certain sections of the charter and section 4041.34 of the Political Code vest the power in the board of supervisors to authorize the contract for special services, as a residuary power. Section 2 of the charter provides that the exercise of all rights and powers of the city and county when not prescribed in the charter shall be as provided by ordinance or resolution of the board of supervisors. Section 3 provides that where a procedure for exercising any right or power is provided by statute, the statutory procedure shall be followed unless a different procedure is provided in the charter or by ordinance under charter authority. Those provisions are repeated in section 107 relative to specified street, sewer and other improvements and to the performance of any other public work or improvement under the jurisdiction of the Department of Public Works. Section 4041.34 of the Political Code provides that boards of supervisors in their respective counties shall have power to contract for special services and advice in financial, economic, accounting, engineering, legal or administrative matters by persons specially trained. Those provisions may be said to govern to the effect here contended only when the charter does not otherwise provide. Charter, § 3. Section 95 of the same instrument provides the procedure for the execution of any public work or improvement, namely, by contract. There is no serious contention that the section does not vest in the director of public works, subject to the approval of the chief administrative officer, the power to contract for the construction of public works and improvements. Plans and specifications are essential to the construction of any such work or improvement. The contract here involved covers only the preparatory plans and specifications which are necessary before the construction of the contemplated project can be commenced. Having the unquestioned express power to let contracts for the construction of the improvement, the power to obtain the plans and specifications therefor follows as a necessary incident. See Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 334, 253 P. 726; Miller v. Boyle, supra, 43 Cal.App. at page 43, 184 P. 421; Powell v. City and County of San Francisco, 62 Cal.App.2d 291, 296, 144 P.2d 617; City and County of San Francisco v. Boyd, supra, 17 Cal.2d at page 618, 110 P.2d 1036, citing State Compensation Ins. Fund v. Riley, supra, 9 Cal.2d 126, 69 P. 985, 111 A.L.R. 1503. Since, therefore, the charter prescribes the authority and procedure for the improvement and the contract here contemplated, the provisions of section 4041.34 of the Political Code are inapplicable.

The respondent also contends that although the contract had the approval of the chief administrative officer, as required, nevertheless it is void because the director of public works did not comply with the provisions of section 95 of the charter requiring that all contracts be let to the lowest reliable and responsible bidder. Section 22 provides that the supervisors, and each board or commission concerning the affairs of its own department, shall deal with administrative matters only in the manner provided by the charter. The provisions of section 95 require that the construction, reconstruction, or repair of public works or improvements, shall be done by contract which shall be let by the head of the department in charge of the work to the lowest reliable and responsible bidder not less than ten days after advertising by publication for two consecutive days for sealed proposals for the work or improvement. The board of supervisors is empowered to establish procedure whereby the several city and county departments

may file sealed bids for the execution of any work to be performed under the contract.

[10, 11] It is true, as asserted by the respondent, that the mode prescribed for the exercise of power by a public officer is the measure of the power. Zottman v. City and County of San Francisco, 20 Cal. 96, 103, 81 Am.Dec. 96; Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 353, 291 P. 839, 71 A.L.R. 161. It is also true that the framers of the charter were at pains to require that contracts for the construction of public works should be subject to competitive bidding, and it is assumed that all contracts for the construction of the improvement will conform to that procedure. But it does not follow that strict compliance with that requirement must be maintained in procuring expert services to furnish plans and specifications for the construction. In Los Angeles Dredging Co. v. City of Long Beach, supra, 210 Cal. at page 354, 291 P. 839, 842, 71 A.L.R. 161, it was recognized that there are exceptions to the requirement that contracts must be let under competitive bidding, the court saying: "The first exception is founded on the fact that sometimes it is undesirable or impossible to advertise for bids for particular work. In such cases the statutory requirement is deemed not to apply. In 2 Dillon on Municipal Corporations, 1199, § 802, the law is thus stated: 'It has been held that where competitive proposals work an incongruity and are unavailing as affecting the final result, or where they do not produce any advantage * * * or it is practically impossible to obtain what is required and observe such forms, a statute requiring competitive bidding does not apply.' Our courts have approved this doctrine." In McQuillin on Municipal Corporations, volume 2, second edition revised, page 1182, section 1292, it is stated with citation of cases: "Provisions as to competitive bidding have been held not to apply to contracts for personal services depending upon the peculiar skill or ability of the individual, such as the services of * * * an attorney at law, a superintendent or architect * * * or a consulting and supervising engineer. And generally the requirement does not apply to the employment of a professional man, in which case the authorities have a discretion as to his qualifications." In Miller v. Boyle, supra, 43 Cal.App. 39, at page 44, 184 P. 421, at page 423, the following was quoted with approval: "An architect is an artist. His work requires taste, skill, and technical learning, and ability of a rare kind. Advertising might bring many bids, but it is beyond peradventure that the lowest bidder might be the least capable and most inexperienced and absolutely unacceptable. As well advertise for a lawyer or civil engineer for the city and intrust its vast affairs and important interests to the one who would work for the least money." Without further discussion, this court in City and County of San Francisco v. Boyd, supra, 17 Cal.2d at page 620, 110 P.2d at page 1044, said that "The employment of a person who is highly and technically skilled in his science or profession is one which may properly be made without competitive bidding."

[12] No question is raised as to the power of the city under its charter to proceed in the matter of sewage reduction, treatment and disposal (see City of Oakland v. Williams, 15 Cal.2d 542, at page 550, 103 P.2d 168) and the record shows that since the adoption of the new charter the Department of Public Works, the chief administrative officer, and the board of supervisors have so construed its provisions as not to require that contracts for expert and professional services be subject to the civil service provisions or the procedure of competitive bidding. The practice has been for the director of public works to make such contracts with independent contractors upon the approval of the chief administrative officer and without advertising for bids. There is no language in the charter which may be said to require a different method of procedure.

From what has been said it follows that the contract involved is valid and the petitioner is entitled to the relief sought.

Let the peremptory writ issue as prayed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

28 Cal.2d 634

**TAYLOR v. SELIG et al.**

**S. F. 17139.**

Supreme Court of California, In Bank.

July 26, 1946.

**1. Appeal and error ⇐1011(1)**

A conflict in the evidence was resolved against plaintiff by the trial court's finding against plaintiff.

**2. Patents ⇐202(1)**

The meaning of instrument assigning one-half interest in invention must be ascertained from a reading of the language contained in the instrument, by reference to the surrounding circumstances, the wording of the assignment, the evidence concerning the assignment, and the conduct of the parties.

**3. Patents ⇐203**

Evidence warranted finding that contract assigning one-half interest in invention obligated assignee to advance funds for further development of invention only so far as assignee's finances justified, and that inventor had not rescinded and was not entitled to a rescission of the contract.

**4. Patents ⇐200**

Alleged illegal issuance of stock by corporations formed by inventor and assignee of one-half interest in invention did not warrant setting aside contract which assigned one-half interest in invention to assignee agreeing to advance funds for further development of invention.

**5. Corporations ⇐104**

A corporate director and active participant in formation of corporation could not complain of alleged illegal issuance of stock by corporation.

**6. Patents ⇐214**

Alleged selling without a permit of stock in corporations, which were formed by inventor and assignee of one-half interest in invention in furtherance of their plan to further develop invention, was not ground for inventor to rescind license to corporations to manufacture and sell the article invented, where one corporation had issued no stock and the other corporation had issued 51 per cent of its stock to inventor and assignee for the license.

**7. Action ⇐6**

In inventor's action against assignee of one-half interest in invention and two corporations organized by inventor and assignee pursuant to their plan to further develop invention, for declaration of rights of assignee and the two corporations in the invention, finding that assignee owned a one-half interest, and that one corporation had the exclusive license to handle the article invented, disposed of all the issues between the parties.

**8. Action ⇐6**

A judgment declaring that defendant was owner of one-half interest in patents issued on invention and all alterations, modifications, improvements, or substitutions thereof, was not too broad, where inventor had assigned to defendant a one-half interest in invention and improvements thereof.

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Appeal from Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

Action for declaratory relief by Lloyd M. Taylor against George A. Selig and another. From a judgment denying relief, the plaintiff appeals.

Affirmed.

Prior opinion, App., 164 P.2d 276.

Vincent Surr and Morgan V. Spicer, both of San Francisco, for appellant.

Fred A. Watkins, of San Francisco, for respondents.

CARTER, Justice.

Plaintiff appeals from a judgment declaring the defendant George A. Selig to be the owner of a half interest in an invention.

In 1936 defendant George A. Selig and plaintiff were working as mechanics for United Air Lines in Oakland, California, at which time they became acquainted. Plaintiff had an idea for the invention of an internal combustion engine. The idea was incomplete and needed considerable

development. Selig became interested in the idea and the two men worked together on it in their spare time. During the latter part of 1936 and the first part of 1937 they consulted Mr. White, a patent attorney, with reference to protecting the invention by obtaining a patent therefor. The charges for services and fees in connection with the patent were paid for by Selig, totalling $867. After explaining to White concerning their joint efforts in connection with the invention and that each was to have a one-half interest therein, he suggested that the patent be obtained in plaintiff's name, and that plaintiff would then assign a one-half interest therein to Selig. An agreement (hereinafter referred to as agreement) was made between plaintiff and Selig on March 20, 1937, reciting that plaintiff was the inventor and is "desirous of having the services and financial support of * * * [Selig] for further experimentation work on said invention, the commercial exploitation thereof and the securing of Letters Patent therefor; and

"* * * [Selig] is desirous of lending his assistance and financial support to said Inventor and has heretofore aided said Inventor with respect to the provision of facilities for experimentation work and has provided funds in furtherance of the commercial advancement of said invention." Plaintiff agreed to assign to Selig a one-half interest in "the entire right, title and interest in and to said invention and improvements thereof; and in and to any and all Letters Patent that may be granted on said invention and/or improvements thereof by the United States or any foreign country." Selig promised in paragraph 2 that he would "advance all funds necessary for the protection of said invention including applications for Letters Patent on said invention and/or improvements thereof, and all necessary expenses for the prosecution of said applications for Letters Patent. * * * [Selig] further covenants and agrees to continue to use his best efforts and to advance funds and to provide facilities for the further development of said invention and/or improvements thereof, and toward interesting third parties in the commercial exploitation of said invention." On April 17, 1937, plaintiff gave the assignment to Selig reciting that it was in consideration of $1.00 "in hand paid to said * * * [plaintiff] by said George A. Selig, and other good and valuable consideration, the receipt of which in full is hereby acknowledged by Lloyd M. Taylor."

Consultations with reference to the invention were had with the General Electric Company in New York, in connection with which the expenses were shared equally. At the suggestion of the company plaintiff and Selig, by their combined efforts, prepared blueprints of the engine and sent them to the company. Receiving a favorable report the "first cast" was completed, the materials therefor being paid for by Selig. He also financed plaintiff's trip to New York with a model of the engine. After the assignment to Selig and the execution of the agreement, he spent $692.94 for the support of plaintiff while the latter was working on the engine and $249.10 for materials in the construction of the engine. In 1938 Selig's funds were exhausted. Plaintiff knew of that fact and they discussed ways and means of further promoting the invention. It was agreed that a corporation would be formed to assist in financing the project. After several contacts were made to further the advancement of the enterprise and had proved unsuccessful, in January, 1940, defendant Harry Selig, defendant George Selig's father, came into the picture and it was arranged by George Selig, Harry Selig and plaintiff that a California corporation be formed. According to the testimony of George Selig, the conversation between them was to the effect that they "needed more money to go ahead, and a corporation suggested itself as the only means of continuing, and Mr. Taylor (plaintiff) agreed in front of us—in front of my father and myself—that that was the only thing to do. And during that conversation it was also brought up that I would go to Los Angeles and continue my business efforts there. My father would help Mr. Taylor (plaintiff) get organized in San Francisco and Oakland to carry out this development." Thereafter George Selig left for southern California and the

California corporation (All Steel Engine Company) was formed by Harry Selig and plaintiff. Plaintiff and George Selig were directors of the corporation. In June, 1941, unsuccessful efforts were made to develop the project through the Ford Motor Company. While in southern California George Selig worked on prospective deals for the manufacture and development of the engine. He knew nothing of the steps in launching the California corporation and was summoned to a meeting of the corporation directors in January, 1941. Prior to that time plaintiff had never at any time claimed or stated that George Selig had failed to advance the money he had agreed to raise or breached the agreement, and at this meeting all of the directors including plaintiff were present. Plaintiff and George Selig gave defendant All Steel Engine Company, the California corporation, an exclusive license to manufacture and sell the engine in the United States and Canada for which plaintiff and George Selig were to receive stock. Difficulties being encountered in issuing the stock of that company, plaintiff, George Selig and others organized a corporation in Nevada, defendant, All Steel Engines, Inc., and gave to it a similar exclusive license. The latter company agreed to issue 51 per cent of its stock to plaintiff and George Selig for the license.

Plaintiff, denominating the present action as one for declaratory relief, sets forth three purported causes of action. In the first he prays for a declaration of his, George Selig's and the two corporation's rights in the invention. He charges that George Selig falsely represented that he had $6,000 and was able and willing to advance $5,000 or $6,000 for the development of the invention, and in reliance thereon, he (plaintiff) assigned a half interest in the invention to George Selig and executed the agreement above mentioned; that in January, 1941, he offered to restore the moneys advanced by George Selig and rescinded the assignment and agreement.

In the second cause of action plaintiff realleges the fraud and asserts that George Selig told him that Harry Selig was a competent promoter and plaintiff relied on his advice and joined in the formation of the California and Nevada corporations and executed the licenses to them.

In the third cause of action plaintiff realleges parts of the first and second causes of action and states that the Nevada corporation transferred its license rights to Kinner Motors, Inc. without plaintiff's consent and that the latter acquired no rights therein.

Plaintiff prays that it be declared that a rescission has taken place, that neither George Selig nor the corporations have any rights in the patent, and that plaintiff is the sole owner thereof.

[1] The court found against plaintiff on his charge that George Selig represented that he had and would advance $5,000 or $6,000 to develop the invention. Plaintiff asserts that that finding lacks evidentiary support. On direct examination George Selig testified that no such representations were made, and evidently the court chose to accept that testimony as true. Plaintiff testified that such representations were made, and George Selig stated on cross-examination that there may have been some talk of $5,000 or $6,000, but any conflict was resolved against plaintiff by the trial court. Rice v. California Lutheran Hospital, 127 Cal.2d 296, 301, 163 P.2d 860.

Plaintiff contends that paragraph 2 of the agreement heretofore quoted required the defendant George Selig to continue to advance all funds necessary for the development of the invention; that the evidence does not support the finding of the court that George Selig would "according to his financial ability, assist in the development of said invention, and endeavor to raise funds to the best of his ability from other sources"; and that George Selig defaulted in his promise. Paragraph 2 of the agreement may be subject to plaintiff's interpretation but it is doubtful. While it is true that it provides that George Selig is to continue to advance funds for further development it does not state how much or the extent of the development to be achieved.

[2, 3] The meaning of the instrument must be ascertained from a reading of the language contained therein, by reference to

the surrounding circumstances, the wording of the assignment, the evidence concerning it, and the conduct of the parties. In the light of those factors and the uncertainty of the agreement it is susceptible to the interpretation that George Selig was to advance funds only according to his financial ability, as found by the court, and to use his best efforts to raise funds. It will be remembered that the agreement was followed by plaintiff's assignment to George Selig of a half interest in the invention and any patents procured thereon. Nothing was said therein about George Selig's financing the project, and the recital of consideration for the transfer is to the effect that it (the consideration) had already been received. George Selig as well as plaintiff was a mechanic working for wages and with limited finances. Plaintiff was aware of that circumstance, and the whole relation between the parties was disclosed to White, the patent attorney, when they consulted him with reference to obtaining a patent. With reference to the agreement and the conversation between plaintiff, George Selig and White, George Selig testified: "Well, I noticed where it confined me there definitely to do a lot of things that I couldn't do, and I asked Attorney White—Mr. Taylor was present—I said, 'I am just a mechanic; I can't—' * * * Well, Attorney White said that he would draw it up in the same way. He said, 'It is only intended for a few days. It doesn't mean anything.' He said, 'The assignment that Taylor will make on the patent application will take care of your actual conditions. In other words, it will satisfy both of you, but,' he said, 'we will put it in here now, and it doesn't matter very much.'" The instruments were executed in 1937. In 1939 or 1940 after George Selig had advanced about $1,800 he and plaintiff had a discussion. George Selig testified: "Well, we had reached a point where we had constructed this first little engine and built up a small test stand, and we had been approached on two or three occasions by individuals who wanted to make us a deal, and at that particular time, why, *Mr. Taylor and I got together in discussing ways and means to promote this thing further. Mr. Taylor was cognizant of the fact that I had reached a point where it was almost impossible for me to put in any money during that time.* So the first discussion took place on forming a corporation and raising money in that manner to promote this thing to a point where we could still interest a third or fourth party. We wanted to put it in the hands of a responsible manufacturer, but not being successful up to that point we needed this additional money to work on further development." The court found that plaintiff did not at any time complain to George Selig that he was not carrying out his agreement or not advancing funds as obligated. (Plaintiff's attack on that finding will be hereafter discussed.) The corporations were formed to finance and develop the invention and plaintiff actively participated in the formation of them and was a director thereof. From all of these circumstances we conclude that the court had evidence to support its finding that George Selig was obligated to advance funds only so far as his finances justified it and that plaintiff was not entitled to rescind the assignment and no rescission had taken place, that is, he had complied with the agreement or any breach thereof was waived.

Plaintiff contends that there is insufficient evidence to support the court's finding that he "did not at any time protest or assert to said defendant [Selig] or at all that the said defendant had misrepresented his financial condition to plaintiff or the extent to which he would assist plaintiff financially; the first such charge on the part of plaintiff was made as a part of his complaint herein." That is not of controlling significance inasmuch as it is only one of the factors forming the basis for the foregoing conclusion. The evidence pointed to by plaintiff is a letter by him addressed to George Selig dated December 11, 1940, more than three years after the agreement and assignment and after the corporations were formed. In that letter plaintiff stated that George Selig had agreed to promote and finance the invention (Selig had been doing that), that he had failed to do so and that he could terminate his rights by a law suit. He referred to the patents as "our patents." He did not say what steps he was going to take. Moreover, on January

24, 1941, he sent a letter to George Selig complaining of the California corporation and Nevada corporation and that they were violating the corporate securities law and of the licenses given to them. He said then he "was going to ask" George Selig to reassign the half interest in the patent and reimburse his advances or go in on a stock deal with him. Otherwise he is going to "take the matter into the courts." No claim is there made that Selig had not performed his agreement.

The contention of lack of evidentiary support for the findings, that plaintiff did not rescind the assignment, that the letter of January 24, 1941, did not constitute a notice of rescission, and that he made no offer to restore, becomes immaterial in the light of the foregoing discussion. Plaintiff had no right to rescind. There was no default on George Selig's part. For the same reasons plaintiff's argument that he accepted Selig's default and thus accomplished a rescission by consent is not pertinent.

[4-6] The court's failure to find whether the corporations acted illegally in reference to transactions of business and issuance of stock in California without complying with the California law is claimed by plaintiff as error on the assumption that a court must find on every material issue. In that connection plaintiff also urges that such illegality was ground for rescission of the assignment of the interest in the invention to George Selig. Whether or not the stock is being illegally issued by the corporations is wholly immaterial so far as the rights under the assignment are concerned. Even assuming that stock is being illegally issued, that is no ground for setting aside the assignment and declaring that George Selig has no interest therein. That transaction is between plaintiff and George Selig and the corporations are not concerned therewith. Moreover, plaintiff was an active participant in the formation of the corporations and is one of the directors thereof. He is not in a position to complain. Nor is the asserted selling of stock by the corporations without a permit ground for plaintiff to rescind the license to the corporations to manufacture and sell the article invented. The court found that no stock had been issued by the California corporation and that the Nevada corporation had agreed to issue 51 per cent of its stock to plaintiff and George Selig for the license granted it. Plaintiff is a participant in the management of the latter corporation. The controversy in this respect would seem to be between plaintiff and the other officers or stockholders, if any, of the corporation but his action does not purport to embrace such issues.

[7] Plaintiff contends that the court erred in failing to fully declare his rights; that it failed to determine how the asserted joint venture between plaintiff and George Selig is to be wound up; that friction has developed between the parties and plaintiff cannot be held to be bound by the assignment of the one-half interest in the invention. The court found that George Selig owned a one-half interest and that the Nevada corporation had the exclusive license to handle the engine. That disposed of all the issues between the parties.

Plaintiff urges that the court erred in declaring George Selig's and the Nevada corporation's rights in the invention and license, respectively, because those defendants merely prayed that plaintiff take nothing. Plaintiff, however, asked "That it be determined what rights defendants and each of them, have, if any, in said patent." True the court found that plaintiff did not desire a declaration of his rights and that it was adjudged that he take nothing but that was merely a method of declaring that his attack on Selig's rights was unfounded. The action was litigated upon the basis that a determination should be made of the respective rights of the parties.

[8] Finally, it is urged that the judgment is too broad in its declaration of the scope of George Selig's right in the invention. The judgment declares that George Selig is the owner of a one-half interest in the patents issued on the invention and "any and all alterations, modifications, improvements or substitutions thereof." The agreement heretofore mentioned called for a transfer to George Selig of a one-half interest in "said invention and improvements thereof." The assignment referred to used the same words and continued, "in-

cluding each and every Letters Patent granted on any application which is a division, substitution for or continuation of said parent application; and in and to each and every reissue or extension of said Letters Patent." The only words which appear in the judgment different from those in the assignment are "Alterations" and "modifications" but the words "improvements and substitutions" in the assignment are at least as comprehensive as those words.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.




28 Cal.2d 587

**In re ABDALE'S ESTATE.**

**RANDALL v. DEPARTMENT OF INSTITUTIONS et al.**

**L. A. 19221.**

Supreme Court of California, in Bank.

July 9, 1946.

Rehearing Denied Aug. 6, 1946.

**1. Descent and distribution ⇐57**

If property had its origin as separate property of predeceased spouse, section 229 regarding succession to separate property of deceased spouse leaving no issue applies and if it has its source as separate property of surviving spouse, section does not apply but the same purpose is accomplished by distribution of property upon death of surviving spouse to the kin of such spouse under other provisions of Probate Code. Probate Code, §§ 225, 226, 229.

**2. Descent and distribution ⇐57**

A wife's half interest in realty which husband acquired before marriage and which he thereafter placed in joint tenancy with wife, was not wife's separate property which, on wife's death, would pass to husband as surviving joint tenant, and hence on husband's death without spouse or issue such half interest did not descend to wife's son by a former marriage but descended to husband's heirs. Probate Code, § 229.

**3. Husband and wife ⇐274(1)**

Under statute regarding succession to community property where there is no issue and making the statute applicable when the estate or any portion thereof "was community property" of decedent and a previously deceased spouse, and became vested in decedent on death of such spouse by right of survivorship in joint tenancy between such spouse and decedent, quoted phrase refers to character of the property before it was placed in joint tenancy and Legislature intended to ignore the fact that a vested one-half interest as separate property may be created, and viewed the property in its original form as community property. Probate Code, § 228.

**4. Statutes ⇐231**

The provisions of the Probate Code regarding succession to community property where there is no issue and regarding succession to separate property of a deceased spouse leaving no issue must be read together. Probate Code, §§ 228, 229.

**5. Descent and distribution ⇐57**
**Husband and wife ⇐257**

Funds procured by hypothecation of separate property of a spouse are separate property of that spouse, and hence if payment of assessment by wife on property which husband had placed in joint tenancy with wife was by way of gift, wife was the source of that part of estate attributable to such payment and such part would be distributable to wife's son by a former marriage where property on wife's death passed to husband as surviving joint tenant and husband died without spouse or issue. Probate Code, § 229.

**6. Executors and administrators ⇐49**

Where husband created joint tenancy in realty which husband acquired before marriage and wife borrowed money by mortgaging her separate property and with such sum paid a special assessment for sewer purposes levied against the realty held in joint tenancy, if such payment was

by way of loan, payment of assessment created an indebtedness in husband but did not affect origin of the realty, and such indebtedness, if unsatisfied and not otherwise barred, should have been included as an asset in wife's estate. Probate Code, § 229.

**7. Descent and distribution ⊂=57**

The statute providing that any portion of intestate's estate which has been separate property of previously deceased spouse should, in the event that intestate had neither spouse nor issue, descend to children of previously deceased spouse, does not apply unless property allegedly distributable thereunder is identified as the former separate property of deceased spouse, and burden is on party claiming thereunder to so identify the property. Probate Code, § 229.

**8. Husband and wife ⊂=49¾(6)**

The payment of debts of husband with separate property of wife is presumed to be a loan and not a gift.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of William Abdale, deceased, wherein Charles Raymond Randall filed a petition to determine heirship, opposed by the Department of Institutions of the State of California as guardian in the estate of Alfred Abdale, incompetent, and others. From an order determining heirship, the guardian and others appeal.

Reversed with directions.

Prior opinion, 165 P.2d 550.

Robert E. Hatch, of San Francisco, Brandenburger & White and Wm. A. White, all of Sacramento, for appellants.

Joseph J. Goodman, S. Arion Lewis, Jr., and Harold R. Spence, all of Los Angeles, for respondent.

TRAYNOR, Justice.

The contestants appeal from an order in a proceeding under section 1080 of the Probate Code that the petitioner, Charles R. Randall, is the sole heir at law of William Abdale, deceased. The decedent acquired various parcels of real estate before his marriage on August 13, 1929, to Anna Marie Becker. On December 15, 1930, he had title to this property transferred to himself and his wife as joint tenants. It appears that Mrs. Abdale received her interest as joint tenant as a gift from her husband. He again became the sole owner of the property on the death intestate of Mrs. Abdale on February 14, 1941. He sold the property for $19,855 a few months before his death intestate on February 2, 1943. His estate consists solely of funds and securities derived from the proceeds of this sale. The decedent's only income during his marriage was from his separate property, and no evidence was presented that any contribution was made to the real estate from community funds. The decedent left neither spouse nor issue. The petitioner is the son by a prior marriage of Anna Marie Abdale, and is her only issue. Contestants are the legal representatives of the son, declared incompetent, of a predeceased brother of decedent, the children of another predeceased brother, and the legal representative of a brother deceased since the death of decedent.

Petitioner relies on section 229 of the Probate Code: "If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead or in a joint tenancy between such spouse and the decedent, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the deceased spouse and to their descendants by right of representation." *

* Corresponding provisions with respect to community property are found in section 228 of the Probate Code: "If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and

The contestants contend that this section is not applicable and that the estate is distributable to them under section 225 of the Probate Code, on the grounds that the governing principle of sections 228 and 229 is that the origin or source of the property determines its distribution and that the property in question did not have its origin or source as separate property of the predeceased spouse, since it was originally the separate property of the decedent and any interest therein of the predeceased spouse came to her as a gift from the decedent.

The petitioner contends that even though the property was originally the separate property of the decedent, the predeceased spouse held her interest in the joint tenancy as her separate property (citing Estate of Harris, 9 Cal.2d 649, 659, 72 P.2d 873), which therefore became vested in the decedent within the meaning of section 229 upon her death. According to this contention, it is immaterial that William Abdale was the sole owner of the property before the creation of the joint tenancy, or that it was through his efforts that the property was accumulated. The question is thus posed whether separate property given by one spouse to another can be viewed as property that in retrospect "was separate property" of the donor spouse or only as separate property of the donee spouse within the meaning of section 229, if the donor spouse survives the donee spouse and thereby reacquires the property. If the donor spouse predeceases the donee spouse, it is clear that the property will be distributed upon the death of the latter intestate without spouse or issue, as property that "was separate property" of the predeceased donor spouse. Estate of Brady, 171 Cal. 1, 4, 151 P. 275; Estate of Harris, 9 Cal.2d 649, 658, 72 P.2d 873. Thus if a husband gives his separate property to his wife and predeceases her, on her death intestate leaving neither spouse nor issue his kin will inherit the property under section 229. It would be a strange anomaly if should he survive her and thereby reacquire the property, on his death intestate leaving neither spouse nor issue, not his kin but his wife's would inherit the property under section 229.

After reviewing the history of sections 228 and 229, in Estate of Rattray, 13 Cal. 2d 702, 713, 91 P.2d 1042, 1048, this court stated: "It is apparent from the history of these code provisions and the various changes therein that ever since the amendment in 1905 [Stats.1905, p. 608], wherein the origin or source of the property was first set up as one of the determining factors in the descent and distribution of the estate of a decedent dying intestate without issue, that there has been a consistent attempt to work out a reasonable, consistent scheme of distribution wherein upon the death of a decedent intestate without issue, instead of the whole property going to the relatives of the last surviving spouse, the property should go back to the relatives of the spouse from which title was derived. The scheme in general, as was fair and reasonable, provided that the separate property of a predeceased spouse should go back in its entirety to the relatives of said predeceased spouse, and that the community property of the spouses should be shared equally by the relatives of the predeceased spouse and the relatives of the surviving spouse since both spouses are deemed to have contributed equally to its acquisition. * * * It will be noted that the provisions relative to the separate property of the predeceased spouse and

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a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead, or in a joint tenancy between such spouse and the decedent or was set aside as a probate homestead, such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of said deceased spouse and to their descendants by right of representation."

relative to the community property of the spouses * * * were intended to furnish one general plan of distribution based upon the same underlying fundamental principle, that the origin or source of the property should determine its distribution."

[1, 2] This principle has been uniformly recognized in the construction of these provisions. Estate of Perkins, 21 Cal.2d 561, 569, 576, 134 P.2d 231; Estate of Rattray, supra, 13 Cal.2d 702, 713, 91 P.2d 1042; Estate of Slack, 13 Cal.2d 721, 727, 91 P.2d 1052; Estate of Harris, 9 Cal.2d 649, 660, 72 P.2d 873; Estate of Putnam, 219 Cal. 608, 611, 28 P.2d 27; Estate of McArthur, 210 Cal. 439, 445, 292 P. 469, 72 A.L.R. 1318; Estate of Hill, 179 Cal. 683, 688, 178 P. 710; Estate of Brady, 171 Cal. 1, 4, 151 P. 275; Estate of Nielsen, 65 Cal. App.2d 60, 62, 149 P.2d 737; Estate of Taitmeyer, 60 Cal.App.2d 699, 704, 141 P.2d 504; Estate of Flood, 55 Cal.App.2d 410, 412, 130 P.2d 811; see 27 Cal.L.Rev. 748. If the property had its origin or source as the separate property of the predeceased spouse, section 229 applies. If it had its source as separate property of the surviving spouse, the section does not apply, but the same purpose is accomplished by distribution of the property upon the death of the surviving spouse to the kin of such spouse under other provisions of the Probate Code. See Prob.Code, §§ 225, 226. Thus, in Estate of Harris, 9 Cal.2d 649, 659, 660, 661, 72 P.2d 873, property having its origin in separate property of both spouses was held distributable on the death of the surviving spouse, on the basis of its origin, in part to the family of the surviving spouse and in part to the family of the predeceased spouse, even though during the marriage the property was placed in joint tenancy, then transferred in its entirety to the predeceased spouse and finally retransferred to the surviving spouse. Although the opinion speaks in terms of the law of trusts, this court looking beyond the character of the property immediately preceding its transfer to the surviving spouse, was concerned with its distribution according to its source. In Estate of Putnam, 219 Cal. 608, 28 P.2d 27, and Estate of Flood, 55 Cal.App.2d 410, 130 P.2d 811, the property was transferred by the surviving spouse to a third party and later retransferred by the third party to such spouse. The section was held inapplicable on the death intestate of the surviving spouse, without spouse or issue, since the surviving spouse had unconditionally disposed of the property. On its retransfer by the third party donor to the surviving spouse, this spouse and not the predeceased spouse became the source of the property. The "title [of the surviving spouse] * * * was a new title". Estate of Putnam, supra, 219 Cal. 608, 611, 612, 28 P.2d 27, 29. So in the present case, the decedent himself, and not the predeceased spouse, was the source of the property, for it was acquired through his efforts before it came by gift to the predeceased spouse. The earlier acquisition of the property by the decedent in the present case from an outside source corresponds to the acquisition by the surviving spouse from the third party donors in the Flood and Putnam cases and prevents the application of section 229 for the same reason, namely, the property did not have its origin or source as the separate property of the predeceased spouse within the meaning of the section.

[3, 4] Petitioner's contention that the character of the property at the time of the death of the predeceased spouse is controlling would render sections 228 and 229 inconsistent with each other. Section 228 applies when "* * * the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, and * * * became vested in the decedent on the death of such spouse by right of survivorship * * * in a joint tenancy between such spouse and the decedent." (Stats.1939, p. 2992.) Section 229 likewise applies when "* * * the estate or any portion thereof was separate property of a previously deceased spouse, and * * * became vested in the decedent on the death of such spouse by right of survivorship * * * in a joint tenancy between such spouse and the decedent." The phrase "was community property" in section 228 necessarily refers to the character of the property before it was placed in joint tenancy. Accordingly, it is held that

"the Legislature intended to ignore the fact that a vested one-half interest as separate property may be created, and viewed the property in its original form as community property." Estate of Taitmeyer, supra, 60 Cal.App.2d 699, 703, 711, 712, 141 P.2d 504, 507; Estate of Nielsen, 65 Cal.App.2d 60, 62, 149 P.2d 737. Since the two sections must be "read and construed together" (Estate of Rattray, 13 Cal.2d 702, 708, 91 P.2d 1042, 1046), consistency requires that the phrase "was separate property" in section 229 also be interpreted as referring to the character of the property before it was placed in joint tenancy. A distribution under section 228 of property that was community property before it was placed in joint tenancy, on the theory that the two spouses are deemed to have contributed equally to its acquisition can find a consistent counterpart in section 229 only if property originally acquired by one of the spouses before it was placed in joint tenancy is distributed in recognition of the fact that this spouse alone contributed to its acquisition.

[5] Petitioner testified that Mrs. Abdale borrowed "twelve or fourteen hundred dollars" by mortgaging real estate that was her separate property, and with this sum paid a special assessment for sewer purposes levied before 1936 against the real estate held in joint tenancy. Contestants contend that this transaction is not material. The transaction is of significance, however, for funds procured by the hypothecation of separate property of a spouse are separate property of that spouse (Heney v. Pesoli, 109 Cal. 53, 61, 41 P. 819; Flournoy v. Flournoy, 86 Cal. 286, 293, 24 P. 1012, 21 Am.St.Rep. 39; Carle v. Heller, 18 Cal.App. 577, 582, 123 P. 815; see 3 Cal.Jur.Supp. 536), and if the payment of the assessment was by way of gift, Mrs. Abdale was the source of that part of the estate attributable to such payment. See Estate of Brady, supra, 171 Cal. 1, 4, 151 P. 275. Accordingly, this part would be distributable to petitioner under section 229. Such part may be segregated from the remainder of the estate by determining what amount of the estate bears the same proportion to the total estate as the amount of the assessment bears to the reasonable market value of the real estate immediately after the assessment was paid.

[6-8] Petitioner's testimony fails to reveal, however, whether the alleged payment was by way of gift or loan. See Tilden v. Tilden, 81 Cal.App. 535, 541, 254 P. 310. If it was the latter, the payment of the assessment created an indebtedness in William Abdale but did not affect the origin of the real estate. Such indebtedness, if unsatisfied and not otherwise barred, should have been included as an asset in Mrs. Abdale's estate. See Estate of Pepper, 158 Cal. 619, 625, 112 P. 62, 31 L.R.A.,N.S., 1092. It is settled that section 229 does not apply unless property allegedly distributable thereunder is traced and identified as the former separate property of the predeceased spouse (Estate of Brady, supra, 171 Cal. 1, 5, 151 P. 275; Pickens v. Merriam, 274 F. 1, 11), and that the burden is on the party claiming thereunder to so identify the property. Estate of Rattray, supra, 13 Cal.2d 702, 706, 91 P.2d 1042; Estate of Harris, supra, 9 Cal.2d 649, 662, 72 P.2d 873; Estate of Simonton, 183 Cal. 53, 60, 190 P. 442; see 9 Cal.Jur. 416, 563. It is presumed, moreover, that the payment of debts of the husband with separate property of the wife is a loan, not a gift. See McKay v. McKay, 184 Cal. 742, 746, 195 P. 385; 3 Cal.Jur. Supp. 565. It is therefore for petitioner to establish that the alleged tax assessment was paid by way of gift with separate property of Anna Marie Abdale, and to prove the amount of the estate attributable to such payment.

The order is reversed and the cause remanded with directions that the estate be distributed to contestants, except that any part thereof that is attributable to a gift of separate property of Anna Becker Abdale shall be distributed to petitioner.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.

## MERCHANT SHIPPERS ASS'N v. KELLOGG EXPRESS & DRAYING CO.

S. F. 17302.

Supreme Court of California, in Bank.

July 16, 1946.

Rehearing Denied Aug. 12, 1946.

**1. Carriers ⇐4**

When a forwarder assembles various lots of goods for transportation in carload lots and by contract assumes the responsibility for safe carriage from point of receipt to point of destination, the forwarder becomes a "freight forwarder" or forwarder with common carrier liability as well as a "forwarder shipper". Interstate Commerce Act, § 402(a) (5), 49 U.S.C.A. § 1002(a) (5).

See Words and Phrases, Permanent Edition, for all other definitions of "Freight Forwarder" and "Forwarder Shipper".

**2. Indemnity ⇐13(1)**

When a freight forwarder who has assumed responsibility for safe carriage from point of receipt to point of destination entrusts to a carrier goods which are damaged in transit and freight forwarder pays consignee upon a legitimate claim, freight forwarder may maintain an action against the negligent carrier.

**3. Bailment ⇐1**
**Carriers ⇐4, 76**

Freight forwarder, which, in absence of a counter-order by owner, has right to control shipment incident to its assumption of responsibility for safe through carriage of freight to point of destination, stood in position of a bailee with added liability of a common carrier so that liability did not terminate upon delivery to a carrier but continued for full carriage period to point of destination, and freight carrier's right of action against a third person for damage to freight in transit was not dependent upon factor of actual possession.

**4. Carriers ⇐132**

General rule that, in action against carrier, burden is on plaintiff to prove that property was in good condition when delivered to carrier may be relied upon when there is no direct proof of an accident resulting in injury.

**5. Carriers ⇐134**

In action by freight forwarder against carrier for damage to machinery being shipped, proof that carrier dropped the machine from freight platform to street, evidence that damage found to exist after accident, consisting of cracks and breaks in end frames, was of type which could reasonably be expected from the dropping of heavy machinery, and absence of proof that machinery was not in good condition when received by carrier justified inference that cracks and breaks in end frames occurred when machine was dropped.

**6. Evidence ⇐317(10)**

Testimony by freight forwarder's assistant vice-president that freight forwarder had been notified by consignee that machine had been injured by defendant carrier was hearsay.

**7. Appeal and error ⇐837(11)**

Where hearsay testimony is admitted without objection, it may be considered on appeal in support of trial court's findings.

**8. Damages ⇐113**

Where machine was new at time it was damaged by carrier and evidence justified conclusion that machine could not completely be repaired and restored to its previous condition with value which it had prior to injury, proper measure of damages was difference between its value before injury and its value after repairs plus reasonable cost of making repairs.

**9. Damages ⇐113**

The measure of damages which limits recovery to cost of repairs of damaged machinery is applicable only where injured machinery can be entirely repaired, presupposing that such machinery can be restored to its former state with no depreciation in its former value.

**10. Appeal and error ⇐882(3)**

Where parties tried case upon theory that there had been no change in value of damaged machine from time repairs had been completed until time of trial, defendant could not complain on appeal that

expert evidence and findings relating to value were directed to time of trial rather than to an earlier date.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Merchant Shippers Association against Kellogg Express & Draying Company to recover for damage to freight delivered to defendant, a common carrier, for transportation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, see 164 P.2d 852.

Derby, Sharp, Quinby & Tweedt and Lloyd M. Tweedt, all of San Francisco, for appellant.

Jacobs, Blanckenburg & May and G. B. Blanckenburg, all of San Francisco, for respondent.

SPENCE, Justice.

This is an appeal from a judgment for damages which the court found plaintiff had sustained by reason of defendant's handling of a piece of machinery in the course of delivery to its destination. As grounds for reversal, defendant challenges: (1) The right of plaintiff to maintain this action; (2) the sufficiency of the evidence to sustain the findings upon which defendant's liability was based; and (3) the propriety of the damage award. The record does not support defendant's position.

Both plaintiff and defendant, California corporations, were engaged in interstate commerce, plaintiff as a "freight forwarder" and defendant as a common carrier. On or about August 1, 1942, defendant, by agreement with plaintiff, took delivery of certain woodworking machinery—"a Heath 2 Drive Sander Machine"—encased in a crate and weighing 5,500 pounds, at the freight shed of the Associated Forwarders in San Francisco. Said machine had been shipped by Beach Manufacturing Co. from Montrose, Pennsylvania, as consignor, to Defense Plant Corporation, % Moore Drydock Company, Oakland, California, as consignee, through plaintiff as the "freight forwarder." In defendant's attempt to load the machine on a rack trailer at the freight shed in San Francisco, both the trailer and the machine were overturned, tearing off the skids on which the machine was bedded as it dropped from the freight platform to the street. Some six days later defendant caused the skids to be replaced and delivered the machine to the consignee. Immediately thereafter the consignee discovered the machine had numerous breaks and cracks, and notified plaintiff. Plaintiff authorized the consignee to have the machine repaired. After the repairs were made, the consignee still refused to accept the machine and filed a claim with plaintiff for its alleged value of $2,626.05, plus cost of repairs amounting to $325.53, or a total of $2,951.58, which sum plaintiff paid in full. Thereupon plaintiff brought the present action and recovered judgment for $2,051.58, upon the finding of the trial court that $900 was then the value of the machine in the possession of plaintiff.

The business association of the parties appears from the undisputed testimony of plaintiff's assistant vice-president. He testified that plaintiff had taken possession of the crate of machinery at Montrose, Pennsylvania, and agreed to transport it to Defense Plant Corporation, % Moore Dry Dock Company at Oakland, California; that at that time plaintiff had an agreement with defendant providing that the latter should pick up at a designated point in San Francisco all plaintiff's shipments destined for Oakland at a flat rate irrespective of compensation collected by plaintiff. He further testified that plaintiff was engaged in the assembling of less than carload shipments of freight into full cars in the eastern part of the United States and forwarding them to strategic points on the Pacific Coast for distribution to the ultimate consignees, and that the damaged machinery was shipped in a Santa Fe railroad car which plaintiff supervised and consolidated, and on which it paid the freight. He also testified that plaintiff was a freight forwarding company possessing a certificate from the Interstate Commerce Commission. To supplement his testimony, a copy of the

"concurrence agreement" between plaintiff and defendant as to freight tariffs was introduced in evidence.

[1, 2] In attacking at the outset plaintiff's right to maintain this action, defendant refers to the complaint as affirmatively showing, and to the evidence as substantiating, that "plaintiff was a mere forwarder and that other parties were the shipper, consignee and bailee in possession of the machine at the time of the alleged damage." It is defendant's theory that as a forwarder, plaintiff's interest did not extend beyond the initial shipping arrangements and that title to the machine rested with the consignee, who became the only party entitled to litigate this damage claim. As authority for its position, defendant cites such cases as Lawrence v. Minturn, 17 How. 100, 58 U.S. 100, 15 L.Ed. 58, and Bruner v. Chicago & E. I. R. Co., 87 Ind.App. 374, 161 N.E. 680. These cases merely stand for the well-recognized proposition that when title has passed to the buyer on delivery to the carrier, and when the lawful possession of the bill of lading is in the consignee, the consignor may not bring an action for damages to the goods occurring while in transit. They have no application here where plaintiff's interest in the shipped goods was that of a "freight forwarder" as defined by the Interstate Commerce Act, 49 U.S.C.A. § 1002(a) (5), to be "any person which (otherwise than as a carrier subject to chapter 1, 8, or 12 of this title) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) *assumes responsibility for the transportation of such property from point of receipt to point of destination,* and (C) *utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapter 1, 8, or 12 of this title.*" (Emphasis added.)

When a forwarder assembles various lots of goods for transportation in carload lots, and by contract assumes the responsibility for safe carriage from point of receipt to point of destination, the forwarder becomes, so to speak, a freight forwarder, or forwarder with common carrier liability, as well as a forwarder shipper. Heath v. Judson F. Forwarding Co., 47 Cal.App. 426, 430, 190 P. 839; cf. United States v. Chicago Heights Trucking Co., 310 U.S. 344, 346, 60 S.Ct. 931, 84 L.Ed. 1243. Distinguishable on the basis of actionable interest is the forwarder who merely accumulates goods for shipment, for a fee which is paid by the shipper, and who assumes no responsibility beyond shipping the goods by a reliable common carrier. Here through the "concurrence agreement" between the parties, it appears that defendant, engaged by plaintiff to attend the final carriage of the machine to the designated consignee, fits into the pattern of plaintiff's full undertaking as the latter's delivery agent. When such freight forwarder entrusts to a carrier goods which are damaged in transit, and the freight forwarder pays the consignee upon a legitimate claim, the freight forwarder should be permitted to maintain an action against the negligent carrier. (Bunge, Law of Draymen, Freight Forwarders and Warehousemen, p. 117.)

[3] There is no claim here that the consignee was not the lawful holder of the bill of lading. But, as appears from the testimony of plaintiff's assistant vice-president, the significant circumstance is that in the absence of a counterorder by the owner, plaintiff had the right to control the shipment incident to its assumption of responsibility for the "safe through carriage" of the machine to its point of destination. United States v. Chicago Heights Trucking Co., supra, 310 U.S. 344, 346, 60 S.Ct. 931, 84 L.Ed. 1243. Such freight forwarder stands in the position of a bailee with the added liability of a common carrier. Heath v. Judson F. Forwarding Co., supra, 47 Cal. App. 426, 430, 431, 190 P. 839. Thus, unlike an ordinary bailee, such freight forwarder assumes an obligation tantamount to that of an insurer of the goods entrusted to it, and its liability does not terminate upon delivery

to a carrier. With responsibility so extended for the full carriage period to the point of destination, its correlative right of action against a third person for damage to the goods in transit should not depend on the factor of actual possession. These considerations affecting plaintiff's distinct status as a freight forwarder negative any force which defendant seeks to attach to its citation of the case of Schuette v. Larson, 44 Cal.App.2d 296, 112 P.2d 275.

[4, 5] The next question to be considered is the sufficiency of the proof of defendant's liability for the alleged damage. Defendant cites the general rule that "the burden is on plaintiff to prove that the property was in good condition when delivered to the carrier." 13 C.J.S., Carriers, § 254, subsec. d, p. 538; Ohio Galvanizing & Mfg. Co. v. Southern Pacific Co., 6 Cir., 39 F.2d 840, 841. While this general rule may be relied upon when there is no direct proof of an accident resulting in injury, we believe that the evidence here was sufficient under the circumstances to sustain the findings imposing liability upon defendant. The happening of the accident was admitted by the pleadings and was proved by uncontradicted evidence. The admitted damage found to exist after the accident, consisting of cracks and breaks in the end frames, was obviously the type of damage which might reasonably have been expected to result from the dropping of heavy machinery. There was no proof that the machinery was not in good condition when received by defendant, but on the contrary it was shown that it was then encased in a crate and was mounted on skids. Under these circumstances the trial court was justified in drawing the reasonable inference that the cracks and breaks in the end frames occurred when the machine was dropped to the street and the skids were torn off. Furthermore, despite certain denials in defendant's answer, the case was apparently tried upon the theory that the above-mentioned damage to the machine occurred when it dropped to the street.

[6, 7] Thus, plaintiff's assistant vice-president was permitted to testify, without objection, that his company had been notified by the consignee "that that machine had been injured by the Kellogg Express and Draying Company." This was hearsay testimony, but it is well settled that where hearsay testimony is admitted without objection, such evidence may be considered on appeal in support of the trial court's findings. Weiss v. Bank of America, 57 Cal. App.2d 892, 895, 896, 135 P.2d 584, and cases there cited; West Coast L. Ins. Co. v. Crawford, 58 Cal.App.2d 771, 784, 138 P.2d 384.

Defendant's final objection concerns the amount of the damage award. The trial court found that plaintiff had "been damaged in the sum of $2,626.05, the value of the machine before the injury, plus the sum of $325.53, the cost of repairs, or a total of $2,951.58, less the sum of $900, the present value of the machine after the injury, or a net of $2,051.58." Thus it appears that the damage award included both the cost of repairs and the purported difference between the value of the machine immediately before the injury and its value after the repairs had been made. Defendant contends first that the trial court applied the wrong measure of damages; and second, that in any event there was no evidence to sustain the findings upon which the award of $2,051.58 was based. We are of the opinion that neither of these contentions may be sustained.

[8, 9] Under the evidence hereinafter discussed and the facts found by the trial court, the measure of damages applied was in accord with the rules set forth in Byrne v. Western Pipe & Steel Co., 81 Cal.App. 270, 272–274, 253 P. 776. See, also, 25 C. J.S., Damages, § 83, pp. 597–599. It is undisputed that the machine was a new one at the time of injury, and there was ample evidence to justify the conclusion of the trial court that the machine could not be completely repaired and restored to its previous condition with the value which it had prior to the injury. In the Byrne case, supra, it is said 81 Cal.App. at page 274, 253 P. at page 777, that "if the damaged property cannot be completely repaired, the measure of damages is the difference between its value before the injury and its value after the repairs have been made, plus the reasonable cost of making the re-

pairs. [Citing cases.] The foregoing rule gives the plaintiff the difference between the value of the machine before the injury and its value after such injury, the amount thereof being made up of the cost of repairs and the depreciation notwithstanding such repairs." The rule urged by defendant, which limits the recovery to the cost of repairs, is applicable only in those cases in which the injured property "can be *entirely* repaired." (Emphasis added.) Rhodes v. Firestone Tire & R. Co., 51 Cal. App. 569, 573, 197 P. 392, 394. This latter rule presupposes that the damaged property can be restored to its former state with no depreciation in its former value. 25 C.J.S., Damages, § 83, pp. 597–599.

Turning to the evidence, we believe it sufficient to sustain the findings and award. It appears that the machine was a precision machine and that the repairs which were made did not restore it to its former state with no depreciation in its former value. There was evidence showing that the value of the machine after it was repaired was much less than before the injury; that the repairs did not put it in such condition of working efficiency as would sustain a guarantee by the manufacturer; that the machine would still have to be completely overhauled and tested, preferably at the factory, before it would give satisfactory precision service in accordance with its design; that even when so overhauled and adjusted, it would nevertheless remain a secondhand machine on the market; and that this type of machine was "slow moving" on the market because of the limited demand.

[10] While the repairs were made in the latter part of 1942 and the trial was held in June, 1944, the machine had remained in plaintiff's warehouse in the meantime and had not been used. The parties apparently tried the case upon the theory that the value of the machine immediately after the completion of the repairs was the same as the value at the time of the trial. Plaintiff's expert witness, testifying on direct examination and without objection, fixed the value of the machine "today" as "$750." On cross-examination by counsel for defendant, he was asked: "What, in your opinion, is the value of the machine?" He replied: "$750 right where it is, as is." He indicated that additional work to the amount of about $500 was required in order to sell it on the market for $1,500, in which event he would expect to make about $250 as profit in the transaction. Defendant introduced in evidence a written offer in the sum of $750 made by this witness on January 19, 1943. Defendant also introduced in evidence a written offer in the sum of $1,100 made on January 25, 1943, by a person who was not called as a witness. This purported offer was introduced on stipulation as follows: "Mr. Tweedt: With Mr. Blanckenburg's consent, I will offer in evidence a bid made on this machine, as is, where it is. Mr. Blanckenburg: We stipulate that you received that. Mr. Tweedt: We will offer that as Defendant's next exhibit." No further reference to this offer is found in the record; and it does not appear that said offer was ever received by plaintiff or that it was made known to plaintiff at any time prior to the trial. As the parties tried the case upon the theory that there had been no change in the value of the machine from the time the repairs had been completed until the time of trial, defendant may not now complain that the expert evidence and the findings relating to value were directed to the time of the trial rather than to an earlier time.

From what has been said it is apparent that there was sufficient evidence to sustain a finding that the value of the machine following the repairs was but $750. While it is difficult to ascertain the exact means by which the trial court arrived at the figure of $900, the error, if any, in fixing the value at $900, rather than at $750, was in defendant's favor, as the increased amount was deducted in computing the actual award. There was also sufficient evidence to sustain the finding that the value prior to the injury was $2,626.05, as there was evidence showing that that figure represented the cost of the new machine to the consignee. 10 Cal.Jur. § 127, p. 846.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

28 Cal.2d 509

## CITY OF LOS ANGELES v. COLE et al.

L. A. 19575.

Supreme Court of California, In Bank.

June 27, 1946.

Rehearing Denied July 24, 1946.

**1. New trial ⇐153**

Where some issues are to be tried by jury and others by court and no judgment for either party can be entered until all issues are determined, new trial proceedings, instituted after jury's verdict and before court's determination of other issues, are premature. Code Civ.Proc. §§ 656, 657.

**2. New trial ⇐153**

The amendatory statute, providing that notice of intention to move for new trial may be filed either before entry of judgment or within ten days after receiving written notice of entry thereof, did not change rule that new trial proceedings, instituted after jury's verdict on some issues, but before court's determination of other issues, are premature. Code Civ. Proc. §§ 656, 657, 659.

**3. Eminent domain ⇐224**

Plaintiff's notice of intention to move for new trial after jury's verdict determining market value of some parcels of land involved in eminent domain proceeding, but before determination of other issues by court, filing of its fact findings or conclusions of law, and entry of judgment, was premature and ineffectual for any purpose, and efficacy of second trial thereafter could not be predicated on theory of completed trial followed by valid proceeding leading to granting of new trial. Code Civ.Proc. §§ 656, 657, 1237.

**4. Eminent domain ⇐223**

In eminent domain proceedings, jury's verdict, fixing value of property taken, is conclusive on court. Code Civ.Proc. § 1237; Const. art. 1, § 14.

**5. Eminent domain ⇐224**
**Estoppel ⇐79**

When trial of condemnation case has progressed no further than determination of issue of damages by jury, parties may consent to retrial of such issue and thereby estop themselves from questioning validity of proceedings on retrial. Code Civ.Proc. § 1237, Const. art. 1, § 14.

**6. Stipulations ⇐3, 14(1)**

Generally, a valid stipulation may be made concerning any steps of action or proceeding, and such stipulation is binding on parties, so as to preclude objection to procedural matters expressly or impliedly agreed on. Code Civ.Proc. § 283.

**7. Estoppel ⇐79**

Where court's jurisdiction of subject matter of eminent domain proceeding was unquestioned, parties invoking court's jurisdiction to proceed on stipulation with retrial of cause after granting of plaintiff's motion for new trial following jury's determination of market value of certain parcels of land involved and before determination of other issues by court were estopped to question efficacy of retrial proceedings. Code Civ.Proc. §§ 283, 1237.

**8. Eminent domain ⇐222(4)**

In city's condemnation proceeding, instructions to jury that price paid by plaintiff for other property was not proper basis for determining market value of land involved and that price fixed by agreement between landowner and public corporation seeking to condemn land cannot be taken as criterion of market value of other land in vicinity, correctly stated law governing jury's determination of market value of land in light of evidence adduced. Code Civ.Proc. § 1237.

**9. Evidence ⇐142(1)**

In condemnation proceeding, evidence of price paid by condemning party to owners of adjacent lands, however similar to land in controversy, is incompetent, as such price is not fair test of market value of land involved. Code Civ.Proc. § 1237.

**10. Trial ⇐296(7)**

In city's condemnation proceeding, instructions that price paid by plaintiff or fixed by agreement for other property was not proper basis for determining market value of property involved were not prejudicial to defendants because of fail-

ure to instruct that such evidence is admissible on cross-examination to test fairness or honesty of witness' opinion on direct examination as to value of property involved, where such testimony was permitted on cross-examination of plaintiff's witnesses and court instructed jury as to propriety of considering such testimony for impeachment purposes. Code Civ. Proc. § 1237.

**11. Eminent domain ⇐202(4)**

In ascertaining market value of realty sought to be condemned, any evidence tending to show its physical condition, purpose for which it is employed, or any reasonable use for which it may be adapted, is competent. Code Civ.Proc. § 1237.

**12. Eminent domain ⇐263**

In city's condemnation proceeding, erroneous exclusion of testimony of architect and structural engineer as to geology and physical characteristics of lands involved as affecting use to which they could be put was not prejudicial to defendant landowners, where their expert witnesses testified concerning their opinions as to highest and best use of lands and no questions asked them on cross-examination even remotely suggested inadaptability thereof for such use because of any geological or structural defects. Code Civ. Proc. § 1237; Const. art. 6, § 4½.

CARTER, TRAYNOR and SCHAUER, JJ., dissenting.

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Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action in eminent domain by the City of Los Angeles against Henrietta Hawley Cole and others and Concepcion Calderon De Acosta and others to acquire 12 parcels of land for a new alignment of streets. From a judgment for plaintiff and orders denying defendants' motions for a new trial, to declare a second trial after a jury's verdict finding the market value of certain parcels void, and to set aside the jury's second verdict and the judgment, defendants De Acosta and others appeal.

Appeals from orders dismissed, and judgment affirmed.

Prior opinion, Cal.App., 162 P.2d 306.

Burr & Smith and Philip Grey Smith, all of Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, and S. V. O. Prichard, Asst. County Counsel, both of Los Angeles, for respondent.

SPENCE, Justice.

This is an action in eminent domain (Code Civ.Proc. § 1237) instituted by the plaintiff city to acquire twelve parcels of land in the Los Angeles Civic Center area for a new alignment of certain streets therein. For the determination of the market value of parcels 5, 9 and 11, a "first trial" was had before a jury and a verdict was returned. Thereafter, and before any other issue was tried and before findings were signed or judgment was entered, plaintiff filed a so-called "notice of intention to move for a new trial." An order was made granting said motion "particularly upon the ground that the evidence is insufficient to justify the verdict of the jury." From said order defendants interested in the parcels in question filed an appeal, which they later abandoned upon joining with plaintiff city in a stipulation requesting that the action "be set for retrial." A "second trial" was then had, wherein a jury determined the market value of the three parcels, the court determined other issues in the condemnation proceeding, findings were filed, and a judgment was entered. Defendants moved for a new trial. They also moved the court to have the "second trial" in its entirety declared void—to have the jury's verdict therein and the judgment set aside. These motions were denied. From the judgment and from the orders denying said motions, defendants prosecute this appeal.

The first point to be considered is the efficacy of the "second trial." Appellants claim that the entire "second trial proceedings" were void and should have been set aside because respondent's so-called "motion for a new trial" in the original proceedings was made in consequence of the jury's verdict on the single issue of market

value and before the determination of the remaining issues, such as use and necessity, and before the filing of any findings of fact or conclusions of law; that said motion was therefore premature and the trial court was without power to grant it. Reclamation District No. 556 v. Thisby, 131 Cal. 572, 574, 63 P. 918; In re Estate of McKenna, 138 Cal. 439, 440, 71 P. 501; San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson, 30 Cal.App. 405, 413-415, 158 P. 768; Hinshaw v. Superior Court, 45 Cal.App. 105, 106, 107, 187 P. 41.

Respondent contends: (1) That the 1923 amendment, Stats.1923, p. 751, of section 659 of the Code of Civil Procedure was "deliberately calculated to change the rule announced" in the cited cases; and (2) that in any event, appellants are now estopped by their conduct from questioning the action of the trial court in setting aside the verdict of the jury and proceeding with the "second trial." We cannot agree with respondent's first contention but we are of the opinion that respondent's second contention must be sustained.

[1] With respect to respondent's first contention, the cited authorities are conceded to be directly in point unless the 1923 amendment to section 659 changed the rule thereby established. Those authorities lay down the rule that in a case where some of the issues are to be tried by a jury and other issues are to be tried by the court, and where no judgment in favor of either party can be entered until all issues have been thus determined, new trial proceedings are premature when instituted after a verdict of the jury and before the determination of the other issues. The reason for the rule is that there is no completed "trial and decision" (Code Civ.Proc. § 656) and there is no "party aggrieved" (Code Civ. Proc. § 657) until such time as there has been a completed trial and decision, at which time nothing remains to be done except to enter judgment in favor of the prevailing party.

In the cited condemnation cases (Reclamation District No. 556 v. Thisby, 131 Cal. 572, 63 P. 918; San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson, 30 Cal.App. 405, 158 P. 768; Hinshaw v. Superior Court, 45 Cal.App. 105, 187 P. 41), it is clear that no judgment could have been entered upon the verdict fixing damages unless and until the court had determined the other issues, such as use and necessity, in favor of the condemner. If those other issues had thereafter been determined adversely to the condemner, then condemnation would have been denied and the verdict fixing damages would have become immaterial. In Re Estate of McKenna, supra, 138 Cal. 439, 71 P. 501, there was a contest of a will in which only some of the issues had been submitted to the jury and those issues had been decided in favor of the proponents of the will. It is likewise clear in that case that no judgment or order admitting the will to probate could have been entered upon the verdict unless and until the court had determined the other issues, such as due execution, in favor of the proponents. If those other issues had thereafter been determined adversely to the proponents, then the will would have been denied probate and the verdict determining soundness of mind and lack of undue influence would have become immaterial.

[2] When section 659 of the Code of Civil Procedure was amended in 1923 to provide that the notice of intention to move for a new trial could be filed "either before the entry of judgment or within ten (10) days after receiving written notice of the entry of the judgment," it does not appear that the amendment was intended to change the rule of the cited cases so as to permit a motion for a new trial to be made before a completed "trial and decision" (Code Civ. Proc. § 656) and before there was a "party aggrieved" (Code Civ.Proc. § 657). If the 1923 amendment were to be so construed, then an order granting a new trial would be subject to an appeal and upon affirmance of the order, a new trial would be required in a case which, if allowed to proceed in the regular course through a completed trial, might be finally determined in favor of the appealing party. We are of the view that no such change, with the resulting useless expenditure of the time and effort of the parties and of the appellate courts, was ever intended.

There is nothing in Re Estate of Green, 25 Cal.2d 535, 154 P.2d 692, which is contrary to the view which we have expressed. On the will contest there involved, contestant raised three issues, to wit: "Unsoundness of mind, undue influence, and fraud." She later abandoned the fraud issue and the remaining issues were decided in her favor by the verdict of the jury. The proponents' motion for a new trial was granted and contestant appealed from the order. This court held that "the notice of intention was not prematurely filed, and that the trial court had jurisdiction to pass upon the motion for a new trial made in pursuance of the notice of intention filed before the entry of judgment but subsequent to the rendition of the verdict of the jury." 25 Cal.2d at page 541, 154 P.2d at page 695. In re Estate of McKenna, supra, was distinguished upon the ground that in the Green case "all issues raised by contestant, except one which had been abandoned, were submitted to the jury and decided by their verdict. As these issues were decided in favor of contestant, nothing remained to be done but to enter judgment." 25 Cal.2d at page 539, 154 P.2d at page 694. And in further distinguishing the McKenna case and others, this court quoted approvingly from Krug v. John E. Yoakum Co., 27 Cal.App.2d 91, at page 96, 80 P.2d 492, at page 494, where it was said: "The cases cited by the appellant are not controlling here for the simple reason that in every one of them there remained something more for the court to do before judgment could be entered."

[3] It is entirely clear in the present case, that "there remained something more for the court to do before judgment could be entered." We therefore conclude from the cited authorities that the notice of intention to move for a new trial was prematurely filed and was ineffectual for any purpose (see, also, Root v. Daugherty, 201 Cal. 12, 14, 255 P. 181; In re Estate of Barker, 207 Cal. 112, 114, 276 P. 992; Middleton v. Finney, 214 Cal. 523, 527, 6 P.2d 938, 78 A.L.R. 1104; Reeve v. Jahn, 9 Cal. 2d 244, 250, 70 P.2d 610) and that the efficacy of the so-called "second trial" cannot be predicated upon the theory that there had been a completed trial followed by a valid proceeding leading to the granting of a new trial. Under the facts before us, however, we do not believe that the foregoing conclusion compels the further conclusion that the so-called "second trial" must be declared void, and that a third trial of the issue of damages must be had. We therefore turn to respondent's second contention that appellants are estopped by their conduct from questioning the action of the trial court in setting aside the verdict and proceeding with the "second trial."

When the purported new trial was granted upon the ground of the insufficiency of the evidence to sustain the jury's verdict in the "first trial," appellants took an appeal from the order granting the new trial. While appellants could have prevailed upon that appeal upon the ground that the motion had been prematurely made, they no doubt realized the futility of pursuing an appeal from the order, as the trial court's action had clearly indicated that if and when the trial might be completed and an award might be made in their favor, based upon the jury's verdict, a new trial would then be granted. Appellants therefore (1) abandoned their appeal from the order; (2) entered into a stipulation with respondent agreeing "that said action may be set for retrial by a jury"; and (3) thereafter freely participated in the retrial without any objection. These facts distinguish this case from any of the authorities to which reference has been made.

[4-6] Our Constitution (art. I, § 14) provides that in eminent domain proceedings, the issue of damages "shall be ascertained by a jury, unless a jury be waived * * *" and it is therefore well settled that the verdict of the jury in fixing the value of the property taken is conclusive upon the court. 10 Cal.Jur. § 75, p. 369; California Southern Railroad Co. v. Southern Pacific Railroad Co., 67 Cal. 59, 62, 7 P. 123; Vallejo & Northern Railroad Co. v. Reed Orchard Co., 169 Cal. 545, 555, 556, 147 P. 238; Housing Authority v. Forbes, 51 Cal.App.2d 1, 8, 124 P.2d 194. Nevertheless, when a trial of a condemnation case has progressed no further than the determination of the issue of damages without

the determination of the other issues, there appears to be no reason why the parties may not consent to the retrial of the issue of damages and no reason why such consent should not thereafter estop the parties from questioning the validity of the proceedings on the retrial. Generally speaking, a valid stipulation may be entered into concerning any of the steps of an action or proceeding (Code Civ.Proc. § 283) and such stipulation is, of course, binding upon the parties, precluding objection to matters concerning procedure which have been expressly or impliedly agreed upon. 23 Cal. Jur. § 12, p. 826.

[7] It has been said that "Jurisdiction of the subject matter cannot be conferred by estoppel; but one who invokes or consents to a court's jurisdiction is estopped to question it on any ground other than that the court lacks jurisdiction of the subject matter." 21 C.J.S., Courts, § 108, p. 161; see, also, Harrington v. Superior Court, 194 Cal. 185, 188, 228 P. 15; In re McDonald, 45 Cal.App. 480, 489, 187 P. 991. Here the court had unquestioned jurisdiction of the subject matter involved in the uncompleted trial and, after the parties had invoked the jurisdiction of the court to proceed upon stipulation with a retrial of the partially tried cause, they should be estopped to question the efficacy of such retrial proceedings. To hold otherwise would permit the parties to trifle with the courts. The law should not and in our opinion does not countenance such action.

The situation presented here is not comparable to that involved in the case of Tabor v. Superior Court, Cal.Sup., 170 P.2d 667, the opinion in which has been this day filed. There an order granting a new trial was made after a completed trial and decision and after the entry of judgment. It was held that the timely filing of the notice of intention to move for a new trial was jurisdictional and that in the absence of such timely filing, the trial court had no jurisdiction to set aside the judgment and grant a new trial despite the fact that the parties had raised no objection to the hearing of the motion. In the instant case, no completed trial or judgment was involved and the retrial was had pursuant to stipulation. It is simply a situation in which the parties, during the course of an uncompleted trial and at a time when no judgment could be entered, gave their written consent to the retrial of one of the issues after the trial court had clearly indicated that the jury's determination of that particular issue could not be permitted, after the trial of the remaining issues, to sustain any judgment based thereon. As the trial court had jurisdiction of the subject matter and as the parties consented to the action of the trial court in proceeding with the retrial of the single issue theretofore tried, we are of the opinion that this is precisely the type of case in which the doctrine of estoppel should be applied.

[8, 9] There now remain for consideration two points unavailingly raised by appellants as grounds for reversal of the judgment entered in the "second trial." The first matter is the claim that the court erred in giving to the jury at the request of respondent these two instructions:

"You are instructed that the price paid by plaintiff condemner for other property is not a proper basis for determining the market value of the property here in question. Such sales are not a fair criterion of value for the reason that they are in the nature of a compromise. The fear of the one party or the other to take the risk of legal proceedings ordinarily results in the one party's paying more or the other party's taking less than is considered to be the fair market value of the property. For these reasons such sales are not proper evidence of value in any case, whether in a proceeding by the same condemning party or otherwise."

"You are instructed that the price fixed by an agreement between the owner of property and a public corporation seeking to condemn his land by virtue of eminent domain cannot be taken as a criterion of the market value of other land in the vicinity. The price so fixed by compromise, when there can be no other purchaser and the seller has no option to refuse to sell and can only elect between the acceptance of the price offered and the delay, uncertainty and trouble for legal proceedings of an assessment, is not a reasonable or fair

test of just compensation for the defendant's property. It is in no sense a sale in the market."

The property involved is located upon the top of what is known as Fort Moore Hill, which overlies the North Broadway Tunnel and is immediately adjacent to and northerly from the Hall of Justice in downtown Los Angeles. Respondent produced three, and appellants two, market value witnesses. The disparity in the appraisals of these witnesses was due in the main to the different matters which they took into consideration in formulating their respective opinions. Thus, it appears from the record that the expert witnesses produced by appellants predicated their opinions as to market value almost wholly upon transactions (as far as sales were concerned) by which one or the other of the interested governmental agencies had acquired property within the Civic Center area, either by purchase or condemnation. Indeed, in this regard, appellants frankly admit in their briefs that "these purchases by the City of Los Angeles and other government entities formed a large part of the basis for the opinions of the experts called by the appellants. * * *" On the other hand, the expert witnesses called by respondent city expressly excluded these purchases by gevernmental agencies within the Civic Center area from their consideration as a basis for their expressed opinions, although they had familiarized themselves with the nature and detail of such transactions. Appellants were permitted to cross-examine respondent's witnesses at length as to their knowledge of such transactions and thereby adduced from said witnesses on cross-examination the price paid and other details regarding such transactions.

Contrary to appellants' claim, the challenged instructions correctly state the law governing the jury's determination of the market value problem in the light of the evidence adduced. As claimed by respondent, these instructions are in part a paraphrase and in part a precise reproduction of a quotation from Mr. Lewis in his treatise on Eminent Domain, 1st Ed., § 447; 3d Ed., § 667, as discussed with approval in the early case of City of San Luis Obispo v. Brizzolara, 100 Cal. 434, 436, 34 P. 1083. From such authority the rule appears to be settled in this state that it is not competent for either party in a condemnation proceeding to put in evidence the amount paid by a condemning party to the owners of adjacent lands, however similar they may be to that in controversy, because the price paid under such circumstances "is not a reasonable or fair test of market value." This rule is in accord with the weight of authority. See Annotation, 118 A.L.R. 893 et seq.

[10] Nor does the record sustain appellants' objection that these instructions were prejudicial because in their statement of the law they did not contain the additional rule announced in the Brizzolara case, supra, 100 Cal. at page 437, 34 P. at page 1084, that while evidence of the character specified is not admissible as evidence in chief, such evidence is admissible by way of cross-examination "for the purpose of testing the fairness or honesty of an opinion which the witness may have given upon his direct examination, in relation to the value of the property involved in the action." As heretofore noted, in the present action such testimony was permitted on cross-examination of respondent's witness, and in a separate instruction the court advised the jury as to the propriety of their taking such testimony into consideration for the aforesaid limited purpose—its impeaching effect. Reclamation District No. 730 v. Inglin, 31 Cal.App. 495, 500, 160 P. 1098, and cases therein cited. Considering "the instructions * * * as a whole" and regarding "each in the light of all the others," as the jury was properly admonished to do, it is plain that the court fully and fairly stated the law applicable to the evidence relating to market value.

[11, 12] Appellants' final point of challenge of the judgment concerns the court's refusal to permit them to prove, through testimony of an "architect and structural engineer," the geology and physical characteristics of the hill and tunnel as facts affecting the use to which the particular parcels involved could be put. The rule on this point is stated in the case of City of Beverly Hills v. Anger, 127 Cal.App. 223, 228, 15 P.2d 867, 869, as follows: "In ascertaining the market value of real prop-

erty, any evidence which tends to show the physical condition of the property, the purpose for which it is employed, or any reasonable use for which it may be adapted, is competent."

While the proffered testimony was therefore admissible, its rejection does not appear to have been prejudicial under the situation disclosed by the record.

Appellants' two expert witnesses on market value were permitted to testify at length concerning their opinions as to the highest and best use of the property under condemnation—the erection of "an apartment house or other building" of medium height —and no questions were asked on cross-examination which, as respondent states, "even remotely suggested that the present properties were not adaptable for the highest and best use thus indicated by defendants' witnesses, either by reason of any geological or structural defect in the land which would render it either dangerous or unsuitable for such a purpose." In these circumstances it is apparent that both parties to this proceeding were in agreement as to the adaptability of the parcels of land involved and as to the absence of any geological difficulties offered by the hill or tunnel in relation to the possible type of construction consistent with the attested "highest and best use"; and it is further apparent that the witnesses for both appellants and respondent assumed these favorable physical characteristics affecting the property under condemnation in giving their opinions as to market value. From this standpoint the testimony of appellants' expert engineer would have served only to corroborate an undisputed fact established by competent evidence, and the exclusion of his testimony, though erroneous, could not have affected the decision upon the material issue of market value. On this basis the error would not justify a reversal of the judgment. Const. art. VI, § 4½.

The attempted appeals from the orders denying appellants' motion for a new trial and their motion to declare void the entire "second trial" are dismissed. The judgment is affirmed.

GIBSON, C. J., and SHENK and EDMONDS, JJ., concurred.

CARTER, Justice.

I dissent. I agree with what is said in the majority opinion relative to the abortive order granting a new trial and the estoppel invoked against the appellants relative thereto. I also agree that the exclusion of the testimony of appellants' engineering witness was not prejudicial under the circumstances related in said opinion, but I do not agree with that portion of the majority opinion which approves the giving of instructions to the jury in an eminent domain proceeding to the effect that the price paid by the condemner for other similar property in connection with its contemplated project cannot be considered by the jury as evidence of the value of defendant's property involved in the instant proceeding.

The precise issue in this case with reference to the instructions given to the jury is whether or not evidence of prices paid by the condemner for other property similar to defendant's, the property in controversy, is admissible to show the value of defendant's property. But that issue is really only one aspect or phase of a broader problem, to wit, is evidence of the price paid at sales, whether to the condemner or any other person, of other property similar to defendant's, admissible to establish the value of defendant's property. Logic, reason and authority compel the conclusion that evidence of the price paid at sales of similar property to persons other than the condemner is admissible to prove the value of the property in controversy. That such evidence is *relevant* to the value of the property in question cannot be doubted. Value is nothing more than the price for which property may be sold, and the value of other like property is highly probative as to the value of the property in question. It cannot be doubted that in the commercial field there is *no more commonly accepted method for* ascertaining property values than by comparison with other property and the price for which it is sold. It is aptly said: "that since value is a money-estimate of a marketable article possessing certain definable qualities, the value of other marketable articles possessing substantially similar qualities is strongly evidential and is so treated in commercial life; all the

argument and protestation conceivable cannot alter the fact that the commercial world perceives and acts on this relevancy." Wigmore on Evidence, 3d Ed., vol. II, p. 505, § 463. The overwhelming weight of authority supports the proposition that evidence of sales of other similar property and the price paid is admissible to prove market value of the property in question. Norwich Assessment Committee v. Pointer, 2 K.B. 47; Stanton v. Embry, Administrator, 93 U.S. 548, 23 L.Ed. 983; Miller v. United States, 9 Cir., 125 F.2d 75; United States v. Meyer, 7 Cir., 113 F.2d 387; Tennessee Coal, Iron & R. Co. v. State, 141 Ala. 103, 37 So. 433; Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 5 S.W. 792, 4 Am. St.Rep. 51; Crusoe v. Clark, 127 Cal. 341, 59 P. 700; Loloff v. Sterling, 31 Colo. 102, 71 P. 1113; Flemister v. Central Georgia Power Co., 140 Ga. 511, 79 S.E. 148; Basye v. Hayes, 58 Idaho 569, 76 P.2d 435; Rhodes v. Davis, 374 Ill. 65, 28 N.E.2d 113; Department of Public Works & Buildings v. Diggins, 374 Ill. 11, 27 N.E.2d 826; West Kentucky Coal Co. v. Dyer, 161 Ky. 407, 170 S.W. 967; Warren v. Wheeler, 21 Me. 484; Mayor, etc., of Baltimore v. Hurlock, 113 Md. 674, 78 A. 558; Iris v. Town of Hingham, 303 Mass. 401, 22 N.E.2d 13; Forsyth Boulevard v. Forsyth, 127 Mo. 417, 30 S.W. 188; Eames v. Southern New Hampshire Hydro-Electric Corp., 85 N.H. 379, 159 A. 128; Village of Reeder v. Hanson, 55 N.D. 331, 213 N.W. 492; In re Hudson Coal Co., 327 Pa. 247, 193 A. 8; Hervey v. City of Providence, 47 R.I. 378, 133 A. 618; Kean v. Landrum, 72 S.C. 556, 52 S.E. 421; Union R. Co. v. Hunton, 114 Tenn. 609, 88 S.W. 182; Davis v. Cotey, 70 Vt. 120, 39 A. 628; Seattle & M. Ry. Co. v. Gilchrist, 4 Wash. 509, 30 P. 738; American States Security Co. v. Milwaukee N. R. Co., 139 Wis. 199, 120 N.W. 844; Morrison v. Cottonwood Development Co., 38 Wyo. 190, 266 P. 117; Wigmore on Evidence, 3d Ed., § 463; Orgel on Valuation Under Eminent Domain (1936), § 135, et seq.; 18 Am.Jur., Eminent Domain, § 351; 17 A.L.R. 101; Maxwell v. Iowa State Highway Commission, 223 Iowa 159, 271 N.W. 883, 118 A.L.R. 869. There are cases in California which hold that evidence of such sales is not admissible to prove value, that is, valuation witnesses cannot be examined concerning other sales on *direct* examination.

City of Los Angeles v. Hughes, 202 Cal. 731, 262 P. 737; In re Estate of Ross, 171 Cal. 64, 151 P. 1138; Arnold v. Producers' Fruit Co., 141 Cal. 738, 75 P. 326; Spring Valley W.-W. v. Drinkhouse, 92 Cal. 528, 28 P. 681; Central Pac. R. Co. v. Pearson, 35 Cal. 247; Thompson v. Stoakes, 46 Cal. App.2d 285, 115 P.2d 830; Atchison, T. & S. F. R. Co. v. Southern Pac. Co., 13 Cal. App.2d 505, 57 P.2d 575; Tatone v. Chin Bing, 12 Cal.App.2d 543, 55 P.2d 933; Hibernia Sav., etc., Soc. v. Ellis Estate Co., 132 Cal.App. 408, 22 P.2d 806; City of Los Angeles v. Deacon, 119 Cal.App. 491, 7 P.2d 378; Merchants' Trust Co. v. Hopkins, 103 Cal.App. 473, 284 P. 1072; Fishel v. F. M. Ball & Co., Inc., 83 Cal.App. 128, 256 P. 493; Palladine v. Imperial Valley F. L. Ass'n, 65 Cal.App. 727, 225 P. 291; Reclamation Dist. No. 730 v. Inglin, 31 Cal.App. 495, 160 P. 1098. But it has been intimated or held that the rule is to the contrary. Betts v. Southern California, etc. Exchange, 144 Cal. 402, 77 P. 993; Crusoe v. Clark, 127 Cal. 341, 59 P. 700; Moore v. Maryland Casualty Co., 100 Cal.App. 658, 280 P. 1008; Dean v. Hawes, 29 Cal.App. 689, 157 P. 558. And it has been held that the *value* of other similar property may be shown to establish the value of the particular property in controversy. (The price paid at sales of such other property is its market value on a competitive market under our system of free enterprise.) Shoemaker v. Acker, 116 Cal. 239, 48 P. 62; Cleland v. Thornton, 43 Cal. 437. On cross-examination a valuation witness may be questioned in regard to his knowledge of sales of other property for the purpose of impeachment. City and County of San Francisco v. Tillman Estate Co., 205 Cal. 651, 272 P. 585; East Bay Mun. Utility Dist. v. Kieffer, 99 Cal.App. 240, 278 P. 476, 279 P. 178; Los Angeles Gas & Elec. Corp. v. Etienne, 83 Cal.App. 645, 257 P. 123; and see cases cited supra. If such evidence is admissible on cross-examination it cannot be denied that it must be considered *relevant* to the value of the property in controversy. Otherwise what difference would it make whether the expert valuation witness did or

did not know of other sales if the existence of such sales had no bearing upon the value of the property in controversy.

So much for *relevancy*, but a ground commonly given for the exclusion of evidence of the price paid for similar property on direct examination is that to do so permits an excursion into collateral matters (e. g., whether the other property is similar, the circumstances of the sale, and its proximity to the instant problem) resulting in a confusion of issues and loss of time. There is little danger of confusion. The issue is value and there should be no difficulty in maintaining a clear course between other sales and that issue. Loss of time should not be a reason to exclude highly pertinent evidence. If so-called collateral issues are permitted on cross-examination why should they not be permitted on direct? Indeed the trier of fact is confused by such a distinction. Merely asking the witness as to his knowledge of other sales leaves the matter wholly up in the air. The jury knows nothing of the pertinency of such other sales and, as a practical matter, the trial court may instruct unavailingly until Doomsday to the effect that reference to such other sales was only for the purpose of impeachment. The impression has been made on the jury. Why not allow such evidence on direct examination as relevant to value and permit a full disclosure to the jury of the relevancy of the other sales? Other sales are in fact not collateral to the main issue. They are directly pertinent to it. What property is selling for in the community is the measure of the market price. In any event the modern tendency is to liberalize the rules of evidence. The discretion of the trial judge is a barrier against fanciful flights into remote subjects. In answer to the objection with regard to collateral issues "it may be noted that this objection may or may not exist in a given instance, and that the rational and practical way of meeting it is to allow the trial Court in its discretion to exclude such evidence when it does involve a confusion of issues, but otherwise to receive it." Wigmore on Evidence, 3d Ed., vol. II, p. 505, § 463. See, 4 Cal.L.Rev. 151, 152.

In my opinion the cases heretofore cited which hold that the sales of other similar property are not admissible to prove value are clearly unsound and should be overruled. Their force is considerably weakened if not destroyed by the addition in 1937 of section 1872 to the Code of Civil Procedure. It reads: "Whenever an expert witness gives his opinion, he may, upon direct examination, be asked to state the reasons for such opinion, and he may be fully cross-examined thereon by opposing counsel." The main purpose of that section was to do away with the former court made rule that an expert witness could not give his reasons. *But if he may give his reasons those reasons may consist of reference to prices paid in sales of similar property in the vicinity.* Certainly, he could give such reason for he could be asked on cross-examination concerning other sales. Being able to testify to these sales as reasons, they are direct and probative evidence on the value of the property in controversy.

In the instant case the challenged instructions to the jury dealt with the evidence of the price paid at sales of other property to the condemner in acquiring property for its project. On the general theory evidence of those sales was probative evidence of value. The only question is whether it should be excluded because it violated the substantive law test of market value; that is, a buyer and seller willing to deal and not acting under compulsion. That, however, is a matter going to the weight or value of the evidence not its admissibility and can properly be governed by the discretion of the trial judge. See Wigmore on Evidence, 3d Ed., vol. II, p. 505, § 463; 4 Cal.L.Rev. 151, 152. If the circumstances of a particular sale are such that it was not a free bargain between the parties it might not be very valuable in ascertaining market value, but that depends upon the facts. All sales merely because they are to the condemner are not under fear or compulsion or lacking in freeness. The condemner may well be paying what it feels the property is worth and the buyer selling for a price he believes is fair. The only case in California that declares evidence of such sales

inadmissible is City of San Luis Obispo v. Brizzolara, 100 Cal. 434, 34 P. 1083, and there it was conceded that evidence relating to other sales could be *developed on cross-examination*. If it was proper there as bearing on value it certainly was pertinent on direct examination. There are authorities declaring evidence of sales to the condemner admissible in a condemnation suit. Shaw v. Monongahela R. Co., 110 W.Va. 155, 157 S.E. 170; Hadley v. Board of Chosen Freeholders of Passaic County, 73 N.J.L. 197, 62 A. 1132; Ross v. Commissioners of Palisades Interstate Park, 90 N.J.L. 461, 101 A. 60; Eames v. Southern New Hampshire Hydro-Electric Corp., 85 N.H. 379, 159 A. 128; Louisiana Highway Commission v. Merchant, La.App., 174 So. 696; Washington Home v. Hazen, 63 App. D.C. 185, 70 F.2d 847; Maxwell v. Iowa State Highway Commission, 223 Iowa 159, 271 N.W. 883, 118 A.L.R. 869, 898; Orgel on Valuation under Eminent Domain, § 146. In Eames v. Southern New Hampshire Hydo-Electric Corp., supra, 159 A. at page 130, the court said: "What the courts, holding to the majority view [that other sales to the condemner are not admissible], have seemingly done, is to adopt the more pronounced phenomena incident to sales to a condemnor as a conclusive test of their probative character. Although such sales are less likely to have useful evidentiary value than sales to strangers, no logical reason in principle is perceived why they should not have the same treatment. Their relative immunity from irrelevant influences is merely a matter of degree, and their reasonable freedome therefrom purely a matter of proof. The test of the probative character of a given sale of either class is to be found in answer to the inquiry whether the motivating circumstances influencing the parties thereto were such as probably to materially affect the price paid, and therefore to destroy its usefulness as a standard of value."

In my opinion the giving of the instructions complained of constituted prejudicial error justifying a reversal of the judgment.

TRAYNOR and SCHAUER, JJ., concurred.



28 Cal.2d 567

## HOLLAND et al. v. BYRAM, Treasurer of Los Angeles County, et al.

L. A. 19566.

Supreme Court of California, in Bank.

July 3, 1946.

1. Officers ⇐100(1)

The 1944 amendment to constitution permitting Legislature to suspend provision against increase of compensation of any county, township or municipal officer after his election or during his term of office, declared a state-wide policy authorizing for a limited period the removal of restrictions prohibiting salary increases during terms of office. Const. art. 11, § 5, as amended in 1944.

2. Justices of the peace ⇐15

Where constitutional provision prohibiting salary increases during term of office contained a section granting to counties having freeholders' charters the power to adopt such restrictive provision, which restriction was placed in the Los Angeles county charter, 1944 amendment authorizing temporary removal of restriction during war emergency and legislation enacted pursuant thereto applied equally to all counties in the state including counties with freeholders' charters, hence, Los Angeles county ordinance increasing salaries of justices of the peace during their term of office was valid. St.1945, p. 316; Const. art. 11, § 5, as amended in 1944.

Original proceeding in mandamus on the petition of Cecil D. Holland and others, justices of the peace in Los Angeles county, against Howard Byram, as treasurer of Los Angeles county, etc., and others, directing county auditor to approve and treasurer to pay their salaries as increased by county ordinance during their terms of office.

Peremptory writ issued.

Morris Lavine, of Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, S. V. O. Prichard, Asst. County Counsel, and Claude H. McFadden, Dep. County

Counsel, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

Petitioners, justices of the peace in Los Angeles County, seek a writ of mandate directing the auditor to approve and the treasurer to pay their salaries as increased by county ordinance during their terms of office.

When petitioners were elected, the Constitution of California provided that the compensation of any county, township or municipal officer should not be increased after his election or during his term of office. Cal.Const. art. XI, § 5. The section was amended in 1944 so as to permit the Legislature to suspend the provision for any period during which the United States was engaged in war and for a year after termination of hostilities. Pursuant to this constitutional amendment, the Legislature suspended the prohibition for the period of the war and six months thereafter. (Stats.1945, ch. 5, p. 316.) In reliance thereon, the Board of Supervisors of Los Angeles County passed the ordinance under which petitioners claim the increased compensation.

Respondents contend that the ordinance is invalid because it is in conflict with section 52, article 12, of the Los Angeles County charter which prohibits salary increases during terms of office. It is argued that since the constitutional amendment does not expressly authorize the suspension of restrictions contained in county charters, the provision of the Los Angeles County charter prohibiting increases remains in force.

The constitutional amendment was submitted to the people as a wartime emergency measure. The argument presented to the voters in support of its adoption was as follows: "The need for this amendment at the present time is great * * * With wartime conditions, many of the elective officers in the various counties find themselves working for much less than their deputies. * * * Nonelective officials are entitled to salary adjustments whenever necessary, and elective officials should be granted the same consideration, especially during times like the present, with the steady rise in the cost of living. * * * In many instances what was one time a part-time job has grown into more than a full-time job, with no opportunity under the present constitutional provision to give relief to the official affected. This is only a wartime measure, and * * * is only in keeping with the many other adjustments we have been obliged to make to keep abreast with the changing conditions, and to further the war effort. If adopted, this amendment will provide means whereby the Legislature, at its discretion and upon submission of proper evidence and investigation thereof, may bring about needed salary adjustments during the war emergency." Arguments, p. 11, Proposed Amendments to Const., submitted to Electors at General Election, Nov. 1944.

[1, 2] It is clear therefore that the constitutional amendment was intended to declare a statewide policy authorizing for a limited period the removal of restrictions prohibiting salary increases during terms of office. The article thus amended contains the section which grants to counties having freeholders' charters the power to adopt the restrictive provision contained in the Los Angeles County charter. Inasmuch as the effect of the constitutional amendment and the legislative act adopted pursuant thereto was to suspend the constitutional restriction for the designated period, it is only reasonable to suppose that the same effect was intended with respect to the charter provision. Obviously, the necessity for the wartime suspension was equally applicable to all counties in the state, including counties with freeholders' charters. In other words, the conditions brought about by the war generally affected all public officers and were of concern to the state as a whole. The constitutional amendment and the legislation enacted pursuant thereto, as here construed, give full effect to the declared policy.

Let the peremptory writ of mandate issue.

SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

75 Cal.App.2d 423

**PEOPLE v. WELLS.**

**Cr. 4005.**

District Court of Appeal, Second District, Division 1, California.

July 18, 1946.

**Criminal law ⇐511(1)**

Testimony of defendant's daughter to acts of intercourse with defendant was sufficiently corroborated, even if daughter were considered an accomplice, to authorize conviction of incest.

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Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Elmer Jackson Wells was convicted of incest, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was accused by information of the crime of incest in three counts. A jury was duly waived. This is an appeal from the judgment of guilty on all counts.

It is contended on appeal that the evidence is insufficient to support the judgment.

The principal witness for the prosecution was defendant's daughter, who was the alleged victim of the offense. Juanita Wells, the daughter, was twenty-one years of age. It was established by the testimony of the daughter that the intimate relation between them had gone on for years; that they had always occupied the same bed.

Appellant's contention that the evidence is insufficient to support the judgment is based on the proposition that the daughter is an accomplice. There is testimony that the alleged acts were consented to, but as the result of fear produced by threats. Assuming that the daughter was in fact and in law an accomplice, nevertheless, there was sufficient corroboration. It was established that after the arrest, defendant was confronted by the daughter and accused of the acts constituting the alleged offense. A shorthand reporter recorded the interview which was conducted in part by Officer Kellogg, a portion of which is as follows:

"'Kellogg: Within the past two months he has had relations, sexual relations, with you two or three times a week?

"'Juanita Wells: Yes.

"'Kellogg: He is your true father, not your stepfather?

"'Juanita Wells: Yes, my true father.

"'Kellogg: He has kept you under very close supervision during working hours at the home? Does not let you go out with your mother, sisters or your mother?

"'Juanita: No.

"'Miss—that is myself. During the time of the commission of all these acts you have objected?

"'Juanita: I was doing it in fear.

"'Kellogg: He threatened you if you ceased these acts, to cause you pain?

"'Juanita: Yes.

"'Kellogg: Has he hit you before?

"'Juanita: Yes, because I wouldn't agree he would twist my arm.

"'Kellogg: Well, have you any answer to any of that? (Juanita Wells leaves the room.)

"'Wells answers: I wanted to ask her (keeps mumbling).

"'Kellogg: Have you had intercourse with your daughter any time over a period of four years?

"'Wells: Well, I don't think it would be fair until I talked to Juanita. (The girl Juanita is brought back into the room.)

"'Wells to Juanita: I want to ask you, is it all over between you and me?

"'Juanita: I guess it is.

"'Kellogg: Do you mean in a sexual way?

"'Wells mumbles: I don't know.

"'Wells to Juanita: Do you want me to keep my mouth shut?

"'Juanita: If it will make you feel better, you don't have to. Just don't say anything. I won't tell any lies. (Juanita Wells leaves room.)

"'Wells: Just let it go the way she said; I won't deny anything she says.

"'Smith: Was it your fault all this happened?

"'Wells: Yes, like everything she said.

"'Smith: Isn't it a fact, as she stated, that you threatened her, practically forced your daughter to submit to your sexual passions?

"'Wells: I heard her say so.

"'Smith: Did she submit to your sexual passions; she did, didn't she?

"'Kellogg: Is she lying? (Wells mumbles.)

"'Then: You have to ask her, I don't affirm and I don't deny.

"'Kellogg: You don't deny any part of what she said in front of you?

"'Wells: Would it do any good if I did?

"'Kellogg: I am giving you an opportunity now of denying the statements made by your daughter, and ask you in the presence of Detective Sergeant Smith, myself and the stenographer here, do you deny them?

"'Wells: Just let her tell what she wants to.

"'Smith: Was she telling the truth?

"'Wells: I don't admit all of it.

"'Smith: Did you have sexual intercourse with your daughter?

"'Wells: I won't admit that.'"

Officer Imler testified with regard to a visit one night to defendant's house. The light was on in the room occupied by defendant. The witness testified, "the shades didn't meet with the edge of the window frame, it was possible to look into the room from two different angles so that I could see approximately three-quarters of the room. Q. Could you see the bed from where you stood? A. Yes, I could." The witness then described what occurred, which testimony in itself amounts to substantial corroboration.

No evidence was offered on behalf of defendant at the trial; the defendant did not testify.

There are no errors in the record, the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.




## THE VON HAMM-YOUNG CO., Limited, v. CITY AND COUNTY OF SAN FRANCISCO.*

Civ. 13067.

District Court of Appeal, First District, Division 1, California.

June 27, 1946.

Rehearing Denied July 27, 1946.

Hearing Granted Aug. 22, 1946.

**1. Commerce ⇐72**

The commerce clause does not permit those engaged in interstate commerce to evade a state tax burden merely because of increase in the cost of doing business. U.S.C.A.Const. art. 1, § 8, cl. 3.

**2. Commerce ⇐54**

Whether state statute discriminates against particular property in interstate commerce must be determined from facts of the particular case. U.S.C.A.Const. art. 1, § 8, cl. 3.

**3. Taxation ⇐4**

Generally, a state may tax commodities within its borders unless there is a superior jurisdictional right by some other governmental agency such as another state or the United States with whose powers its exercise might conflict.

**4. Commerce ⇐72**

Goods in transit in interstate commerce are not subject to tax by jurisdiction through which they pass on their interstate journey. U.S.C.A.Const. art. 1, § 8, cl. 3.

**5. Commerce ⇐33(1)**

A commodity in transit to another state or foreign country comes within protection

* Subsequent opinion 178 P.2d 745.

of commerce clause until it comes to rest at its destination. U.S.C.A.Const. art. 1, §§ 8, 10.

**6. Commerce ⇐72**

Whether state may impose tax on commodities moving in interstate commerce depends upon character and kind of commodity, intention of owner, possible change of intent, continuity of transit, control owner retains to change destination, purpose and cause of interruption, length of interruption and whether it results in profit or loss to owner. U.S.C.A.Const. art. 1, § 8, cl. 3.

**7. Appeal and error ⇐996**

If evidence is susceptible to opposing inferences an appellate court is bound by trial court's conclusion on a matter of fact.

**8. Commerce ⇐72**

Where goods purchased from manufacturers and dealers by taxpayer, doing business outside of California, for shipment to Hawaii but which because of shortage of shipping space during war was stored temporarily in warehouses in San Francisco until shipping space was available and for no other purpose, the goods were within protection of commerce clause and were not subject to personal property taxes in California. U.S.C.A.Const. art. 1, § 8, cl. 3.

**9. Commerce ⇐72**

Where taxpayer engaged in purchasing merchandise for shipment to Hawaii was compelled by shortage of shipping space during war to store goods temporarily in warehouses in San Francisco, goods purchased by taxpayers in San Francisco were not outside protection of commerce clause and subject to personal property tax in California on ground that interstate journey of those goods had not begun. U.S.C.A.Const. art. 1, § 8, cl. 3.

**10. Commerce ⇐72**

Intoxicating liquor purchased for shipment to Hawaii but temporarily stored in warehouses in San Francisco to await availability of shipping space was not subject to personal property tax in California on ground that intoxicating liquor in view of 21st Amendment was not within protection of commerce clause. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 21.

**11. Taxation ⇐543(7)**

In suit to recover personal property taxes paid under protest, taxpayer had burden of showing that tax was not applicable to property involved.

PETERS, P. J., dissenting on petition for rehearing.

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Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Suit by the Von Hamm-Young Company, Limited, against the City and County of San Francisco to recover personal property taxes paid under protest. Judgment for the plaintiff, and the defendant appeals.

Judgment affirmed.

Robert W. Kenny, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., and John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy, City Atty., both of San Francisco, for appellant.

Brobeck, Phleger & Harrison, of San Francisco, for respondent.

WARD, Justice.

Plaintiff recovered judgment for personal property taxes paid under protest which were assessed on the first Monday in March, 1943, from which judgment the defendant appeals.

The findings follow the stipulation of facts as augmented by the additional evidence introduced in the form of testimony, and the reasonable inferences that may be drawn therefrom. In order to discuss the general principles of law applicable, the facts in the transcript and stipulation of facts must be briefly summarized: Plaintiff is in the business of buying goods from manufacturers and dealers for shipment and resale to Hawaii and has never sold any goods in California. Prior to the outbreak of the war with Japan in 1941 all goods shipped by plaintiff were either shipped direct from eastern points, via the Panama Canal, or by rail to the west coast and trans-shipped to Hawaii. For several months after the declaration of the war there was a cessation of commerical shipping to Hawaii and plaintiff placed its

goods in a local warehouse. A system of shipping permits was finally evolved pursuant to the orders of the War Shipping Administration and plaintiff was completely governed by the system of shipping permits, which entailed awaiting an opportunity to place any part of its stored goods on ships to the islands. On notice from Hawaii, additional commodities were purchased at points outside and inside California, and stored for shipment to Hawaii if space was not available upon arrival in San Francisco. The problem of obtaining merchandise and shipping it to Hawaii was acute and the tax involved was assessed by the City and County of San Francisco on goods warehoused in San Francisco awaiting space on outgoing ships to Hawaii.

[1-4] The sole issue involved in this case is the effect of the commerce clause (art. I, sec. 8, cl. 3, U. S. Constitution) upon the power of the municipality to levy an ad valorem property tax upon these warehoused goods. Preliminarily it should be noted that the commerce clause was not enacted to assist those engaged in such commerce to evade a state tax burden merely because of the increase in the cost of doing business. McGoldrick v. Berwind-White Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876. However, it is necessary to examine the operation of the state statute as applied to the facts in each case to determine whether there is discrimination and injury to the particular property in interstate commerce. Best & Co. v. Maxwell, 311 U.S. 454, 61 S.Ct. 334, 85 L.Ed. 275. In general it may be stated that a state has jurisdiction to tax commodities within its borders unless there is a superior jurisdictional right by some other governmental agency, such as another state or the United States, with whose powers its exercise might conflict. It is conceivable that when commodities are assembled they may be taxable in one state until delivered for the purpose of exportation beyond the state border. Coe v. Town of Errol, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715. After exportation begins it is possible that the goods may, by ill fortune in passing through different areas, receive a double personal property tax, depending on the time that the goods pass through and the period selected in each state as the date to impose the tax; as an example, the first Monday in March in California, Dant & Russell, Inc., v. Board of Supervisors, 21 Cal.2d 534, 133 P.2d 817; the second Monday in April in Michigan, Diamond Match Co. v. Village of Ontonagon, 188 U.S. 82, 23 S.Ct. 266, 47 L.Ed. 349; May 1st in Minnesota, State of Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131. Consequently, where interstate commerce is concerned, the Supreme Court has enunciated the rule in the many cases hereafter cited that where goods are in transit in interstate commerce, they are not subject to tax by jurisdictions through which they pass on their interstate journey. To permit such taxation would subject interstate commerce to double taxation and a discrimination to which intrastate commerce of the same kind is not subject.

In support of its position that the warehoused goods were not in transit when the assessment was made, appellant relies on a series of cases each based on varying sets of facts, while respondent cites as its authority cases decided on different facts from those cited by appellant. The rule that governs the determination of this case is to be reached by examining the distinctions between this and other cases decided by the United States Supreme Court and the California Supreme Court. It should be noted that in many of the decisions, particularly in the United States Supreme Court, there is a marked purpose to protect interstate and foreign commerce from the attempted inroads of state government. In California it has been said in a case in which the taxpayer has appealed to the Supreme Court of the United States: "It is apparent, however, that a new approach has been taken with respect to the problem of state taxation in the field of interstate commerce, and that there are various local activities by a taxpayer within a state sufficient to support a non-discriminatory tax although the tax may have some incidental effect on interstate commerce." Richfield Oil Corp. v. State Board of Equalization, 27 Cal.2d 150, 163 P.2d 1, 7. In considering the following cases it should be noted that none were decided in view of govern-

mental war emergency measures, which fact *primarily* marks the difference between this case and all other cases called to our attention. The main question involved in Coe v. Town of Errol, supra, was whether products of a state are liable to taxation like other property within the state though intended and partially prepared and deposited at the point of shipment for exportation to another state. In brief, the question was, Does the intent to export control the taxability of things within a state? The court in that case stressed the point relative to the change of mind of the owner. The goods (at page 528 of 116 U.S., at page 479 of 6 S.Ct., 29 L.Ed. 715) "were to remain until it should be convenient to send them to their destination." The goods were taxed in the same manner as other goods and not solely because there was a delay in transportation.

In Diamond Match Co. v. Village of Ontonagon, supra, the complainant was an owner of lumber mills. It became necessary on account of a fire to move one hundred eighty million feet of logs, which was more than complainant intended to move in one season, from Michigan to Wisconsin. It was not the *intention* of the complainant to transport in any one season more than twenty million feet. The rest of the logs were left at the mouth of the river near Ontonagon. In the present case the goods had not reached their destination and the admitted intent was to move the property at the earliest possible date that governmental regulations would permit. In American Steel & Wire Co. v. Speed, 192 U.S. 500, 24 S.Ct. 365, 48 L.Ed. 538, the evidence showed that the goods had reached their destination and were not in transit. They were held in storage to be sold, as contracts for that purpose were consummated.

The principal reliance of appellant is placed upon General Oil Co. v. Crain, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754. In that case certain oil in two tanks was in transit from Pennsylvania to the place of sale in Arkansas. There was a delay in Tennessee for the purpose of separation, distribution and re-shipment of the oil for a period in accord with the nature of the business and the exigencies of transportation. The oil in tank No. 1 was sold before shipment and the oil in tank No. 2 was to be sold in Tennessee to various purchasers. It appears that at some point enroute it was necessary to change the oil from tanks to barrels. The General Oil Company conducted a business located at Memphis, Tennessee, for the change in form and contents of the reshipments. In the Crain case there are comments on cases other than the cases previously mentioned herein. The pertinent comments appear as follows (at pages 229, 230 of 209 U.S., at page 481 of 28 S.Ct., 52 L.Ed. 754):

"In Kelley v. Rhoads, 188 U.S. 1, 23 S. Ct. 259, 47 L.Ed. 359, a flock of sheep driven from a point in Utah across Wyoming to a point in Nebraska, for the purpose of shipment by rail from the latter point, was held to be property engaged in interstate commerce, and exempt from taxation by Wyoming under the statute taxing all live stock brought into the state 'for the purpose of being grazed.' There was no difficulty in the case except that which arose from the contention that the manner of transit was adopted as an evasion of the statute. Otherwise the grazing of the sheep was as incidental as feeding them would be if transported by rail. The pertinence of the case to the present controversy is in its summary of the principles of prior cases, expressed in the following passage: 'The substances of these cases is that, while property is at rest for an indefinite time, awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But, if it be actually in transit to another state, it becomes the subject of interstate commerce and is exempt from local assessment.' Property, therefore, at an intermediate point between the place of shipment and ultimate destination may cease to be a subject of interstate commerce. Necessarily, however, the length and purpose of the interruption of transit must be considered.

"In State v. Engle, Receiver, etc. [34 N. J.L. 425, 435, 5 Vroom 425, 435], coal mined in Pennsylvania and sent by rail to Elizabethport, in New Jersey, where it was deposited on the wharf for separation and

assortment for the purpose of being shipped by water to other markets for the purpose of sale,—it was held that the property was not subject to taxation in New Jersey. The court said: 'Delay within the state, which is no longer than is necessary for the convenience of transshipment for its transportation to its desination, will not make it property within the state for the purpose of taxation.' See also in State v. Carrigan [39 N.J.L. 35, 36, 10 Vroom 35, 36], where coal also shipped from Pennsylvania to a port in New Jersey and remaining there no longer than was necessary to obtain vessels to transport it to other places was held to be in course of transportation, and not subject to the taxing power of the State. In Burlington Lumber Co. v. Willetts, 118 Ill. 559, 9 N.E. 254, the principle was recognized that property in transitu was not subject to the taxing power of a state, but was held that logs in rafts sent from Wisconsin to Burlington, Iowa, by the Mississippi river, a part of which were stopped at a place in Illinois called Boston Harbor, to be there kept until needed at Burlington for mill purposes, were subject to taxation. The court said that the property was 'kept at New Boston on account of the *profit* of the owners to keep it there;' and further, that the company was engaged in business in the state, beneficial to itself, and its property was so located as to claim the protection of the laws of the state and hence was liable to taxation." Emphasis added. See, also, Susquehanna Coal Co. v. City of South Amboy, 228 U.S. 665, 33 S.Ct. 712, 57 L.Ed. 1015.

The court stated that there was alleged a business which voluntarily brought the commodity to rest in the State of Tennessee and held (at pages 230, 231 of 209 U.S., at page 482 of 28 S.Ct., 52 L.Ed. 754:) "The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in State, etc., v. Engle, supra, but for the business purposes and profit of the company."

Champlain Realty Co. v. City of Brattleboro, 260 U.S. 366, 43 S.Ct. 146, 67 L.Ed. 309, 25 A.L.R. 1195, is important on the question of temporary delay. At page 376 of 260 U.S., at page 149 of 43 S.Ct., 25 A. L.R. 1195, the court said: "When it is shipped by a common carrier from one state to another, in the course of such an uninterrupted journey, it is clearly immune. The doubt arises when there are interruptions in the journey and when the property in its transportation is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken." With Bacon v. People of State of Illinois, 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615, General Oil Co. v. Crain, supra, and other cases as authority, the court further said: "In other words, in such cases interstate continuity of transit is to be determined by a consideration of the various factors of the situation. Chief among these are the intention of the owner, the control he retains to change destination, the agency by which the transit is effected, the actual continuity of the transportation, and the occasion or purpose of the interruption during which the tax is sought to be levied."

In Hughes Bros. Timber Co. v. State of Minnesota, 272 U.S. 469, 476, 47 S.Ct. 170, 172, 71 L.Ed. 359, the court stated: "The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation, as in the Champlain Co. case."

Carson Petroleum Co. v. Vial, 279 U.S. 95, 49 S.Ct. 292, 73 L.Ed. 626, decided later than any of the previously cited cases, was a petition by the Carson Petroleum Company to enjoin a Louisiana sheriff from laying and levying against it an alleged illegal assessment of ad valorem duties on a quantity of oil. Interference with foreign commerce in oil was the question involved. The oil was forwarded in tank lots to St. Rose, a few miles from New Orleans. No oil was sold at St. Rose except

that which was exported, the oil being of a different type than that used for domestic purposes. The business consisted of unloading from railroad tank cars into storage tanks and thence to tankers supplied by buyers for shipment to foreign parts. In the Carson case, it is said (at pages 100, 101, of 279 U.S., at page 293 of 49 S.Ct., 73 L.Ed. 626): "The oil in each railroad tank car, however, is not segregated or assigned or destined to any particular cargo or shipment abroad, but is pumped into the large storage tanks, having the capacity of many tank cars, and is held in the tanks until a ship arrives, or until a sufficient quantity of oil is accumulated to make up a cargo. * * * The oil is shipped from the storage tanks in the same condition in which it was received from the tank cars, without being treated in any way. The oil is never kept on hand at St. Rose any longer than is necessary. The quantity on hand is always awaiting either the arrival of a ship or the accumulation of a sufficient quantity to load a ship." A conflict may appear in the General Oil Co. v. Crain, supra, and Carson Petroleum Co. v. Vial, supra, cases, but in the latter case, speaking of the Crain case, the court said (at pages 105, 106 of 279 U.S., at page 295 of 49 S.Ct., 73 L.Ed. 626): "We do not think in deciding the case at bar that we should give the Crain case the force claimed for it by the court below and by counsel for the state. Since its decision this court has had to consider several cases where there was transshipment of the commodity from local carriage in a state to a ship at an export port and conveyance thence to a foreign destination. There has been a liberal construction of what is continuity of the journey, in cases where the court finds from the circumstances that export trade has been actually intended and carried through." In the Vial case, the court quoted extensively from Texas & N. O. R. Co. v. Sabine Tram Co., 227 U.S. 111, 33 S.Ct. 229, 57 L.Ed. 442. In the latter case it was not known when the commodity—lumber—left the starting point on the ship destined to receive the property. The lumber remained at the port awaiting a ship that could be chartered by the exporter. In the Vial case the Crain decision was distinguished if not disapproved, and the Sabine case used as the authority for the decision reversing the decision of the Supreme Court of Louisiana directing and decreeing that the tax, with penalties, be imposed. In the Vial case the court said (at pages 107, 108, 109 of 279 U.S., at page 295 of 49 S.Ct., 73 L.Ed. 626):

"'The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial.' * * *

"We do not think the Sabine Tram Co. case can be distinguished from the one before us. It has been suggested that in the present case there was a failure to fix the exact point of destination abroad before shipment and that this prevents a continuity required in a continuous exportation. But there was the same indefiniteness on this point in the Sabine Tram Co. case. Then, it is said, there was no separation of the various shipments of oil from the interior points to the tanks and thence to ships at the port of shipment. But in the Sabine Tram Co. case cars of lumber were sent to the transshipment point without regard to the filling of one order or another. *In both cases the delay in transshipment was due to nothing but the failure of the arrival of the subject to be shipped at the same time as the arrival of the ships at the port of transshipment.*" (Emphasis added.)

It is interesting to note that in California the distinction between the Crain and Vial cases has been recognized in Philippine Refining Corp. of New York v. Contra Costa County, 24 Cal.App.2d 665, 76 P.2d 163, a case involving the question whether certain cocoanut oil, temporarily stored in tanks in Contra Costa County, was subject to local personal property taxation. The action was one to recover taxes paid under protest. The facts appear in the Philippine Refining Corp. opinion as follows (at pages

666, 667 of 24 Cal.App.2d, at page 164 of 76 P.2d): "It is further alleged therein that plaintiff conducts said importing business by aggregating orders sufficient to fill one or more tanks available in steamers and when sufficient orders have been aggregated, plaintiff makes importations of oil and said oil is discharged from the steamers at its said plant at Point San Pablo; that on the first Monday in March, 1933, by reason of the manner of conducting said import business, plaintiff had on hand at its plant a quantity of oil imported on four steamers. The facts concerning the amount, the time of arrival, and time of departure from said plant of the oil in question were set forth in detail. It was further alleged that none of said oil was held by plaintiff for indiscriminate sale, but that it was imported for sale under said several contracts and thereafter delivered to the purchasers pursuant thereto, approximately 90 per cent of the oil continuing its journey to purchasers outside the state of California and the remaining 10 per cent. continuing its journey to purchasers within the state of California; that at all times in question title to said oil remained in plaintiff and that said oil remained in the original form in which it had been imported into the United States; that said oil was on the taxing date in question an import into the United States from a point beyond the territorial limits thereof and was in the course of an interstate and foreign movement and in transit and was not legally assessable or taxable by virtue of the provisions of the Constitution and laws of the United States." The trial court sustained demurrers without leave to amend. The judgment was reversed upon the authority of Carson Petroleum Co. v. Vial, supra, with directions to overrule the demurrers. In considering the Crain and the Vial cases, the court spoke as follows (at page 669 of 24 Cal.App.2d, at page 165 of 76 P.2d): "Respondents cite and rely mainly upon the case of General Oil Co. v. Crain, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754. The case is clearly distinguishable. It appears there that the oil was brought from the north to a distribution plant in Memphis. It was there placed in storage tanks and indiscriminately sold and distributed from that point. After a time, in an attempt to escape a local tax, part of the oil was put in tank No. 1, marked 'Oil already sold in Arkansas, Louisiana and Mississippi,' while the oil which had not been sold was kept in the other tanks. This case is thoroughly discussed in Carson Petroleum Corp. v. Vial, supra, both of said cases having been decided under the commerce clause."

On the special facts in State of Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131, it was determined that the shipment involved was not suspended but ended. The transportation had ceased and the tax was properly assessed on the regular tax day and there was no federal right to immunity from the tax. In determining the question, Mr. Chief Justice Hughes declared (at pages 9, 10 of 290 U.S., at page 37 of 54 S.Ct., 78 L.Ed. 131): "The 'crucial question,' in determining whether the state's taxing power may thus be exerted, is that of 'continuity of transit.' Carson Petroleum Co. v. Vial, 279 U.S. 95, 101, 49 S.Ct. 292, 293, 73 L.Ed. 626 [628]. * * * If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement. * * * The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. * * * The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if it appears 'that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation.' Hughes Bros. [Timber] Co. v. [State of] Minnesota, 272 U.S. 469, 476, 47 S.Ct. 170, 172, 71 L.Ed. 359 [362]."

[5, 6] From the above decisions certain factual bases appear to be necessary if a local government desires to lay an impost or a property tax on imports or exports beyond the necessities of executing local inspection laws. If a commodity is in

transit to another state or a foreign country it comes within the powers granted to the federal government and the prohibition on the states stemming therefrom, implicitly or explicitly contained in art. I, secs. 8 and 10 of the federal Constitution until it comes to rest at its destination. The foregoing excerpts from the cases indicate that whether a tax or duty may be imposed may depend upon the character and kind of the commodity, the original intention of the owner, the possible change of intent, the continuity of transit, the control the owner retains to change the destination, the purpose and cause of an interruption, whether voluntary or involuntary, the length of the interruption and whether the interruption results in profit or loss to the owner or shipper. Coe v. Town of Errol, supra; Diamond Match Co. v. Village of Ontonagon, supra; American Steel & Wire Co. v. Speed, supra; General Oil Co. v. Crain, supra; Champlain Realty Co. v. Brattleboro, supra; Hughes Bros. Timber Co. v. State of Minnesota, supra; Carson Petroleum Co. v. Vial, supra; Philippine Refining Corp. v. Contra Costa County, supra; State of Minnesota v. Blasius, supra; Texas & N. O. R. Railroad Co. v. Sabine Tram Co., supra; Kelley v. Rhoads, supra; Swift and Co. v. United States, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518; Bacon v. People of State of Illinois, 227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615. It must not be understood that any one of the requisites enumerated, standing alone, would necessarily determine the question one way or the other. As an instance, the original intent if demonstrated by competent evidence would be a circumstance to consider, but subsequent actions might show a change of attitude. The preliminary movements in preparation for shipment might show an intent to export or not to export. All the facts must be considered in determining the essentially factual question of whether the goods are in transit or not. Each case is subject to factual distinctions from any other case.

In a California Supreme Court decision, Dant & Russell, Inc., v. Board of Supervisors, supra, it was held that certain lumber from out of the state "had come to rest in this state and was held here at petitioner's pleasure"; that it was part of property within the state and therefore subject to taxation. The court there said (at page 536 of 21 Cal.2d, at page 818 of 133 P.2d): "The commerce clause of the United States Constitution [citing cases] protects the lumber from state and local taxation while in transit (Coe v. Town of Errol, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715; Carson Petroleum Co. v. Vial, 279 U.S. 95, 49 S.Ct. 292, 73 L.Ed. 626; Kelley v. Rhoads, 188 U.S. 1, 23 S.Ct. 259, 47 L.Ed. 359; Hughes Bros. Timber Co. v. [State of] Minnesota, 272 U.S. 469, 47 S.Ct. 170, 71 L.Ed. 359) and from discriminatory state legislation because of its out-of-state origin after the transit ends. [Citing cases.]"

It is now necessary to examine the specific findings and supporting facts in this case in the light of the above tests to determine whether they support the trial court's conclusion that the warehoused commodities were in transit in interstate commerce at the date the municipality attempted to levy the property tax. Extensive reference is made to the findings which mirror the stipulation of facts and the oral evidence with a few exceptions which will be noted. The transcript supports the following findings without conflict:

"Plaintiff is engaged in business as a wholesale and retail merchant, and insurance agent and broker, in the Territory of Hawaii. *Plaintiff is not and never has been engaged in business or qualified to engage in business of any kind in the State of California.* (Emphasis added.)

"In the course of plaintiff's business, plaintiff purchased from manufacturers or dealers in various states of the United States the merchandise required for the conduct of such business. All of such merchandise is sold by plaintiff in the Territory of Hawaii and none of it is or ever has been sold by plaintiff in the State of California.

"Prior to the outbreak of the war with Japan on December 7, 1941, all merchandise purchased by plaintiff outside of California (or at places in California other than San Francisco) for resale in the Territory

of Hawaii, was shipped to plaintiff through the Panama Canal to Hawaii, or overland by rail to San Francisco, where it was loaded on vessels immediately upon its arrival in San Francisco, and was thereafter carried by such vessels to the Territory.

"* * * No commercial cargo was transported from the mainland to the Territory between December 7, 1941 and March, 1942. When shipments were resumed, they were made, and have continued to the present time to be made, exclusively from West Coast ports, since the War Shipping Administration, which has operated all American cargo vessels since December 7, 1941, took all ships off the Panama Canal route to Hawaii.

"From March, 1942 until the present time there has been a continuous shortage of vessels for the transportation of goods from the mainland to the Territory of Hawaii. The shortage was acute as late as April, 1943, due in part to the backlog of cargo built up during the time no ships were running between the mainland and the Territory.

"Martial law was declared in Hawaii on December 7, 1941, by the Civil Governor of Hawaii and the Commanding General of the Hawaiian Department of the United States Army, acting simultaneously under the authority of Section 67 of the Organic Act of the Territory [48 U.S.C.A. § 532]. On January 26, 1942, the Military Governor issued General Orders No. 56, authorizing the control of imports into the Territory by officials appointed by him, namely, the Director of Materials and Supplies Control, and the Director of Food Control. Such control was required by the shortage of shipping space, and the consequent necessity of allocating shipping space among commodities and between the shippers of such commodities. A system of control of imports was established immediately upon the resumption of shipments in March, 1942. Under it all persons desiring to import goods into the Territory were required to secure shipping permits from the Director of Materials and Supplies Control, or the Director of Food Control. The allocation of cargo space between importers holding such permits was accomplished by the San Francisco representative of the Military Governor. Thus, no importer was allowed to ship goods from the mainland to the Territory without (a) securing a shipping permit, and (b) securing an allocation of cargo space for the goods. At all times from March, 1942, to the present time, more cargo has been offered for shipment to the Territory than could be carried by the available ships.

"Instructions regarding the allocation of cargo space were given by the San Francisco representative of the Military Governor to Matson Navigation Company, which was appointed by the War Shipping Administration as booking agent for all commercial cargo shipped from West Coast ports to Hawaii. The War Shipping Administration directed Matson Navigation Company to follow the instructions of the San Francisco representative of the Military Governor in allocating cargo space between holders of shipping permits.

"The foregoing system of controlling shipments from the mainland to Hawaii was in effect from March, 1942, until June, 1944, when the system was somewhat modified. On March 10, 1943, the power to regulate imports into the Territory was returned by the Military Governor to the Civil Governor, but the system of control was not changed. * * *

"On the first Monday in March, 1943, plaintiff was the owner of certain goods temporarily located in warehouses in San Francisco, which it had purchased for resale in the Territory of Hawaii, and for all of which it had secured shipping permits from the Military Governor of Hawaii prior to purchasing the goods. The majority of said goods were purchased from sellers outside the State of California; a small percentage (approximately 1% in cost) was purchased from sellers at points in California other than San Francisco, California; and a small percentage (approximately 10% in cost) was purchased in San Francisco.

"All of said goods (except those purchased in San Francisco) had been shipped by rail to San Francisco prior to the first Monday in March, 1943, en route to the Territory; they were all consigned by the

shippers to plaintiff at Honolulu, Hawaii. Upon arrival of the goods in San Francisco the railroad notified plaintiff of their arrival. Cargo space was not available for shipment of the goods when they arrived in San Francisco, and plaintiff therefore caused the goods to be delivered to San Francisco warehouses to be held temporarily until cargo space should become available. (Where cargo space was available when goods arrived in San Francisco, they were immediately loaded on vessels and shipped to the Territory.)

"All of such goods were removed from the warehouses, placed on board vessels, and shipped to the Territory as soon as cargo space was allocated for them by the San Francisco representative of the Military Governor of Hawaii. *None of such goods were processed or changed in form subsequent to their purchase by plaintiff and prior to their shipment from San Francisco to the Territory; and none of them were held or detained in San Francisco for any purpose other than to await the allocation of cargo space.* Plaintiff had urgent need for the goods in the Territory and had ample warehousing space for them there, and *the storage of the goods in San Francisco was not for plaintiff's benefit or convenience, but resulted in a substantial detriment to plaintiff,* because it caused plaintiff to incur handling and storage charges that would have been avoided if the goods had not had to be warehoused. *The sole reason for such temporary storage was the shortage of shipping and the wartime controls upon the transportation of goods from the mainland to the Territory, imposed by reason of such shortage.* * * * The said tax was and is a tax levied on personal property in the course of interstate commerce between the states of the United States and the Territory of Hawaii." (Emphasis added.)

[7, 8] The above findings are fully supported by the evidence. The appellant's assertion that the italicized portions of the findings are incorrect rests on an interpretation of the facts which the trial court made. The evidence might have been susceptible to opposing inferences. In that state of the record if it existed, an appellate court is bound by the trial court's conclusion on a matter of fact. It therefore appears that the goods were warehoused in San Francisco owing to emergency conditions over which plaintiff had no control. The articles were desperately needed in Hawaii; were intended for Hawaii and were continued on their journey to Hawaii as soon as space was available—some in a few days and for some of the articles shipping facilities were not available for a few months. The storage of the goods "en-route" instead of immediate trans-shipment was not plaintiff's voluntary act and resulted in no profit to plaintiff but in a distinct loss in storage, cartage and hiring expediting employees in San Francisco while seeking allocations of cargo space in which to continue the goods forward to their intended destination. Only by such storage could the necessary commerce be carried on in the emergency period, and the warehousing was solely to further the interstate transportation of the goods as shown by the record in this case. Consequently the evidence is ample to support the findings and fully protects the judgment. Of course it is possible that the owner of property, even in a wartime emergency period, might attempt under the guise of the interstate commerce rule to evade a just local tax, but such fact does not appear in this case.

[9] The defendant and appellant presents a special objection to the refusal of the trial court to permit taxes to be imposed on goods purchased in San Francisco. The objection is based upon the theory that the journey of these goods had not begun. These goods were obtained and added to property purchased in other states, the journey of which had merely been interrupted, as above demonstrated. Defendant seeks further to fortify the objection upon the ground that the goods may have been in the warehouse at the date of purchase or may have been moved there by the seller or the plaintiff. The latter claim is not well founded when the record is examined. In the stipulation of facts the description of each commodity, the quantity, the cost, the point of origin, the date received at the warehouse in San Francisco, the date that each article or quantity of goods were shipped to Hawaii and even the name of the vessel appear. If any of these items happened to be incorrect, the trial court was

the tribunal in which to make an investigation.

The first part of the objection is likewise untenable. There must be a point of time when each article becomes "in transit." The goods purchased in Louisiana, South Carolina or New York, when committed to a carrier for transportation, were in transit. Champlain Realty Co. v. City of Brattleboro, supra. Goods in intermediate areas, collected by the carrier and added to the interstate commerce articles, are likewise immediately subject to the same protection. An involuntary interruption, particularly one caused by war conditions, should not change the legal aspect or position of the goods. The amount of goods which happened to be obtained in San Francisco when designated en route to Hawaii became subject to the protection of the federal constitutional commerce clause, in view of the peculiar emergency situation with respect to through shipments. There is no claim that plaintiff was dishonest or seeking to evade a legitimate impost or duty. All the goods were shipped to the original intended destination—Hawaii. The evidence is sufficient to show that all the goods, including the goods purchased in San Francisco, had entered into the stream of interstate commerce flowing to Hawaii in the only manner possible in wartime.

Some of the goods had not been delivered to a common carrier. Wartime governmental regulations prohibited this but "the property had already been launched upon its export journey" and had "been placed in the hands of an instrumentality whose *sole purpose* is to export goods, thus indelibly characterizing the process as a part of exportation." Richfield Oil Corp. v. State Board of Equalization, supra, 163 P.2d 2. The Richfield Oil case holds that the goods should be delivered to a common carrier, but wartime regulations limiting such delivery were not presented in that case. The goods had been indelibly characterized as "part of exportation." The question is one of fact. The trier of the facts has declared his conclusion. There is no basis upon which this court, as a matter of law, may declare to the contrary. Whether the delay was caused by respondent or by the United States government; whether respondent acquiesced in an undue delay; and whether the government action was instituted in furtherance of safe transportation that forbade transportation without a permit are questions of fact.

[10] One final argument of appellant must be noted. Part of the warehoused goods consisted of intoxicating liquor. Liquors received the lowest priority in cargo space and hence were detained until clothes, trucks, automobiles and accessories, mechanical instruments, etc., were forwarded. However, the transcript indicates that at times liquors were shipped as a type of goods that could be placed on deck around essential airplanes. Further, liquor at times was on the monthly list of necessary articles required in the Hawaiian Islands as prepared by the civilian governor. In this connection, appellant contends that the commerce clause does not prevent the taxation of intoxicating liquor. The twenty-first amendment to the Constitution of the United States provides that the importation into any state "for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The majority opinions in the two cases relied upon by appellant—Duckworth v. State of Arkansas, 314 U.S. 390, 62 S.Ct. 311, 86 L.Ed. 294, 138 A.L.R. 1144 and Carter v. Virginia, 321 U.S. 131, 64 S.Ct. 464, 88 L.Ed. 605—for its position that the twenty-first amendment to the United States Constitution takes interstate liquor commerce without the protection of art. I, sec. 8, cl. 3, hold no more than that interstate liquor commerce is subject to reasonable regulation in view of the interests of the state in respect to that type of commerce. Having once determined that the liquor was in transit, levy of an ad valorem property tax cannot be considered regulation. Appellant places reliance on Gooderham & Worts, Ltd. v. Collins, 50 Cal.App. 2d 716, 123 P.2d 922. That case involved a question of fact concerning the state excise tax on sales of liquor within the state. The court properly held that on the facts of the case whether a sale had taken place within the state was a question of fact decided adversely by the trial court to the plaintiff who was a licensed distributor of distilled spirits in San Francisco. The de-

cision is not relevant to the facts of this case. No question is raised as to the payment of the Alcoholic Beverage Control Act, St.1935, p. 1123, tax on the liquor sales to plaintiff in California and it must be admitted that the liquor was never purchased or imported for "use" in California.

[11] The taxpayer had the burden of showing that the personal property tax was not applicable to the facts of this case. Plaintiff taxpayer, as the trial court found, sustained that burden.

The judgment is affirmed.

PETERS, P. J., and SCHOTTKY, J. pro tem., concur.

On Rehearing.

PER CURIAM.

The petition for rehearing is denied. Presiding Justice Peters votes for granting a rehearing for reasons hereafter stated.

PETERS, Presiding Justice (dissenting).

I believe the petition for rehearing should be granted. I fully agree with the opinion heretofore filed in so far as it holds that as to those articles purchased outside the state the city and county had no power to tax. Those goods in a very real sense were in interstate commerce and the reason they were in the state was because the means of transportation had broken down as a result of the war emergency. But, in my opinion, a different rule applies to the goods purchased in this state and certainly as to the goods purchased in San Francisco. It is incontrovertible that as long as goods remain part of the mass of local goods they are subject to local taxation. The taxing power of the state continues until those goods are separated from the mass of local goods. Here a substantial part of the goods were purchased in San Francisco and stored in warehouses to await shipment to Hawaii. While in the warehouses and before being delivered to a common carrier for shipment the goods remained part of the general mass of state goods subject to local taxation. That was the express holding in the leading case of Coe v. Town of Errol, 116 U.S. 517, 527, 6 S.Ct. 475, 478, 29 L.Ed. 715, where it was stated: "But no definite rule has been adopted with regard to the point of time at which the taxing power of the state ceases as to goods exported to a foreign country or to another state. What we have already said, however, in relation to the products of a state intended for exportation to another state will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation, to another state, or have been started upon such transportation in a continuous route or journey."

At page 528 of 116 U.S., at page 479 of 6 S.Ct., 29 L.Ed. 715, it is stated: "But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation. It is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri, and not at all a fixed and certain thing." See, also, Minnesota v. Blasius, 290 U.S. 1, 9, 54 S.Ct. 34, 78 L. Ed. 131.

For these reasons I believe a rehearing should be granted to reconsider this point.

75 Cal.App.2d 351

## TOBOLA v. WHOLEY.

Civ. 7239.

District Court of Appeal, Third District, California.

July 15, 1946.

**1. Trusts ⇐110**

Evidence warranted finding that ranch owner and defendant employed on the ranch entered into oral agreement to pool their resources and to divide the profits from such resources, and that owner became a trustee of defendant's share in the resources, and that the nature of defendant's title was that of beneficiary of constructive trust.

**2. Appeal and error ⇐996**

The inferences to be drawn from the probative facts is within exclusive province of trial court, whose determination is binding on District Court of Appeal if there is any substantial evidence to support the inferences, notwithstanding that the probative facts are undisputed.

**3. Appeal and error ⇐996, 1011(1)**

Conflicts between opposing inferences and between contradictory statements of fact must be resolved by the trial court.

**4. Appeal and error ⇐996**

The inferences and deductions drawn from the testimony by defendant would not be substituted by District Court of Appeal for inferences and deductions which trial court drew, where the testimony did not involve a physical impossibility and any falsity of testimony was not apparent without resort to inferences or deductions.

**5. Evidence ⇐588**

Testimony which is inherently improbable must be disregarded where the testimony involves a physical impossibility or the falsity thereof is apparent without resort to inferences or deductions.

**6. Witnesses ⇐316**

Where some of plaintiff's testimony is shown to be incredible, the trial court can still believe the rest of the plaintiff's testimony which supports the findings of the trial court.

**7. Joint tenancy ⇐3**

In absence of fraud or mistake, written evidence of a joint bank deposit with right of survivorship is conclusive of the fact of ownership even as between the joint depositors. Civ.Code, § 1828; Gen.Laws. Act 652, § 15a.

**8. Evidence ⇐397(1)**

Where the defense of fraud or mistake was not raised, parol evidence was ineffectual to vary express terms of written contract of joint deposit. Civ.Code, § 1828; Gen.Laws Act 652, § 15a.

**9. Frauds, statute of ⇐56(9)**

The statute of frauds was not applicable to oral agreement between ranch owner and plaintiff employed on the ranch to pool their resources and to enter into a joint enterprise and to divide the profits.

**10. Frauds, statute of ⇐129(1)**

A defendant sued on oral agreement would not be permitted to rely on defense of statute of frauds where the agreement had been performed in its entirety by plaintiff, and defendant would be unjustly enriched if such defense were permitted.

**11. Appeal and error ⇐173(6)**

A defendant sued on oral agreement could not urge on appeal that agreement was invalid under statute of frauds relating to contracts not to be performed during promisor's lifetime and to contracts to bequeath property, where the asserted provisions requiring performance after defendant's lifetime were not mentioned in the pleadings or findings and defendant did not complain of the action of the trial court in omitting to make a finding with respect thereto. Civ.Code, § 1624, subd. 6.

**12. Frauds, statute of ⇐161**

A finding that "each, every and all of the allegations and denials in defendant's answer and * * * sixth * * * defenses to plaintiff's complaint, not hereinabove admitted are untrue," the sixth defense being the defense dealing specifically with the defense of statute of frauds, was a sufficient finding with respect to such defense.

13. Equity ⇐65(1)

The defense that plaintiff came into court with unclean hands was not available to defendant who failed to show what conduct of the plaintiff so prejudicially affected their relationship that to allow the plaintiff to recover in the proceeding would be inequitable.

14. Trusts ⇐49

In action to establish a constructive trust in favor of plaintiff to a one-half interest in personal property in defendant's possession, defendant could not rely on defense of undue influence exerted over defendant by plaintiff where defendant suffered no detriment by any influence exerted by plaintiff.

15. Trusts ⇐371(8)

A ranch owner sued on oral agreement with plaintiff employed on the ranch to pool their resources and enter into a joint enterprise and to divide the profits could not assert that plaintiff failed to care for ranch owner after the severing of their relationship, where such matter was wholly without the issues and the findings.

16. United States ⇐91

A judgment decreeing that plaintiff was entitled to possession of one-half of United States Series E war bonds which named defendant as registered owner and plaintiff as beneficiary was not in contravention of statute declaring that beneficiary named in United States savings bonds is sole owner thereof on death of registered owner. Civ.Code, § 704.

17. Judgment ⇐231

In action to establish constructive trust in favor of plaintiff to a one-half interest in personal property in defendant's possession, a general clause in judgment which followed particular description of property decreed to plaintiff and which read "one-half of all other personal property accumulated by plaintiff and defendant up to and including May 24, 1944," would be disregarded as surplusage where clause was without operative effect.

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Appeal from Superior Court, Siskiyou County; Samuel L. Finley, Judge.

Action by F. J. Tobola against L. Edna Wholey to establish and enforce a constructive trust in favor of the plaintiff to a one-half interest in certain personal property in the possession of the defendant. From the judgment, the defendant appeals.

Affirmed.

Gerald L. Shannon, of Mt. Shasta, and Johnson & Brawman, of Yreka, for appellant.

L. N. Lorenzen, of Mt. Shasta, for respondent.

PEEK, Justice.

This is an appeal from a judgment establishing and enforcing a constructive trust in favor of respondent to a one-half interest in certain personal property in the possession of appellant.

From January 24, 1924, until January 5, 1931, respondent was employed by appellant on a ranch operated by her in Shasta County. On the first mentioned date he was approximately 40 years old, and she between 60 and 65 years of age. For his services during that period he received his room and board and certain disbursements of money totaling about $400, which the court found to be a portion of the wages due him. On the last mentioned date appellant acquired by inheritance the legal title to the ranch which was then worth approximately $6,000. Thereupon, respondent and appellant entered into an oral agreement whereby respondent agreed he would claim no wages for his past services, but in lieu thereof would become half owner of the ranch and of the profits therefrom, that he would operate and manage the same for the mutual benefit of both parties and use his best efforts to improve the ranch and build up a bank account. The relationship so created was found by the court to be one of trust and confidence. Neither of the parties had sufficient funds to operate the ranch properly, and a loan of $2,500 was procured on the property. This sum, together with virtually all of the income from all sources, went into the maintenance and improvement of the ranch. In addition thereto, respondent cashed a life insurance policy belonging to him personally and applied the proceeds, amounting to

$655.52, to the operation of the ranch. He at all times had access to the bank accounts which were maintained in the joint names of the parties, and, on behalf of himself and appellant, signed the bills of sale of the livestock sold.

On May 4, 1944, the ranch, together with its stock and equipment, was sold for the sum of $18,000 cash. The twenty-five hundred dollar loan was paid, and the balance of the money was placed in joint bank accounts. At appellant's request, respondent withdrew $3,000 from one of the accounts and purchased Series E war bonds of the face value of $4,000, naming appellant as registered owner and himself as beneficiary. After giving possession of the ranch to the new owner, the parties moved to the home of appellant's sister. There, animosities developed, culminating in an altercation which landed respondent in jail, charged with battery upon appellant's sister. Shortly after respondent's arrest, appellant withdrew all the money deposited in the joint bank accounts, placed it in her own name, and refused to deliver to respondent his part of the money and the war bonds.

At the conclusion of the hearing on the action instituted by respondent, which was in the nature of a proceeding for specific performance or to have a trust declared in certain personal property, the trial court found for him on all material issues, observing that in effect the parties had entered into a joint venture and concluded that respondent was entitled to one-half of all the property derived therefrom. Judgment was entered accordingly.

[1] The record discloses ample evidence to sustain the finding of the trial court to the effect that the parties agreed to pool their resources and divide the profits therefrom, and to support the court's conclusion that appellant became a trustee of respondent's share therein. As far as the character of the relationship is concerned, a somewhat similar situation existed in the case of Bedolla v. Williams, 15 Cal.App. 738, 115 P. 747, wherein it appears that one of the parties agreed to furnish all the horses and farming implements, lands, buildings, cows, dairy and dairying fixtures, and one-half of the hogs, and the other party agreed to keep the property in good condition and do all the labor necessary to carry on the business, in return for a certain share of the profits. It was held on appeal that the agreement there in question established in legal effect a partnership or joint venture, and that the plaintiff therein was entitled to be compensated for his services not in terms of their value but by the payment of the stipulated proportion of the profits. Applying the rule in the Bedolla case to the relationship found to exist between the parties in the present case, it is apparent that the nature of respondent's title was that of a beneficiary of a constructive trust (Sly v. Abbott, 89 Cal.App. 209, 216, 264 P. 507) and that the trial court properly so adjudged (Lewis v. Winfield, 48 Cal.App.2d 543, 546, 120 P.2d 65).

[2, 3] Appellant's attack on the findings and judgment, while purportedly based principally on asserted errors of the trial court in applying legal principles, is in fact largely directed to the weight of the evidence and the credibility of the testimony of respondent. On the question of the sufficiency of the evidence, her position appears to be this: Since, as she insists, there is little conflict in the testimony, therefore the legal effect of the evidence is a matter of law for this court, or at least one that we may approach without undue regard for the conclusions reached by the trial court. However, it must be noted that on the vital issue of the alleged oral agreement of January 5, 1931, the deposition testimony of appellant was decidedly at variance with the testimony given by respondent. Appellant's view of the situation fails to take into account the rule that even where the probative facts are undisputed, the question as to the inferences to be drawn therefrom is still within the exclusive province of the trial court, and if there is any substantial evidence to support them this court is bound by the determination of the trial court. In other words, it is just as much the function of the trial court to resolve a conflict between opposing inferences as it is to resolve a conflict between contradictory statements

of fact. Mah See v. North American Accident Insurance Co., 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123; McDermot v. Hayes, 175 Cal. 95, 104, 170 P. 616; Kelly v. Brown, 2 Cal. Unrep. 536, 537, 8 P. 38; Bank of America Nat. Trust & Savings Ass'n v. Perry, 41 Cal.App.2d 133, 136, 106 P.2d 53; Wakefield v. Wakefield, 37 Cal.App.2d 648, 655, 99 P.2d 1105; Los Angeles City High School Dist. v. Kennard, 94 Cal.App. 450, 452, 271 P. 342.

Nor has appellant avoided the force of this rule by pointing out certain alleged improbabilities in the testimony of respondent concerning the transactions herein involved, and arguing therefrom that the trial court should have found that the respondent was paid in full for his services rendered on the ranch. For instance, she contends that because respondent was able to contribute the proceeds of an insurance policy to the resources of the ranch, he must have taken from the profits thereof the money with which to keep up the premium payments; that because his testimony fails to show the disposition of a certain sum of money received in the course of the business, it should be concluded that he applied it to his own use; that his explanation of the meaning and effect of a receipt he gave to acknowledge payment of another sum of money is unworthy of belief; and that asserted discrepancies appear in his testimony as to the dates when he took over the management of the ranch, indicating that he never considered himself other than an employee or agent of appellant who was well paid for his services by taking the moneys he might sequester where he could.

[4, 5] This attempt to impeach the testimony of respondent is based solely on appellant's own inferences and deductions, and although to appellant they appear to be quite reasonable, they do not, merely for that reason, foreclose all others. Hence we cannot substitute them for the inferences and deductions which the trial court drew. Hales v. Snowden, 19 Cal.App.2d 366, 372, 65 P.2d 847. Of course, testimony which is inherently improbable must be disregarded (Neilson v. Houle, 200 Cal. 726, 727, 728, 254 P. 891); but such action is warranted only where the testimony involves a physical impossibility or its falsity is apparent without resort to inference or deduction. Hales v. Snowden, supra, 19 Cal.App.2d at pages 372, 373, 65 P.2d 847. Such is not the nature of the testimony here.

[6] Moreover, even if it be assumed that some of respondent's testimony was shown to be incredible, it was still the privilege of the trial court to believe the rest of his testimony which supports the findings (Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, 168 P.2d 946); and in our opinion the record discloses ample evidence to sustain the findings of the trial court in this regard.

[7, 8] Of even less persuasive force is appellant's argument in which certain portions of respondent's testimony are quoted to show that his right to draw upon the funds in the joint bank accounts was merely the privilege of an agent and was not given with the intention of conferring ownership on him. The rule is well established that written evidence of a joint deposit with right of survivorship, such as that introduced herein, in the absence of fraud or mistake is conclusive of the fact of ownership even as between the parties. Hill v. Badeljy, 107 Cal.App. 598, 605, 606, 290 P. 637; In re Estate of Gurnsey, 177 Cal. 211, 213, 170 P. 402; Kennedy v. McMurray, 169 Cal. 287, 292-295, 146 P. 647, Ann.Cas.1916D, 515; Conneally v. San Francisco S. & L. Soc., 70 Cal.App. 180, 184, 232 P. 755. See, also, Civ.Code, sec. 1828; Bank Act, Deering's Gen.Laws, Act 652, sec. 15a. No such defense having been made in the present case, the parol evidence relied on by appellant is ineffectual to vary the express terms of the written contracts of deposit.

[9] Appellant further contends that the oral agreement found to have been entered into by the parties was invalid under the statute of frauds, citing cases involving the performance of personal services in consideration for the promise to transfer real property, but no case is called to our attention which deals with a joint enter-

prise such as the one with which we are concerned herein. In such a situation, the authorities which our independent search discloses appear to be in accord to the effect that the statute of frauds is inapplicable. Koyer v. Willmon, 150 Cal. 785, 787, 789, 90 P. 135; Doudell v. Shoo, 20 Cal.App. 424, 441–443, 129 P. 478; Coward v. Clanton, 79 Cal. 23, 26, 21 P. 359; 12 Cal.Jur. p. 861, § 12; 20 Cal.Jur., p. 713, § 28.

[10] In any event, to permit appellant at this late date, when the agreement in question has been performed in its entirety by respondent, to rely on the defense of the statute of frauds would be manifestly unfair to respondent and would allow the appellant to be enriched unjustly at his expense. The principle here applicable was aptly stated by this court in the case of Flint v. Giguiere, 50 Cal.App. 314, 320, 195 P. 85, 88: "* * * in cases like this where one of the parties has performed his obligation, has suffered the detriment contemplated by the agreement, and the other party has fully received the benefit of the transaction, the chancellor has a large discretion in determining whether it would be inequitable to allow the party who gains by the contract to take refuge under the statute of frauds, and, unless it can be said that such discretion has been abused, an appellate court will not interfere."

[11] Appellant likewise urges that the agreement is invalid as contravening that section of the statute of frauds which deals with contracts not to be performed during the lifetime of the promisor and contracts to devise or bequeath property. Civ.Code, sec. 1624, subd. 6. Her contention in this regard evidently is predicated upon certain testimony indicating that appellant had agreed to make a will in respondent's favor and that respondent had agreed to see that appellant received a decent burial. However, these asserted provisions are not mentioned in the pleadings or the findings and matters with reference thereto are therefore outside the issues in the case, particularly as appellant does not complain of the action of the trial court in omitting to make a finding with respect thereto.

[12] It is further charged that the trial court committed reversible error in its alleged failure to make a finding with respect to the special defense of the statute of frauds, but appellant apparently has overlooked the fact the court expressly found that "each, every and all of the allegations and denials in defendant's answer and * * * sixth * * * defenses to plaintiff's complaint, not hereinabove admitted are untrue," the sixth defense being the one dealing specially with the defense of the statute of frauds. Such a finding is clearly sufficient under the authorities. See, Cleverdon v. Gray, 62 Cal.App.2d 612, 617, 145 P.2d 95.

[13] Although appellant also urges that respondent has come into court with unclean hands, she has failed to show what conduct on the part of respondent so prejudicially affected their relationship that to allow him to recover in this proceeding would be inequitable. Bradley Co. v. Bradley, 165 Cal. 237, 242, 131 P. 750; Wiley v. Wiley, 59 Cal.App.2d 840, 842, 139 P.2d 950.

[14] Again, appellant charges respondent with having exercised undue influence over her, and she emphasizes the fact that she at no time received independent advice from others. However, no showing is made that appellant suffered any detriment or injury by reason of the influence exerted by respondent; and it is not evident that she would have been materially benefited by the advice of others. It appears that for fifteen years appellant enjoyed a comfortable living, due largely to the efforts of respondent, and that now she may obtain the advantage of half the profits inuring from the $12,000 increase in value of the properties in question, due largely to respondent's efforts. She does not charge that the original agreement was induced by undue influence; and no transaction since that time is called to our attention which shows any unfair or oppressive act on the part of respondent which worked to appellant's disadvantage.

"As an essential element of the rule under consideration is that one person has suffered some injury through the abuse of

confidence by another, that fact, it would seem, must be alleged and proved. It must be made to appear that the relationship was used to obtain an unfair advantage, or that confidence was violated." 6 Cal.Jur., pp. 73, 74, § 42.

[15] Appellant further charges that respondent failed to care for her after the severing of their relationship. Such contention, like that made by appellant in relation to respondent's alleged failure to make a will in her favor, appears to be wholly without the issues and the findings and therefore is devoid of merit.

[16] Nor is there any merit in appellant's contention that the trial court acted in contravention of section 704 of the Civil Code by decreeing respondent to be entitled to the possession of one-half of the war bonds. By such order, the ownership or title to the registered bonds has not been changed, but only the ability to dispose of them. Furthermore, said code section does not purport to affect questions of ownership or possession arising during the lifetime of the registered owner but only those which may arise after such owner's death. In the latter event, declares the statute, the beneficiary named in the bond (in this case the respondent) shall become the sole and absolute owner thereof. This provision therefore has no bearing on the issues herein involved.

[17] Finally, appellant objects to a general clause in the judgment which follows the particular description of the property decreed to respondent and reads "one-half of all other personal property accumulated by plaintiff and defendant up to and including May 24, 1944," complaining that it is fatally uncertain and professing to see therein a source of future litigation. It is true that reference to the pleadings and findings fails to disclose the alleged existence of any property other than that specifically described in the decree. Whether this clause was inserted from an overabundance of precaution or to take care of possible transmutations in the property described, it appears to be without operative effect and therefore may be disregarded as mere surplusage. Burke v. Carruthers, 31 Cal. 467, 471; Wallace v. Eldredge, 27 Cal. 495, 497; Murray v. Babb, 30 Cal.App.2d 301, 305, 86 P.2d 146; Hentig v. Johnson, 8 Cal.App. 221, 225, 96 P. 390.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.




75 Cal.App.2d 729

## GARCIA v. SAN DIEGO ELECTRIC RY. CO.

Civ. 3617.

District Court of Appeal, Fourth District, California.

Aug. 8, 1946.

Rehearing Denied Aug. 28, 1946.

**1. Appeal and error ⇐1008(1)**

Whether street railway company's rule, testified to by its bus driver, that passengers should enter bus by front door only, was always strictly enforced by him or whether he permitted passengers to enter by rear door at particular point in violation of such rule, was fact question for trial court in action against company for injuries to passenger attempting to board bus at rear door.

**2. Carriers ⇐246**

Evidence was sufficient to warrant trial court's holding that one injured in attempting to board motor bus became and was a passenger at time of injury.

**3. Appeal and error ⇐1008(1)**

Whether motor bus was so crowded as to impair driver's vision of rear door and steps through front and rear mirrors at time of injury to passenger, attempting to board bus at rear, when driver closed rear door, and whether he looked, but failed to see such passenger, or failed to look and see her with one foot on rear step, were fact questions for trial court.

**4. Appeal and error ⇐1008(1)**

Whether motor bus driver, closing rear door when passenger, attempting to enter

bus, had one foot on rear step and her right hand on door rail, thereby throwing her to pavement, exercised ordinary care, was fact question for trial court in her action against company operating bus for resulting injuries.

**5. Negligence ⇐136(9)**

Contributory negligence, barring recovery for injury sustained, exists as matter of law only where sole inference to be drawn from evidence is one of injured person's negligence proximately contributing to injury.

**6. Appeal and error ⇐1008(1)**

Whether one injured in attempting to board motor bus at rear pushed, shoved and crowded her way through passengers being discharged therefrom was fact question for trial court in her action against company operating bus for damages.

**7. Appeal and error ⇐1008(1)**

Whether woman injured when motor bus driver closed rear door of bus voluntarily and knowingly attempted to board bus at such door in violation of operating company's regulation was fact question for trial court in her action against company for damages.

**8. Appeal and error ⇐1008(1)**

Whether motor bus passengers were permitted, at least tacitly, to board busses at rear, was fact question for trial court in action against company operating bus for injuries to passenger attempting to board bus at rear door when driver closed it.

**9. Appeal and error ⇐994(3)**

The truth of witness' statements on subject of whether motor bus passengers were permitted to board busses at rear was fact question for trial court in action for injuries to passenger attempting to board bus at rear door.

**10. Carriers ⇐347(4)**

A woman injured in attempting to board bus at rear door when driver closed it, throwing her to pavement, was not guilty of contributory negligence, barring recovery of damages from bus operating company for damages, as matter of law.

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Action by Maria Garcia against the San Diego Electric Railway Company for personal injuries sustained in attempting to board a motor bus operated by defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

Huntington P. Bledsoe, of San Diego, for appellant.

Clarence Harden, of San Diego, and Henry F. Walker, of Los Angeles, for respondent.

GRIFFIN, Justice.

Defendant appealed from a judgment, rendered by the trial court sitting without a jury, which was for a claimed injury occurring to plaintiff while she was attempting to board a motor bus operated by the defendant company.

The only questions raised on this appeal are that the evidence is insufficient to justify the finding of negligence on the part of the defendant company and that plaintiff was guilty of contributory negligence as a matter of law.

On the date of the accident, February 10, 1945, plaintiff, during the 5 o'clock rush hour of traffic in the evening, attempted to board the incoming bus at Fifth and E Streets just before it made the "loop" for the return trip. She boarded the bus at this point because she was tired, wanted a seat, and desired to avoid the rush at the plaza, which was the terminal for outbound traffic.

The motorman testified that it was a "pretty common practice" of some passengers to take the inbound bus at that point to avoid the traffic rush at the terminal.

Plaintiff possessed a weekly pass. The fares are collected on the incoming busses when the passengers enter, and on the outgoing busses when the passengers alight. The bus was equipped with folding doors at both front and rear and, by means of a lever, the doors were opened and closed by the driver. It had two inside mirrors, one over the rear door and the other at the

right of the driver, and, according to some of the testimony, by looking into the front mirror there was "a clear view" or "a full view" of the "rear door * * * rear door steps" and to the "outside, right by the step", at the rear.

Defendant asserts that there were oral rules or regulations, promulgated by it, that on incoming busses passengers were to enter by the front door only, and that they may exit at either door; that passengers on outgoing busses could enter at either door, but were to exit only by the front door. No copy of such rule or regulation was introduced in evidence. Apparently it consisted of oral instructions given the driver, and no notice thereof was posted on the bus. Passengers, unacquainted with the rule, could know only by actual knowledge or by being told of it by the driver or other persons.

Plaintiff contends that she had a pass and that although she knew that fares were collected from the passengers at the front end of the bus on incoming trips, she had never been told she should not enter the incoming bus by way of the rear door. She testified that on the date of the accident, the bus stopped on Fifth Street at E; that there were people at the front end trying to get on; that the bus was crowded and people were getting off at the rear end; that other people were trying to and did get on at the rear door ahead of her; that "that is the way they do every time"; that those who get on in the rear hold up their passes and show them to the driver, or step up and pay their fares; that she had gotten on at the rear of the inbound bus on several other occasions,—she did not remember the number. (There is some conflict between her testimony in her deposition and her testimony at the trial in this respect.) She then testified that she was trying to get on the car; that there were people getting on ahead of her; that she was the last one of the group and that she grasped the right-hand handle, stepped her right foot up on the step, and did not know whether she had lifted her left foot onto the step or not when the driver closed the rear door, which threw her to the pavement and injured her.

The bus driver testified that there had been occasions when passengers had attempted to get on at the rear of the bus on inbound trips; that he would let them on, collect their fares, and then explain to them that inbound passengers were supposed to get on at the front entrance; that on this particular occasion, at the time of the accident, passengers got off at both ends of the bus; that as he started the bus he looked in the mirror and saw that the rear steps were clear and that no one was attempting *to leave the bus;* that the passengers were not permitted, nor was it their practice, to board an inbound bus by its back door at Fifth and E Streets; that passengers approaching the bus to board it through the rear doors could not be seen by him if he had a full load, until such persons had actually gotten in the door; that he did not see plaintiff attempt to enter through the rear door or know she had so attempted to enter until after the accident; that he then got out and found plaintiff sitting on the curb.

Upon this evidence the court found the defendant to be guilty of negligence and that the plaintiff was not guilty of contributory negligence. It rendered judgment accordingly. A motion for new trial was denied.

Defendant argues that the plaintiff was not a passenger; that therefore it did not owe the plaintiff the highest degree of care, and that since the relationship of passenger and carrier did not exist, the only obligation resting upon the carrier was that of using ordinary care, citing Foster v. Seattle Electric Co., 35 Wash. 177, 76 P. 995; Hildebrant v. City and County of San Francisco, 69 Cal.App. 590, 231 P. 1008.

It is also argued that the evidence is undisputed that the plaintiff knew that she was required to board the bus through the front door and pay her fare to the operator of the bus who was stationed and sitting in the front of the bus opposite such door, and that the defendant's operator had a right to assume that the plaintiff would do so and that she would use ordinary care for her own protection and would not attempt to crowd or push her way into the bus through the rear door which had been opened by him for the purpose of permit-

ting passengers to alight; that defendant owed plaintiff no duty to protect her against the crowd and that if she were injured by reason of the crowded conditions and the rushing of other passengers the defendant would not be liable, citing Spagnol v. Pennsylvania Railroad Co., 279 Pa. 205, 208, 123 A. 781, 32 A.L.R. 1313, and Dougherty v. Union Traction Co., 23 Cal.App. 17, 24, 136 P. 722.

The evidence shows that on outgoing busses passengers were permitted to use, indiscriminately, either the front or rear doors in boarding the busses. While the driver testified he had instructions that passengers were to board an incoming bus through the front door so the fares then could be collected, the evidence reveals that these instructions were not followed without deviation. No notices were posted by defendant that passengers were or were not to enter the busses through any particular door. The instructions were not conveyed to passengers other than by word of mouth from the driver, and there is nothing to show that plaintiff was ever so notified. Plaintiff may have known that passengers from whom fares were to be collected should enter through the front door. She had a weekly pass and was entitled to passage without payment of any additional fare. She had seen others, on previous occasions, enter incoming busses through the rear door and display their passes from the rear. She said she had done this herself on prior occasions. The evidence and inferences to be drawn therefrom show that passengers, holding weekly passes, were, on occasions, permitted to board incoming busses through the rear door and, according to plaintiff's testimony, at the very time involved, many passengers did enter the bus through the rear door ahead of her.

[1, 2] The question whether the rule testified to by the driver was always strictly enforced by him or whether he permitted passengers to enter the rear of the bus at this particular point in violation of the rule, was a pure question of fact for the determination of the trial court. Under the testimony produced by plaintiff, if believed by the trial court, there was sufficient evidence for the court to hold that she became and was a passenger at the time of her injury. Ivancich v. Davies, 186 Cal. 520, 199 P. 784; Sanchez v. Pacific Auto Stages, 116 Cal.App. 392, 396, 2 P.2d 845; Hellman v. Los Angeles Ry. Corp., 135 Cal. App. 627, 27 P.2d 946, 28 P.2d 384; Franz v. Holyoke St. R. Co., 239 Mass. 565, 132 N.E. 270. The authorities cited and relied upon by defendant do not hold to the contrary.

[3, 4] The evidence establishes the fact that plaintiff had one foot upon the step and her right hand upon the door-rail and was immediately behind other passengers who had entered ahead of her. By the driver's own testimony, it was established that two mirrors were so placed that by looking in the front mirror he could obtain a clear view of the rear door, the rear steps, and to the outside, right by the step at the rear, unless the bus was so crowded that his vision was impaired. Whether the bus was thus crowded, and whether the driver did look but did not see plaintiff, or failed to look and see her in this position was a question of fact for the determination of the trial court. It was apparently after the plaintiff was in the position described that the driver manipulated the lever and closed the rear door, thereby throwing her to the pavement. Whether or not the driver used or exercised ordinary care under the circumstances described was a factual question. The act of opening or closing the doors, when done without exercising ordinary precaution at a time when a passenger is boarding, may constitute negligence. Ryan v. Pittsfield Electric St. Ry. Co., 203 Mass. 283, 89 N.E. 527; Fordham v. London, Brighton & South Coast Ry. Co., L.R. 3 C.P. 368; Oettinger v. Stewart, 24 Cal.2d 133, 148 P.2d 19.

[5] It is only where the evidence is such that the sole inference to be drawn is one of negligence which proximately contributes to the injury of a plaintiff that it may be said that contributory negligence exists as a matter of law. We do not believe that that situation here exists.

[6-10] The argument that the evidence shows without dispute that the plaintiff pushed, shoved, and crowded her way through the passengers who were being discharged from the bus is not meritorious.

It cannot be held, as a matter of law, that the evidence so shows. Neither can it be maintained that the plaintiff voluntarily and knowingly attempted to board the rear door of the bus in violation of defendant's regulations. If she had, on frequent prior occasions, boarded an incoming bus through a rear door, and had frequently seen others do the same, and who showed their passes from the rear of the bus, there was no conclusive showing made by the defendant that the passengers were not permitted, at least passively, to board an incoming bus by the rear door. The truth of the statements of the witnesses on this subject was a matter for the trial court to determine. While the evidence might well have supported a contrary finding, it cannot be said that there was a showing of contributory negligence as a matter of law. Pruitt v. San Pedro, L. A. & S. L. R. Co., 161 Cal. 29, 118 P. 223, 36 L.R.A.,N.S., 331; Gett v. Pacific G. & E. Co., 192 Cal. 621, 221 P. 376; 4 Cal.Jur. p. 961, sec. 106 et seq.

Judgment affirmed.

BARNARD, P. J., concurs.




75 Cal.App.2d 227

## In re HALE'S ESTATE.

## HILL v. HALE, et al.

Civ. 15184.

District Court of Appeal, Second District, Division 1, California.

July 2, 1946.

Hearing Denied Aug. 29, 1946.

**1. Trusts ⇐112**

The intention of trustor when she made declaration of trust must be ascertained from the trust instrument itself.

**2. Descent and distribution ⇐47(1)**

Testatrix' provisions for her grandchildren in a trust created by her prior to execution of her will constituted a "settlement", within statute giving child or issue of any deceased child unprovided for by will or settlement an intestate's share of testator's estate, and, hence, grandchildren were not entitled to recover an intestate's share of testatrix' estate as pretermitted heirs. Probate Code, § 90.

See Words and Phrases, Permanent Edition, for all other definitions of "Settlement".

**3. Wills ⇐473**

Fact that portion of trust which provided for a group other than trustor's grandchildren who were seeking to have trust declared invalid, so as to prevent it from operating as a settlement within statute giving child or issue of deceased child unprovided for by will or settlement an intestate's share of testator's estate, violated the rule against perpetuities, if established, did not invalidate that portion of trust providing for grandchildren, in view of saving clause validating that portion of trust irrespective of invalidity of any other portion.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Proceeding in the matter of the estate of Candace Hale, deceased, wherein Helen Hale Hill, as executrix and sole beneficiary of the last will and testament of Candace Hale, deceased, filed her first final account and petition for distribution of the estate of the decedent, and Robert C. Hale and others, grandchildren of the decedent, contestants, filed their petition for determination of heirship. The two petitions were consolidated for hearing. From that portion of order settling final account and decree of distribution adjudging that contestants were provided for by settlement, were not pretermitted heirs and were not entitled to any portion of decedent's estate and ordering the estate distributed to petitioner, the contestants appeal.

Affirmed.

Andrew J. Copp, Jr. and H. Dexter McKay, both of Los Angeles, for appellants.

John H. Mathews and Ray W. Bruce, both of Los Angeles, for respondent.

YORK, Presiding Justice.

On April 11, 1945, Helen Hale Hill, as executrix and sole beneficiary of the last

will and testament of Candace Hale, deceased, filed her first and final account and petition for distribution of the estate of said decedent. Thereupon contestants, all of whom are grandchildren of decedent, filed their petition for determination of heirship, alleging that said will omitted to provide for them; that it did not appear therefrom that such omission was intentional, and that therefore each of them was entitled to an "undivided 1/15th interest in and to all of the property left by said Candace Hale, deceased, at the time of her death"; pursuant to section 90 of the Probate Code which provides: "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate."

The two petitions were consolidated for hearing, and on July 20, 1945, the court rendered its findings, judgment and order settling final account and decree of distribution by which it was adjudged that said grandchildren had been provided for by a settlement, to-wit: a declaration of trust dated May 3, 1929; that they were not pretermitted heirs and that they were not entitled to any part of the estate which was ordered distributed to Helen Hale Hill, the daughter of decedent.

This appeal is prosecuted by said grandchildren from that portion of said order settling final account and for distribution hereinabove referred to.

In their opening brief appellants limit the issues on appeal to a determination as to "whether or not appellants have been provided for by any settlement within the meaning and intent of the provisions of section 90, Probate Code."

The appeal is presented upon a settled statement of facts from which it appears that testatrix during her lifetime, on May 3, 1929, transferred certain of her real and personal property to the Citizens National Trust and Savings Bank, in trust, for the benefit, among others, of her then living children, one of whom was Claude F. Hale, father of appellants. At the date of the death of testatrix and thereafter, the trust property had a reasonable value of $150,000. The declaration of trust was introduced in evidence by stipulation and it appears therefrom that at the time Mrs. Hale executed the trust she was a widow and had three living children: Claude F. Hale, Winfield Hale and Helen Hale Hill, together with certain grandchildren, who were the then living issue of said children.

Claude F. Hale died on November 25, 1935, Winfield Hale having died previously. At the time of her death on October 23, 1943, testatrix was survived by her daughter Helen Hale Hill, respondent here, and several grandchildren numbered among whom were appellants, the children of Claude F. Hale. The last will and testament admitted to probate was dated June 23, 1941, by the terms of which she devised and bequeathed her entire estate to her daughter, Helen Hale Hill, without mentioning any of her grandchildren.

The declaration of trust, in so far as it concerns appellants, provides that "the entire net income received or derived from the trust estate and available for distribution hereunder shall be, by said Trustee, paid either monthly or quarterly to Candace Hale, Trustor, for and during her natural life." Also, that following her death, "After the setting aside of one-third (1/3) of the entire trust estate for charities * * * and after the payment of the bequest and creation of the trust funds from the remaining two-thirds (2/3) of the trust estate * * * all of the then remaining trust estate in the hands of said Trustee shall be held in trust for the three children of Trustor, Claude F. Hale, Winfield Hale and Helen Hale Hill.

"1.—The entire net income received and derived from this part of the trust estate shall go and be by said Trustee paid in equal monthly installments as follows, to-wit:

"(a)—One-fifth (1/5) of said net income to Claude F. Hale, son of Trustor, for and

during his natural life; upon the death of Claude F. Hale, one-third (1/3) of said entire net income shall go and be paid by said Trustee in equal monthly installments to his children, share and share alike, and to the children of any deceased issue of the said Claude F. Hale per stirpes and by right of representation until the termination of this trust; and in the event that the said Claude F. Hale should die without leaving issue or descendants him surviving, then the income to which he or his descendants would be entitled, if living, shall go and be paid to the other two (2) children of Trustor, Winfield Hale and Helen Hale Hill, share and share alike, and to the issue of either per stirpes and by right of representation until the termination of this trust estate." Then follow provisions with respect to the shares of Winfield Hale and Helen Hale Hill.

Said declaration of trust then provides:

"2.—Upon the death of the survivor of the said Claude F. Hale, Winfield Hale and Helen Hale Hill, Children of Trustor, this trust estate created for their benefit shall ipso facto cease and determine, and the entire principal and any undistributed income thereon shall go and be by said Trustee transferred, assigned and delivered, in cash or in kind as follows, to-wit:

"(a)—One-third (1/3) thereof to the issue of Claude F. Hale, share and share alike, and to the children of any deceased issue of Claude F. Hale per stirpes and by right of representation; in the event that the said Claude F. Hale should die without leaving issue or descendants him surviving, then to his heirs-at-law according to the Laws of Succession of the State of California; provided; that at the time of said distribution all of the children of Claude F. Hale have attained the age of thirty (30) years, and in the event that any of the children of the said Claude F. Hale at the time of such termination should not have attained the age of thirty (30) years, such child's share of the trust estate shall remain in trust until he or she shall have attained the age of thirty (30) years, at which time the Trustee shall transfer and set over to such child his or her respective share as his or her absolute property. * * *

"(d)—Anything herein contained to the contrary notwithstanding, this trust shall ipso facto cease and determine upon the death of the survivor of Claude F. Hale, Winfield Hale and Helen Hale Hill, Children of Trustor, and all of their issue, being grandchildren of Trustor, who are living and in being at the date of the creation and execution of this Declaration of Trust."

The only testimony adduced at the hearing was that of appellant Robert C. Hale, who testified that he was the brother of the other appellants, and the son of Claude F. Hale; that he and his four sisters "knew nothing of the execution of the declaration of trust by our grandmother Candace Hale on the 3rd day of May, 1929. We were not any of us consulted by our grandmother about its terms or provisions and we first heard of this declaration of trust only comparatively recently, about the 23rd of October, 1943. So far as my four sisters and I know, our grandmother Candace Hale did not at the time she executed that declaration of trust on May 3, 1929, or at any time thereafter declare that the contingent provisions and benefits of the trust for my sisters and myself were either an advancement or a settlement"; that they had never seen any writing signed by their grandmother in which she declared her intention as to whether the benefits of the trust were a gift or advancement or settlement; that they had never received any sum of money or benefit from such trust; that they never consented to accept the benefits under the trust as a settlement; had no knowledge that it ever was the intention of their grandmother "to restrict the gift of the benefits under the trust so as to change same to a settlement or advancement or in any other way to qualify the nature of her act of May 3, 1929"; that said witness had no knowledge at any time that it was his grandmother's intention to disinherit "my four sisters and myself so that we would not be entitled to receive our share of her estate as pretermitted grandchildren"; and had no knowledge concerning the execution

of her will of October 31, 1933, or of her last will of June 23, 1941.

Appellants contend that the absence of evidence of decedent's intention to provide for her grandchildren by settlement compels the conclusion that a gift and not a settlement was intended by the declaration of trust of May 3, 1929. In this connection, appellants direct attention to the terms of decedent's first will of October 31, 1933, by which she made equal provision for the distribution of her estate to her then living children, Claude F. Hale and Helen Hale Hill, and to the issue of her deceased son, Winfield Hale; urging that, since decedent on May 3, 1929, and October 31, 1933 "clearly intended to treat her heirs at law equally and to divide her estate between them on equal terms", therefore the will of June 23, 1941 "did not have the effect of converting the gifts in trust under the declaration of trust into a settlement under provisions of section 90, Probate Code, nor have the legal effect of altering the terms and conditions of the gifts in trust under the Declaration of Trust."

[1] The intention of the trustor when she made the declaration of trust must be ascertained from the trust instrument itself. An examination of that document reveals that she had appellants in mind at that time and that she made substantial provision for them. Since the trust was irrevocable, she was thereafter powerless to change it by will or otherwise, because her will could only operate on property not included in the trust. On the other hand, the declaration of trust did not prevent decedent from disposing by her will of such property as was not included in the trust.

This court's attention has been directed to but one California case which contains language defining the word "settlement", i.e.: Nichols v. Emery, 109 Cal. 323, 41 P. 1089, 50 Am.St.Rep. 43, where a father deeded his real property to his son, in trust for the benefit of his five children, including the trustee, the trustor reserving the right to the use of the property for his life, as well as the right to revoke the trust. It was there held at page 332 of 109 Cal., at page 1092 of 41 P., 50 Am.St.Rep. 43: "The deed, being a voluntary settlement for the settlor's children, and being fully executed, does not require other consideration for its support than that of parental affection and duty."

Settlement is defined in 57 C.J. 532, section 3, as "* * * the conveyance of any estate for the benefit of some person or persons; the conveyance of property or the creation of estates therein to make future provision for one or more beneficiaries; the disposition of property for the benefit of some person or persons; usually through the medium of trustees * * *." Citing In re Brant's Estate, 121 Misc. 102, 201 N.Y.S. 60. In the cited case, the Surrogate's Court had before it a will by which the testator devised his entire estate to his widow, who survived him together with a son born some years after the execution of the will. Section 26 of the Decedent Estate Law of New York State, Consol.Laws, c. 13, provides: "Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, *unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will,* every such child shall succeed to the same portion of such parent's real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will." (Emphasis added.)

Quoting from the opinion in the Brant case:

"The son, John Brant, was 'neither provided for nor in any way mentioned in such will.' Consequently, the inquiry is, was he left 'unprovided for by any settlement?' Jessup-Redfield Practice (paragraph 1203), referring to the case of Stachelberg v. Stachelberg, 124 App.Div. 232, 108 N.Y.S. 645, affirmed 192 N.Y. 576, 85 N.E. 1116, says: 'It appears from this case that the settlement referred to in the statute is one outside of the will and that

proof is admissible before the surrogate on the question of whether or not such settlement has in fact been made.' * * *

"It seems to me that the word 'settlement' as used in section 26 of the Decedent Estate Law, means 'to provide for,' or 'to make provision for,' and that is the interpretation I give of it. In McLean v. McLean, 207 N.Y. 365, 373, 101 N.E. 178, 180, Judge Hiscock, writing the opinion of the court, says: 'In construing the statute we are to study it as a whole, and we are justified in interpreting one of its alternative requirements somewhat by reference to the meaning of the other. Inasmuch as the Legislature has permitted a testator to meet the possibility of after-born children by mention or provision, and inasmuch as it has been held that "mention" may be made through a very general provision, it would be somewhat idle if not inconsistent to hold that in order to be effective as a "provision" a bequest or devise must be vested, certain and adequate.' If a testator fails to provide for after-born children, provisions may nevertheless be made outside of a will by way of settlement. * * * There is nothing in the section to indicate the character of settlement necessary in order to comply with or fulfill the requirements. * * *

"The evidence submitted by the petitioner shows that Harry S. Brant had taken out insurance upon his life and had made his son, John M. Brant, sole beneficiary in several of these policies. * * * All of the above-mentioned policies were in full force and effect at the time of testator's death, and provided for the payment of the principal sum of $34,000 to said son. There is no proof tending to show that the testator left the son unprovided for by any settlement. On the contrary, it does appear that the son was not overlooked by the father, and that provision was made for him by way of insurance."

This interpretation of the word "settlement" has been followed by the New York State courts for many years. In re Hagendorn's Will, Sur., 41 N.Y.S.2d 491, 492, decided in 1943, was a case in which the testator, a lawyer, died in 1942 survived by his widow and a son, leaving a will dated November 1, 1920, in which he named his widow sole legatee, devisee and executrix. His son, born after the making thereof, was neither mentioned nor provided for therein, it appearing, however, that the testator on February 1, 1929, took out two policies of life insurance in which he named his wife as beneficiary. On February 17, 1940, decedent executed what is termed a "special settlement request and revocation of previous beneficiaries", by virtue of which the proceeds of the policies became payable to the son if he attained the age of 16 years upon his father's death. The widow sought a determination that the provision, by way of insurance, made by the testator in his lifetime for the benefit of his son constituted a "settlement" for him within the terms of section 26 of the Decedent Estate Law. It was there held that "the provision by way of insurance, made by the testator for his afterborn son was a sufficient compliance with the statutory requirement and that he has no right to an intestate share of his father's estate. Matter of Brant's Estate, 121 Misc. 102, 201 N.Y.S. 60; Matter of Froeb's Estate, 143 Misc. 660, 257 N.Y.S. 851; and Matter of Backer's Estate, 148 Misc. 318, 266 N.Y.S. 47."

[2] In the light of the reasoning set forth in the decisions hereinbefore cited, it would appear that the trust in which appellants are named as the issue of Claude F. Hale and provided for in a substantial amount, constitutes a settlement within the intent and meaning of section 90 of the Probate Code.

[3] Appellants further argue that, because that portion of the trust which provides for a group other than appellants violates the rule against perpetuities, the trust created for the benefit of appellants is also void. However, the saving clause appended to that part of the indenture providing for appellants validates the trust created for their benefit, irrespective of the validity or invalidity of other portions of the trust. Such clause reads: "Anything herein contained to the contrary notwithstanding, this trust shall ipso facto cease and determine upon the death of the survivor of Claude F. Hale, Winfield Hale,

and Helen Hale Hill, Children of Trustor, and all their issue, being grandchildren of Trustor, who are living and in being at the date of the creation and execution of this Declaration of Trust." In this connection see In re Estate of Micheletti, 24 Cal.2d 904, 151 P.2d 833.

For the reasons stated, that portion of the order appealed from is affirmed.

DORAN and WHITE, JJ., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.




75 Cal.App.2d 277

**KERR v. BULLOCK'S, Inc.**

**Civ. 15099.**

**District Court of Appeal, Second District, Division 1, California.**

**July 9, 1946.**

**Rehearing Denied July 26, 1946.**

**Hearing Denied Sept. 5, 1946.**

**1. Negligence ⇐136(14, 26)**

Issues of negligence, contributory negligence, want of ordinary care and the like, present questions of fact for the jury.

**2. Trial ⇐165**

A motion for nonsuit presents a question of law.

**3. Trial ⇐139(1)**

Total lack of substantial evidence to support plaintiff's cause of action imposes upon court the duty, as a matter of law to grant a motion for nonsuit, but if there is substantial evidence, though slight, that may afford opportunity for a reasonable difference of opinion, court must deny such motion and permit the question of fact to be determined under applicable rules of law.

**4. Trial ⇐165**

On motion for nonsuit, inconsistencies must be ignored and only the evidence favorable to plaintiff may be considered.

**5. Negligence ⇐136(22, 27)**

In customer's action against proprietor of store for injuries sustained in fall, whether proprietor was negligent in permitting water and mud brought in on shoes of customers to remain upon aisle leading to entrance so as to make it dangerous and slippery and whether customer was contributorily negligent in walking in such aisle, though she knew of wet, slippery condition of floor, were questions of fact for jury.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Elizabeth Kerr against Bullock's, Inc., for personal injuries sustained by plaintiff when she fell while in defendant's store. Defendant's motion for a nonsuit was granted and from the judgment entered thereon, plaintiff appeals.

Judgment reversed.

Lyons & Lyons, David Lyons, and Harry Lyons, all of Los Angeles, for appellant.

Crider, Runkle & Tilson and E. H. Tilson, all of Los Angeles, for respondent.

DORAN, Justice.

This is an action for damages for personal injuries. The court granted defendant's motion for a nonsuit and from the judgment that followed, plaintiff appeals.

The action was tried before a jury; at the close of plaintiff's case following the motion for a nonsuit and in connection therewith, the trial court commented as follows,

"Well, ladies and gentlemen of the jury, I have saved you some work, that is, I ought to grant a nonsuit in this case after listening to argument. I felt convinced—I may be wrong, but I think I am right,—that there was contributory negligence and that the plaintiff walked into the spot knowing it was there—seeing it, into a place of danger; secondly, that there was no showing that the defendant was negligent.

"So you won't have to decide the case; I will have to grant a nonsuit, and I will have to discharge the jury."

The facts are not disputed; the injuries resulted from an accident, appellant's description of which is as follows,

"On the 30th day of December, 1943, appellant arrived at respondent's store at

about 10:15 o'clock A.M., and entered the Hill Street building. It had been raining since she had left her home some 45 to 50 minutes previously and continued raining until she arrived at the store. She first visited the men's department with her son, remained there about a half hour or more while he purchased a suit and then left him after making arrangements to meet her son later on the ground floor where the cosmetics were or at the Hill Street entrance. She went to the fourth floor, then examined merchandise on the third floor and then came down to the main floor, passing through a covered ramp to the Broadway building. She proceeded in an easterly direction along a main aisle until it intersected with another aisle running in a northerly and southerly direction and leading to the Seventh Street entrance, and arrived there at 11:30 o'clock A.M. She turned to her right down the intersecting aisle to the cosmetic counter where she made a purchase. Upon completing her purchase she was proceeding southerly along the Seventh Street entrance aisle toward the bag counter and looking at merchandise on display when she slipped in water and mud that people had brought in on their shoes and which defendant had allowed to gather and remain upon said aisle so as to make it dangerous and slippery causing her to fall".

It is contended by appellant that a prima facie case having been established, it was error to grant a motion for a nonsuit.

Respondent, on the other hand, argues that "The defendant was only required to use ordinary care to keep its premises in a reasonably safe condition" and that, "The Court Is Justified in Granting a Judgment of Nonsuit When the Evidence is Insufficient to Sustain a Judgment for Plaintiff and Where it Clearly Appears That the Danger, If Any, Which Existed Was an Open and Obvious Danger."

It appears from the record that plaintiff knew of the wet and slippery condition of the floor before the accident occurred. For example, in plaintiff's testimony appears the following,

" 'Q. When you saw that the floor was wet and dirty, what, if anything, did you do about that? A. I did nothing about it, only walked carefully across it.

" 'Q. I mean did you walk more carefully than you normally would? A. Yes, I did.

" 'Q. And how far had you walked in feet, approximately, on this wet or dirty floor before you fell? A. Yes, I walked across the aisle; it was all wet.' "

And on cross-examination,

" 'Q. When you say that you were walking more carefully than you normally would, just what were you doing as you crossed the floor, knowing that it was wet? A. As I said before, I walked carefully across the aisle; I was going to a certain counter further down than the one where I fell, to get a bag, but I did not reach it; I fell where I marked on the map.' "

[1-4] It should be emphasized at the outset that this is not an appeal from the judgment after a verdict, and the usual question as to whether the evidence is sufficient to support the verdict or in the absence of a jury, whether the evidence is sufficient to support the findings, is not involved. Issues of negligence, contributory negligence, want of ordinary care and the like, present questions of fact and are for the jury's determination. A motion for a nonsuit presents a question of law. The decisions uniformly hold, in effect, that a total lack of substantial evidence to support plaintiff's cause of action, imposes upon the court the duty, as a matter of law, to grant the motion. To the contrary, if there is substantial evidence, although slight, that may afford opportunity for a reasonable difference of opinion, then it becomes the court's duty to deny the motion and permit the question of fact to be determined under rules of law applicable to the determination of such questions. And in connection with a motion for a nonsuit all of the evidence may not be weighed; inconsistencies must be ignored, and only the evidence favorable to plaintiff may be considered.

[5] That it was error for the trial court to grant the motion, in the circumstances

there can be no question. The fact that plaintiff observed the alleged dangerous condition, it is true, might have been regarded by the jury as sufficient evidence of negligence on the part of plaintiff to foreclose a recovery. On the other hand, the fact that the accident occurred despite plaintiff's knowledge of such condition, might have been regarded by the jury as evidence of a more aggravated condition than the use of ordinary care would sanction.

The judgment is reversed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.




75 Cal.App.2d 489

**PEOPLE v. SMITH et al.**

**Cr. 3932.**

District Court of Appeal, Second District, Division 3, California.

July 24, 1946.

**Robbery ⇐24(1)**

In prosecution for robbery, evidence sustained conviction.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Mrs. Arneta Smith, Mrs. Marjorie Wright, Mrs. Willie Lee Sharp, and Miss Johnnie Lee were convicted of robbery, and they appeal.

Affirmed.

Crispus A. Wright, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

SHINN, Justice.

Defendants Mrs. Arneta Smith, Mrs. Marjorie Wright, Mrs. Willie Lee Sharp, and Miss Johnnie Lee were charged jointly by information with the crime of robbery from the person of one Mike Wolka, by separate count with the crime of assault by means of force likely to produce great bodily injury, and by a third count with another offense of robbery committed against Jesse Lee Ford. They were tried by the court. Mrs. Arneta Smith and Mrs. Marjorie Wright were found guilty as charged in Count I, Mrs. Arneta Smith, Mrs. Willie Lee Sharp and Miss Johnnie Lee were found guilty as charged in count III, and the crimes of robbery were found to be of the second degree. Mrs. Willie Lee Sharp and Miss Johnnie Lee were acquitted as to count I and Mrs. Marjorie Wright was acquitted as to count III. Count II was dismissed. Defendants have appealed from the judgments and the order denying their motions for a new trial.

The sole contention on the appeal is that the evidence was insufficient to establish guilt. The complaining witness, Mike Wolka, 71 years of age, testified that he resided as 632 Stanford Street in the City of Los Angeles; that he had worked for five years for the Weber Show Case Company as a shipper but was not employed at the time; that on May 21, 1945, in the middle of the day, he bought a pound of cheese at a market at Third and Broadway; that as he was returning home and had reached the vicinity of Towne Avenue and East Fifth Street, he encountered a group of colored women; that defendant Wright jumped on him, put her hand in his pocket, that he held onto his pocketbook and that defendant Arneta Smith took his watch from his pocket, breaking the chain in doing so, and ran away; that defendant Wright slapped him twice in the face and that he slapped her once; that a number of the women then jumped on him, struck him, knocked him down, and kicked him while he was on the ground, breaking four of his ribs. He was confined to the hospital and placed in a plaster cast by reason of his injuries. He identified the defendant Sharp as one of the crowd of women and testified that she kicked him as he lay on the sidewalk. He could not count the number of women in the crowd, but thought there were maybe 10 or 15 altogether, including some men who were standing around. He testified

that he knew the defendants Smith and Wright and that he did not know the others in the crowd. On cross-examination he stated that the first remark was made by one of the women, who asked him where he had stolen the cheese.

A witness, Eddie Jones, who worked in the vicinity, testified that he was standing 25 to 30 feet from the scene of the altercation; that he saw the women around Wolka; that "it seemed like they were dancing with him or something," and "this man gets up and starts walking off and looking back." He identified the four defendants as being present and heard someone say, "I hit him or kicked him" or something like that. On cross-examination he testified he heard Wolka holler, and on redirect examination that Wolka was down when he first saw the altercation.

One of the arresting officers, Bagoye, testified that Wolka pointed out defendants Smith and Wright to him and that the witness Jones pointed out the four defendants who were walking along the street.

All the defendants admitted being on the scene but defendant Lee denied having seen Wolka. Defendant Sharp testified that she heard Wolka call defendant Wright a name and that defendant Wright hit him and he hit her back. Defendant Wright testified that Wolka hit her and that she hit him back. Defendant Smith testified that she and defendant Lee "ran up to see what happened"; that she did not see Wolka, and that they were then arrested, and that defendant Lee started to run away from the officers. All denied the robbery and that Wolka was knocked down or kicked.

There was no corroboration of the testimony of Wolka as to his injuries and hospitalization and no denial of it.

The argument of insufficiency of the evidence is devoted to alleged uncertainties and discrepancies in the testimony of Wolka. The witness spoke somewhat broken English and evidently misunderstood some of the questions asked of him. He gave a lucid account of the occurrence and the record discloses no reason for believing that the testimony was entitled to less credit than it was given by the trial judge.

The robbery of Jesse Ford, as charged in count III, was described by the victim. He was a carpenter who worked at a junior high school in Montebello. About 11:30 p. m. he alighted from a street car and was walking in the vicinity of Fifth and Scranton (Stanford). He identified defendants Smith and Sharp as two girls who came up behind him and grabbed him under the arm, and the defendants Johnnie Lee and Marjorie Wright as two who came up behind him after the first two grabbed him. The defendants Wright and Lee went through his clothes, in which he had a pocketbook, a knife, some smoking tobacco, a $10 bill, a $5 in the the pocketbook, and 60 or 75 cents loose in his pocket. The pocketbook and the loose change were taken and the smoking tobacco was taken and thrown away. While he was being shoved around, and before he was robbed, a man shouted to them, "Keep away from here, get out of here," and threatened to call the police and Ford said, "Why don't you call the law; what are you waiting on"; the women moved away, the man asked Ford also to move, and he walked around the corner, where he was grabbed by defendants Smith and Sharp, and the other two defendants being present and extracting the pocketbook while defendants Smith and Sharp held him. He saw no one but colored people in the neighborhood. Immediately after the robbery he called the police. He was cross-examined at length as to his ability to identify the defendants and was positive in his identification of them, other than defendant Wright, who was acquitted upon count III. All the defendants denied ever having seen Mr. Ford prior to the preliminary hearing, May 29. The two offenses occurred in the neighborhood in which defendants lived. The denials by defendants that Wolka was knocked down and injured as he testified, which injuries were satisfactorily shown, were sufficient in themselves to justify the court in refusing to give credit to their testimony. The testimony of Ford was positive and, if believed by the court, was sufficient to convict the three defendants of the crime committed against him.

Although it is startling, it is, unfortunately, not incredible that this group of

women should have been roaming the streets in the vicinity of their homes, attacking and robbing male pedestrians. They were of mature years, and the most that can be said in their behalf is that they seem to have had an undeveloped understanding of their duty to obey the law. There was convincing evidence of their guilt, and the several judgments and the order denying their motions for new trial are affirmed.

DESMOND, P. J., and WOOD, J., concur.




75 Cal.App.2d 542

**DOANE v. HOOPER et al.**

**Civ. 15269.**

District Court of Appeal, Second District, Division 3, California.

July 30, 1946.

Rehearing Denied Aug. 23, 1946.

Hearing Denied Sept. 19, 1946.

**1. Trusts ⇐1**

Where court found a debtor and creditor relationship to exist between tenants in common of land, court properly took an accounting upon that basis rather than a trust accounting, since a debt is not a trust.

**2. Executors and administrators ⇐231**

Where one tenant in common died and second tenant in common failed to file a claim against the estate, after estate was closed, second tenant was not entitled to an accounting for sums which had been received by deceased tenant in connection with management of common property.

**3. Trusts ⇐61(3)**

Where plaintiff paid half the purchase price of lot at the time of purchase thereof by plaintiff, defendant and defendant's husband, and title was taken in the name of defendant and her husband, subsequent delivery to plaintiff of a deed conveying to him an undivided one-half interest in lot effected a merger of any legal and equitable title which plaintiff may have claimed and terminated any trust relationship that might previously have existed.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by F. F. Doane against Daisy D. Hooper, a widow, and others, to quiet title to an interest in certain land and for other relief. From the judgment, plaintiff appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Paul J. Otto and Irvin C. Evans, both of Los Angeles, for respondents.

DESMOND, Presiding Justice.

Plaintiff, claiming title to an undivided one-half interest in Lot 8, Block 9, Tract 1589, county of Los Angeles, named as defendants in an action to quiet title, Daisy D. Hooper, widow of C. E. Hooper, J. Sherwood Dresser and his wife, Lura H. Dresser, Otto Lande and Tressie M. Lande, husband and wife, and several other individuals who need not be mentioned since they have been eliminated by stipulation or quitclaim. The complaint also asked for an accounting. A first amended complaint filed after a demurrer was sustained made it appear from its caption that the suit was also "To Declare a Resulting Trust in Real Property." This item of the caption was continued into the third amended complaint upon which the cause finally was heard. The trial resulted in a judgment in favor of plaintiff as to title to an undivided one-half interest in said Lot 8, subject to the right of defendants Lande to receive a deed to the West 44 feet of Lot 8 upon the payment of $1,706.39, balance due under a contract of purchase, which payment Mr. and Mrs. Lande tendered into court. The judgment also settled the account in favor of plaintiff but he appeals from the entire judgment for the apparent reason that the trial court in determining the sum of money to be credited to him refused to consider any payments which might have been made prior to January 31, 1939, upon the Lande contract or for rental accruing prior to that

date from the use and occupation of said Lot 8 exclusive of the Lande parcel.

The reason for the refusal appears in paragraph XVI of the Findings of Fact, reading as follows: "The Court further finds that prior to the death of C. E. Hooper on January 31, 1939, the defendant Otto Lande paid to said C. E. Hooper certain moneys as reflected on the back of the said Lande contract, but the Court further finds that neither defendant Daisy D. Hooper nor defendant Lura H. Dresser received any of said sums and the Court finds that plaintiff is entitled to no credit for the same." A preceding finding throws light upon the reasoning of the trial judge. We copy it here:

"The Court further finds that Charles Edward Hooper, also known as Charles E. Hooper, and also known as C. E. Hooper, died on January 31, 1939, leaving surviving him the defendant Daisy D. Hooper as his widow and the defendant Lura H. Dresser as his daughter.

"The Court further finds that the estate of the said Charles E. Hooper, deceased, was duly probated and administered in the Superior Court of the State of California, in and for the County of Los Angeles; that during the said C. E. Hooper's life he made all collections covering the described property and was solely and exclusively in complete possession and management thereof and that the plaintiff made no demand on the said C. E. Hooper during his lifetime for an accounting covering the plaintiff's undivided one-half interest in and to said described premises and did not file at any time a claim against the said Estate of Charles Edward Hooper, etc., deceased, for any moneys alleged to be due him by reason of said plaintiff's alleged undivided one-half interest in and to said premises, and that as a tenant in common of the said C. E. Hooper and the said Daisy D. Hooper it was the duty of the said plaintiff to file his claim for any amounts due him with the administratrix of the said Estate of Charles Edward Hooper, also known as C. E. Hooper, deceased; and that the statute of limitations has run upon any claims or demands of plaintiff for money collected by said C. E. Hooper to January 31, 1939." Another finding was to the effect that Lande had no constructive or actual notice that the plaintiff was the owner or claimed to be the owner of an undivided one-half interest in Lot 8.

[1, 2] From the fact that the court found that the plaintiff was a tenant in common with Mr. and Mrs. Hooper and that as such co-tenant it was his duty to file against the estate of Charles E. Hooper for any amounts due him (see, 14 Am. Jur. 158, citing Willmon v. Koyer, 1914, 168 Cal. 369, 143 P. 694, L.R.A.1915B, 961), it is apparent that the trial judge did not consider that the relationship between him and Mesdames Hooper and Dresser arose from a resulting trust. We believe that under the conditions hereinafter detailed he correctly determined that the relationship was that of debtor and creditor, and since "A debt is not a trust" (Rest., Trusts, § 12) the accounting was properly taken upon the latter basis.

The record indicates that in 1924 Mr. Doane and Mr. Hooper agreed to purchase Lot 8 from a Mr. and Mrs. Dunson, each contributing one-half of the purchase price. These men were brothers-in-law, Mrs. Hooper being the sister of plaintiff. At the time of trial and for several years previously she had been an inmate of various institutions and by reason of old age and infirmity had become incompetent. Her daughter, Mrs. Dresser, was appointed her guardian and was substituted in her stead as a defendant in this action.

[3] Mr. Doane testified that at the time of trial he was 69 years of age and, judging from the record, was quite hazy in his memory as to events following the year 1924. He could not swear as to what the purchase price of Lot 8 was, saying that "This has been a good many years and my recollection is not clear." He also stated that he believed that he and Mr. Hooper paid $2,500 for the lot; that "It would be possible that I paid $2500.00 instead of $1250.00, as half of the purchase price. I can't remember just how it was. Q. But you know you paid at least half? A. I paid half of it, yes." He produced several checks of an early date, one of them indicating that he had contributed $400 toward

the purchase of a small green house which was placed upon Lot 8, and a few checks in the sum of $7.50 which he said he paid to Mr. Hooper as one-half of the rents collected by him at the rate of $15 per month. Whether Mr. Doane contributed his one-half of the purchase price of the Dunson property in a single payment or over a period of months or years does not appear. According to his testimony, title to Lot 8 was taken in the names of Mr. and Mrs. Hooper for the reason that his wife held her property separately and in order that his property might not become confused with hers it was agreed that Mr. and Mrs. Hooper would take the sole title to Lot 8 in their names but with recognition of his right of ownership to one-half thereof. More than a dozen years after April 5, 1924, the date when the Dunson deed was recorded, Mr. and Mrs. Hooper delivered a deed, dated September 1st, 1936, to Mr. Doane, conveying to him an undivided one-half interest in and to Lot 8. This deed was recorded on September 10, 1936. It effected a merger of any legal and equitable title which Mr. Doane may have claimed in Lot 8 and terminated any trust relationship that might have existed prior to that time. Rest., Trusts, §§ 340–410; see, Zakaessian v. Zakaessian, 1945, 70 Cal.App.2d 721, 161 P.2d 677.

Under date of June 26, 1945, a stipulation was entered into by counsel in this case, stating "That since January 31, 1939, defendants Daisy D. Hooper and Lura H. Dresser received into their hands for the use and occupation of the whole of said Lot 8 the total sum of $1271.00 up to and including July 19, 1945." This stipulation is recorded in Finding of Fact No. XIX, in which finding the court also determined that there had been contributions toward improvement of the property, payment of taxes, etc., by the plaintiff in the sum of $706.34, and by Mrs. Hooper and Mrs. Dresser in the sum of $282.17. In Finding XIII, the court determined that between January 31, 1939 (the date of Mr. Hooper's death) and the time of trial, Otto Lande paid to Mrs. Hooper and Mrs. Dresser upon his contract the sum of $1,528.89. To substantiate this finding the court had available, as an exhibit, the contract and a list of payments attached thereto. The two items of gross receipts, $1,271 from rentals and $1,528.89 from Lande, aggregate $2,799.89. The court, recognizing the contribution of $706.34 by the plaintiff and $282.17 by Mrs. Hooper and Mrs. Dresser, settled the account in accordance with its Conclusion No. IV, reading as follows:

"That the defendants Daisy D. Hooper and Lura H. Dresser, having received $2,799.89 and being entitled to credits totaling $282.17, are accountable for the net amount of $2,517.72; that plaintiff is entitled to $706.34, which should be paid out of the $1,706.39 due from the defendants Lande; that $1,000.05, being the remainder thereafter due from the defendants Lande, is an asset of the co-tenancy; that the total net assets of the co-tenancy are the sum of $2,517.72 and $1,000.05, or $3,517.77, of which the plaintiff is entitled to one-half, or $1,758.88, and the defendants Daisy D. Hooper and Lura H. Dresser are entitled to the other half; that the plaintiff is entitled to receive the said $1,000.05 from the defendants Lande and have judgment against the defendants Daisy D. Hooper and Lura H. Dresser for $758.83; that the plaintiff is entitled to recover his costs against said defendants Hooper and Dresser, and the defendants Otto Lande and Tressie M. Lande are entitled to recover their costs against the plaintiff and against said defendants Hooper and Dresser."

Judgment was entered accordingly and included a provision that Mr. and Mrs. Lande, upon paying to the County Clerk the balance due upon their contract, should receive a deed to the West 44 feet of Lot 8, Block 9, Tract 1589, together with the policy of title insurance called for by their contract.

We find no error in the proceedings and the judgment is affirmed.

SHINN and WOOD, JJ., concur.

Hearing denied; CARTER, J., dissenting.

75 Cal.App.2d 235

## BISNO v. HERZBERG et al.

Civ. 15274.

District Court of Appeal, Second District, Division 2, California.

July 2, 1946.

Hearing Denied Aug. 29, 1946.

1. Reformation of Instruments ⇐45(1)

In action to reform written instrument, the evidence must be clear and convincing to the trial court.

2. Appeal and error ⇐1009(3)

On appeal from judgment rendered in action to reform written instrument, trial court's decision based on conflicting evidence is conclusive.

3. Appeal and error ⇐989

Where a judgment is attacked as being unsupported by the evidence, the power of the appellate court begins and ends with its determination whether there is substantial evidence that will support the judgment of trial court.

4. Reformation of Instruments ⇐45(1)

In action to reform written instrument, a mere conflict of testimony as to a mutual mistake or the mistake of the plaintiff and the fraud of the defendant does not require a denial of the relief demanded despite the general rule that the evidence must be clear and convincing.

5. Appeal and error ⇐931(1)

The presumption is that in reaching its conclusion the trial court considered and was governed by the proper rule in weighing the evidence.

6. Reformation of Instruments ⇐45(1)

The rule that the evidence of mistake or fraud in the execution of a writing offered for reformation must be clear and convincing does not require unanswerable evidence.

7. Reformation of Instruments ⇐45(15)

In action to reform written contract for sale of hotel property, evidence sustained finding that the parties intended that the sale should include all the furniture, furnishings, equipment and liquor license.

8. Vendor and purchaser ⇐61

A contract for the purchase of a hotel embraced all the contents thereof other than the stock of merchandise in package, since "hotel" is a house for entertaining strangers or travelers.

See Words and Phrases, Permanent Edition, for all other definitions of "Hotel".

9. Specific performance ⇐28(2)
Vendor and purchaser ⇐49

The ordinary terms set forth in a contract for the purchase of a hotel are a part of the contract even though not set forth in full and where such terms must be supplied by construction the contract is sufficiently definite to support a decree for specific performance.

10. Appeal and error ⇐931(6)

In trial before court without a jury, the presumption is that the court ignored inadmissible evidence.

11. Appeal and error ⇐1054(1)

In action before court without a jury, the admission of inadmissible evidence was harmless where there was an abundance of evidence to support finding of the court.

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Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Alexander Bisno against Louis Herzberg and Louis Herzberg, doing business under the fictitious firm name of Montecito Hotel, Inc., to reform a written instrument. From the judgment rendered, the Montecito Hotel, Inc., appeals.

Judgment affirmed.

J. George Bragin, of Hollywood (Max M. Gilford, of Hollywood, of counsel), for appellant.

Martin Goldman and Alvin P. Jackson, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

This is an action to reform a written instrument in words and figures as follows: "Montecito Hotel April 27, 1944
Price: $102,500.00 Cash: $17,500.00
Balance of $85,000 payable 8% per annum payable monthly plus taxes and insurance

monthly. After 5 years interest is reduced to 4% per annum and prepayment of 4% per annum. Deed to be given when price has been reduced to $60,000.

Montecito Hotel, Inc., acknowledges receipt of $1,000 to bind this contract, $4,000 to be paid on evidence of good title, balance on or before June 1st.

Buyer: A. Bisno or his assignee
Seller: Montecito Hotel, Inc.
Louis Herzberg"

Upon a proper complaint to revise the writing to express the true and complete intention of the parties, following a trial the court decreed that defendant as owner agreed to sell and plaintiff agreed to buy the Montecito hotel consisting not only of seven parcels of real estate and improvements situate thereon but also of the furniture, fixtures, equipment and all personal property, including the liquor license of defendant, used in and about and in connection with the operation of the hotel, for the sum of $102,500 payable as follows: $1,000 of even date with the writing, $4,000 upon the production of evidence of good title in the seller and $12,500 on June 1, 1944. Inasmuch as the controversy involves but one issue the other details of the contract found to have been agreed to will not be necessary to the consideration and determination of the one question, namely: Did the parties intend that the agreement of purchase and sale should include all of the furniture, furnishings, equipment and the liquor license?

[1-6] Because respondent had been engaged as a real estate broker and operator for 25 years and owned three hotels in the state of Texas appellant argues that respondent must have known his own purposes and intention at the time of the execution of the writing, and that because of the rule that proof in actions for reformation must be clear, unequivocal, convincing and free from reasonable doubt the respondent failed to prove his case. Citing 22 Cal.Jur. 742. But the rule with reference to the reformation of a written contract is that the evidence must be clear and convincing to the trial court, and on appeal its decision upon a conflict of evidence is conclusive. Sullivan v. Moorhead, 99 Cal. 157, 161, 33 P. 796. When a judgment is attacked as being unsupported the power of the appellate court begins and ends with its determination as to whether there is substantial evidence which will support the judgment of the trial court. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183. See also Herbert's Laurel-Ventura Inc. v. Laurel Ventura Holding Corporation, 58 Cal.App.2d 684, 691, 138 P.2d 43; Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Loewenberg v. Schneider, 14 Cal.2d 305, 307, 93 P.2d 1014; People v. Alexander, 41 Cal.App.2d 275, 283, 106 P.2d 450, 916; Shahabian v. Najarian, 14 Cal.App.2d 435, 443, 58 P.2d 396; Kling v. Crown Finance Corporation, 63 Cal.App.2d 33, 36, 146 P.2d 54. A mere conflict of testimony as to a mutual mistake or the mistake of the plaintiff and the fraud of the defendant does not require a denial of the relief demanded (Sullivan v. Moorhead, supra), despite the general rule that the evidence must be clear and convincing. It must be presumed that in reaching its conclusion the court considered and was governed by such general rule in weighing the evidence. Ford v. Ford, 44 Cal.App. 415, 418, 186 P. 164. The rule that the evidence of mistake or fraud in the execution of a writing which is offered for reformation must be clear and convincing is not a requirement of unanswerable evidence. Hobart v. Hobart Estate Company, 26 Cal.2d 412, 445, 159 P.2d 958.

The only question for consideration by the court of review with respect to the sufficiency of the proof is whether such evidence of the mutual mistake or other alleged grounds for the reformation of the agreement if standing alone without contradiction would establish a prima facie case. Roush v. Kirkman, 42 Cal.App. 353, 183 P. 353. If a mere denial by a defendant that he was mistaken or that he had committed a fraud were sufficient as a matter of law to prevail against the testimony of the party who claims that the writing offered for reformation does not express the true agreement of the parties, rarely or never could a plaintiff in such an action prevail.

The testimony of respondent and his associate, Mr. Snader, is sufficient to prove that the terms agreed upon at the first meeting of the parties included the movables as

contended by respondent. A few days prior to his call at the hotel respondent learned that it was for sale. Accompanied by Mr. Snader he visited the hotel on April 27, 1944, and engaged Mr. Herzberg, president of appellant, in negotiations for its purchase. Concerning his conversations with that gentleman respondent testified substantially as follows:

"Mr. Snader, my associate, and I arrived at the Montecito hotel about 11 o'clock on the morning of April 27, 1944. Mr. Herzberg arrived about an hour later. After some conversation with him he showed us the building, the various rooms, the boiler room. We three walked through the kitchen, the cocktail lounge and the dining room. We then returned to Mr. Herzberg's private office.

"I told Mr. Herzberg that my understanding was that he wanted $100,000 for the building and contents and that he wanted $15,000 cash and that he was asking payments for the balance at the rate of $1,000 per month including interest at 4% and taxes and insurance. He agreed that that was his price.

"Prior to making the contract I said that I would like to know what furniture we were getting there and the condition of it and he said the furniture in the building was all good with the exception of about six rooms that needed new or better furniture and that he would show me the type of furniture. He then showed us the rooms and the property and then after we saw that we went back to his office and talked further on negotiations."

Respondent then testified as to conversations with reference to the terms of the sale in which it was agreed that the price should be $102,500, $17,500 cash, appellant to take 8% interest for five years, after which he was to accept 4% interest and 4% per annum on the principal until the indebtedness should be reduced to $60,000. He would then give a deed and take back a first mortgage for the balance. Further, with reference to the items to be included in the sale respondent proceeded:

"After I had stated to Mr. Herzberg my understanding of his price and terms for the building and contents there was discussion about the inventory of liquor. Mr. Herzberg said that I would have to pay extra for the liquor inventory and the unopened packages of food. To this I agreed because it was the customary way to make a deal. I am sure beyond the question of any doubt that he did not ask me to enter into an agreement at a later date for the purchase of the furniture. There was nothing said about the restaurant equipment except that he showed me what equipment they had there. He showed me the bar but nothing else was said about it. One thing I very specifically mentioned before I drew up this agreement was the liquor license and he said it was included also.

"The word Montecito Hotel used in the memorandum meant to me the land, building, contents, furniture, the equipment, everything that belonged to the corporation other than the liquor inventory and the unopened packages of food. We discussed the income of the hotel and the income of the restaurant and of the bar."

The witness Snader in substance testified:

"I accompanied Mr. Bisno to Santa Barbara and to the Montecito Hotel. After Mr. Bisno and I had looked around the hotel for a while Mr. Herzberg arrived and asked if we had seen the hotel. After showing us around some other places he invited us into his office to talk the matters over. We sat down and I asked Mr. Herzberg regarding the heating plant there, the Oil-O-Matic. He invited us to the basement to show it and said 'We have recently spent $700 or $800 to remodel this and everything is in perfect condition. The furniture needs no repair. I have spent thousands of dollars here. The carpets are in good shape'—and everything in general was shown to us to be in fine shape. *Mr. Bisno was present at the conversation.*

"He then took us to see some particularly nice rooms off a balcony which were in perfect condition. He said, 'You can see what the hotel is like. That is the way it is all the way through.'

"In the meantime we had gone through the dining room, cocktail bar and the

kitchen and I think he requested us not to make it too obvious what we were doing and so we went into his room and there we discussed the terms of the sale upon which agreement was reached. So Mr. Herzberg then said, 'If you will make that payment $17,500, I will make the deal as is; I will just walk right out of this building and you fellows can have it anytime; you can have it tomorrow if you want it.' Bisno said, 'Well, that is all right. Let us go to Los Angeles and have the contract drawn up.' To which Mr. Herzberg replied: 'No, if we don't make a deal right this minute, if you fellows walk out of this building there is no deal. I want to go east. If I don't make a deal today I am hiring a manager and there is no need talking about the deal.'

"Mr. Herzberg said that the $102,500 included the furniture, fixtures, equipment, the license, the bar, everything with the exception of the inventory of food and liquors. My recollection is that he used the expression 'lock stock, and barrel.'

"That is the way the contract was drawn up. Mr. Herzberg shook both Mr. Bisno's hand and my hand and said, 'Well, I think you fellows made a dandy deal here. You won't have to spend anything on any of this furniture, or any of this equipment for a long, long time because I have put it in top shape.' After some further discussion we agreed to meet at the broker's office on the following Saturday to complete the deal."

Further evidence of the intention of defendant to include all of the contents of the building was the testimony concerning the discussion with reference to the income of the hotel, of the restaurant, of the bar and of the expense of operating each of them. How could the purchaser of a hotel reckon upon the earning power of his investment if he did not know the amount to be invested? The determination of Mr. Herzberg to make an immediate sale of the hotel on that day; respondent's necessity of obtaining furniture for its operation and a license for the bar; the fact that no mention was made by Mr. Herzberg in his conversations with Bisno and Snader of his desire to sell the furniture or of respondent's need of it, or of the difficulty the latter might experience in acquiring such articles as would be indispensable to the conduct of the hotel—such facts supply inferences in support of the testimony of respondent.

[7, 8] But aside from the reasonableness of the trial court's finding that the parties intended to include the movable contents of the hotel in their contract of sale, it requires no strain of the rules of construction or of the judicial conscience to determine from the memorandum alone that such was their intention. It is a very brief document but it indicates that $102,500 is to be paid for the Montecito hotel and specifies the terms of payment. The Oxford and Webster dictionaries define *hotel* as a house for entertaining strangers or travelers. In view of such universal significance of the word and its implications it is unreasonable to conceive that appellant had any thought at the time of signing the memorandum other than that *hotel* embraced all of the contents of the Montecito other than the stock of merchandise in package. This conclusion is supported by the language of the Missouri Court of Appeals which determined that a hotel is a place where lodging is furnished to transient guests as well as one where both lodging and food are furnished (Metzler v. Terminal Hotel Company, 135 Mo.App. 410, 115 S.W. 1037), followed by that of the Supreme Court of Oklahoma to the effect that the word hotel as used in an accident policy "did not mean the bare building that was used for a hotel * * *. A building is a necessary part of a hotel, but the furnishings and all equipment therein are as necessary to make a hotel as the building itself, and therefore the word 'hotel' necessarily embraces the personal property that must be used therewith, including the bedding and heating facilities." Commercial Casualty Ins. Co. v. Adkisson, 152 Okl. 216, 4 P.2d 50, 53, 54.

[9] The ordinary terms set forth in a contract for the purchase of a hotel are a part of the contract even though not set forth in full; and where such terms must be supplied by construction the contract is sufficiently definite to support a decree for

specific performance. Janssen v. Davis, 219 Cal. 783, 888, 29 P.2d 196.

[10, 11] At some length appellant in its brief sets forth the testimony of the witnesses Minster and Hanford to show that appellant had listed the hotel and its contents with Mr. Minster, a hotel broker, some two months prior to the date of the written memorandum at the same price agreed upon by the respondent and appellant. It will not be necessary to discuss the merits of the argument as to whether such evidence was proper. Conceding it to have been res inter alios acta and therefore inadmissible, the proof was abundant without it and the court is presumed to have ignored it in deriving its final decision. Cordi v. Garcia, 56 Cal.App.2d 584, 132 P.2d 887; Roth v. Thomson, 40 Cal. App. 208, 216, 180 P. 656; Farmers' & Merchants' National Bank of Los Angeles v. Stowell, 6 Cal.App.2d 373, 378, 44 P.2d 392.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.




## AUTRY v. REPUBLIC PRODUCTIONS, INC. *

Civ. 15017.

District Court of Appeal, Second District, Division 3, California.

July 9, 1946.

Hearing Granted Sept. 5, 1946.

1. Contracts ⇐215(1)

Producer's notice to actor of election to extend current term of employment was ineffective to extend term under provisions in contract of employment for extensions in event production was prevented by causes beyond the control of the parties such as fire and war, or by reason of actor's failure or refusal to render services.

2. Contracts ⇐303(1)

Motion picture actor's military duties while in military service excused performance under contract of employment with producer, during the period of such military service.

3. Contracts ⇐215(1)

Motion picture actor who entered military service was not thereby "incapacitated" or "disabled" within provision in contract of employment for extension thereof in the event of actor's incapacity to perform by reason of mental or physical disability or otherwise.

See Words and Phrases, Permanent Edition, for all other definitions of "Disabled" and "Incapacitated".

4. Contracts ⇐215(1), 217

Motion picture actor's contract of employment with provision that contract contained the entire understanding and agreement of the parties was to be read as expressing the complete understanding of the parties as to all possible conditions which would operate to extend any yearly term of actor's service, or which would give producer an option to extend it.

5. Contracts ⇐309(1)

Where performance has been rendered impossible temporarily, further performance will not be required if it would impose upon the promisor a substantially greater burden than the one he originally assumed.

6. Contracts ⇐211, 215(1)

Under motion picture actor's contract of employment for one year plus optional successive yearly periods terminating ultimately on March 6, 1945, where period for production of each photo play was limited, and time for exercising various options was specified in number of days, time of performance was of the essence of the contract, and actor, who had joined the Army on July 26, 1942, and was still in the Army on March 6, 1945, would not be required after his discharge therefrom to complete the 21 additional photo plays contemplated by the contract, since such performance would be different from that contemplated by the parties with respect to time of performance.

 * Subsequent opinion 180 P.2d 888.

**7. Contracts ⇐227**

Motion picture actor's contract of employment could not be extended beyond date on which term of employment expired, except by express agreement between the parties, and was not extended by conduct allegedly waiving right to declare contract terminated by actor's entry into military service.

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Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Gene Autry against Republic Productions, Inc., for a declaration of the rights and obligations of the parties under a contract of employment. From an adverse judgment, the plaintiff appeals.

Reversed with instructions.

Prior opinion, 165 P.2d 688.

Gang, Kopp & Tyre, of Los Angeles, and Samuel Williston, of Cambridge, Mass., for appellant.

Loeb & Loeb, Finlayson, Bennett & Morrow, Milton H. Schwartz, Hubert T. Morrow, and John C. Morrow, all of Los Angeles, for respondent.

SHINN, Justice.

This is an action for a declaration of the rights and obligations of the parties under a contract of employment.

Plaintiff is by profession an actor in photoplays.

Under agreement of September 22, 1938, plaintiff's services were engaged by defendant for the period of the year July 1, 1938, to June 30, 1939, during which time he was to make ten pictures. Defendant was given four options, a, b, c, and d, to extend the contract by successive yearly periods, and plaintiff in each such extended period was to make eight additional photoplays. Each option was to be exercised by notice in writing given during the current yearly term. Option a was exercised by defendant and by agreement the term of that period was extended so as to run from June 30, 1939, to March 7, 1941. Succeeding yearly periods ran from the latter date. The findings were that options b, c, and d also were exercised. By another writing executed by the parties on May 11, 1942, defendant was given an additional option under which eight more photoplays were to be made after the expiration of the period covered by option d, and the finding was that defendant exercised this additional option. This final period expired March 7, 1945. It was further found that during the period when option c was operative, and which commenced March 6, 1942, plaintiff made three photoplays, which were finished, respectively, in April, June, and July, 1942.

Plaintiff rendered services as agreed until July, 1942. He entered the Army July 26, 1942, and at the time of trial of the action in March, 1945, was still serving in the armed forces of the United States. He has rendered no services to defendant and has received no compensation since July, 1942. On June 17, 1944, he served notice upon defendant that the contract was thereby terminated and that he was no longer in its employ, basing his action upon the stated grounds that further performance of the agreement had been rendered impossible and that the purposes of the agreement had been frustrated by reason of his military service. Defendant has at all times denied that the employment has been terminated and has demanded that plaintiff resume performance after his release from military service. Plaintiff's contention that his employment was terminated by reason of his service in the armed forces was rejected by the trial court, as evidenced by the following conclusions of law:

"Said contracts have not nor has either of them been terminated or discharged nor has plaintiff been released or discharged from any of his duties or obligations thereunder.

"By reason of plaintiff's unavailability to render services for the defendant because of his induction into and service in the armed forces of the United States, plaintiff's employment was suspended and the term thereof is extended for a period of time equal to the period of time from the date of said induction until the date when said unavailability ceases."

The judgment declares that plaintiff is obligated to make twenty-one additional photoplays. These consist of the five that were not made under option c, and sixteen that were to be made under option d, and

the May 11, 1942, agreement. The two agreements will be referred to in the singular.

The parties are in agreement upon the following points: (1) performance of plaintiff's services according to the agreement has been impossible and for that reason has been excused during the period of plaintiff's military service; (2) it will be possible upon plaintiff's release from military service for him to make the remaining twenty-one pictures, and (3) no more time or effort upon the part of plaintiff would be required to make the pictures after his release from the Army than would have been required if production had not been interrupted, and his compensation would be the same.

Plaintiff insists that the following are the only proper conclusions of law to be drawn from the facts which we have stated: (1) that his enlistment in the armed forces, ipso facto, terminated the contract, for the reason that further performance was rendered impossible and illegal; (2) that the objects and purposes of the parties have been frustrated and that he is thereby released from the duty to render further services, and (3) that he contracted to render services only up to March 7, 1945, and that the life of the contract therefore ended, by its own terms, while he was still in the service, and before the rendition of the judgment.

Defendant contends (1) that it had the right by the terms of the agreement to extend its life for a period equal to the entire time during which performance was prevented by reason of plaintiff's military service, and that it availed itself of this right; (2) that, independently of any express or implied provisions for extension, plaintiff is bound, under principles of equity, to resume and complete his services when he shall have been released from the Army, and (3) that if plaintiff ever had a right to declare the contract terminated by reason of his military service, he waived that right by his actions and conduct after he had enlisted.

The principles of law from which the parties evolve their opposing theories as to their rights under the contract are elaborately discussed in the briefs, and much care and research have been devoted to the arguments. We shall not have occasion to decide more than two of the propositions advanced by the parties, namely, the third one of plaintiff and the third one of the defendant, as we have stated them. The first question is whether plaintiff's obligation to render services was limited by the agreement to a period which expired while he was still in the military service. If it was so limited, his obligation came to an end when that date arrived.

March 6, 1945, was the last day upon which plaintiff was required to participate in the production of the agreed number of photoplays, unless the contingency of his entering the armed forces was one in which defendant was given the right to extend the term of the agreement. It is necessary to set out certain of the provisions for extensions at length. Under one of them plaintiff would have been required to spend a brief time in the completion of any picture under production at the expiration date of any of the yearly terms, but that provision is not here involved. Paragraphs 12, 13 and 14 of the agreement give defendant options to extend any yearly term under stated conditions. These paragraphs read as follows:

"12. If the production of any photoplay in which the artist is appearing or is scheduled to appear hereunder is necessarily prevented, suspended or postponed during the employment period concerned by reason of any fire, casualty, lockout, strike, labor conditions, riot, war, act of God, or by the enactment of any municipal, state or federal ordinance or law, or by the issuance of any executive or judicial order or decree, whether municipal, state or federal, or by any other legally constituted authority, or if the majority of the motion picture theatres in the United States shall be closed for a week or any period in excess of a week, then and in any of said events, this agreement, at the option of the producer, may be suspended likewise during the continuance of such prevention, suspension and/or postponement, and the producer shall not be required to pay any compensation to the artist for or during such period of suspension or suspensions.

The term of this agreement, and all of its provisions herein contained, may be extended, at the option of the producer, for a period equivalent to all or any part of the period of such suspension or suspensions. If such suspension or suspensions in connection with any particular employment period should continue for a period or aggregate of periods of four (4) weeks, the artist, at his option, may elect to terminate his employment hereunder; provided, however, that should the producer, within three (3) days after the expiration of such four (4) weeks, notify the artist in writing of its election to maintain this agreement in force, the artist shall not have the right to terminate his employment hereunder, but in such case the producer shall pay the artist weekly at the end of each week of such period of suspension, commencing with the fifth (5th) week, for so long during such period of suspension as it continues to maintain this agreement in force, compensation in an amount equivalent to one-fifth (1/5th) of the compensation which the producer is required to pay to the artist for the photoplay concerned. Such payment shall be in addition to the compensation which the producer is required to pay the artist for such photoplay. If such suspension or suspensions in connection with any particular employment period should continue for a period or aggregate of periods of four (4) weeks, the producer, at its option, may elect to terminate the artist's employment hereunder, and in such event it shall be released from all further obligations whatsoever hereunder, except to pay the artist reasonable compensation for the days, if any, on which the artist shall have actually rendered services for the producer during the employment period concerned.

"13. In the event that by reason of mental or physical disability or otherwise, the artist shall be incapacitated from fully performing the terms hereof or from complying with each and all of his obligations hereunder, or in the event that the artist suffers any facial or physical disfigurement or material alteration or change in his present facial or physical appearance or any impairment of his voice, materially detracting from his appearance on the screen or interfering with his ability to perform properly his required services hereunder (all being hereinafter referred to as 'disability or incapacity'), then in either or any of said events this agreement shall be suspended during the period of such disability or incapacity, and the producer shall not be required to pay any compensation to the artist for or during such period of suspension or suspensions. The term of this agreement, and all of its provisions herein contained, may be extended, at the option of the producer, for a period equivalent to all or any part of the period of such suspension or suspensions. If such disability or incapacity should continue during any employment period for a consecutive period of two (2) weeks or for an aggregate of periods of four (4) weeks, the producer, at its option, may cancel and terminate this agreement, and thereupon be released from all further obligations whatsoever hereunder. It is further agreed that if the artist alleges that he is incapacitated by illness or other disability from the full and faithful performance of this agreement, the producer shall have the right to have medical examinations of the artist made by such physician or physicians and at such reasonable time or times as it may designate.

"14. It is distinctly understood and agreed by and between the parties hereto that the services to be rendered by the artist under the terms hereof, and the rights and privileges granted to the producer by the artist under the terms hereof, are of a special, unique, unusual, extraordinary and intellectual character, which gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, and that a breach by the artist of any of the provisions contained in this agreement will cause the producer irreparable injury and damage. The artist hereby expressly agrees that the producer shall be entitled to injunctive and other equitable relief to prevent a breach of this agreement by the artist. Resort to such injunctive and other equitable relief, however, shall not be construed as a waiver of any other rights that the producer may have

in the premises, for damages or otherwise. In the event of the failure, refusal or neglect of the artist to perform or observe any of his obligations hereunder to the full limit of his ability or as instructed, the producer, at its option, shall have the right to cancel and terminate this agreement or the employment period concerned, and, if the right to cancel and terminate this agreement is not exercised, shall have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues. If the producer elects to terminate this agreement, it shall be released from all further obligations hereunder whatsoever. If the producer elects to terminate the employment period concerned, it shall be released from the obligation to pay any compensation whatsoever to the artist with respect to such employment period. If, at the time of such failure, refusal or neglect, the artist shall have been cast to portray a role in a photoplay, and if because of such failure, refusal or neglect on the part of the artist, another person should be engaged to portray such role, the producer shall have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the time reasonably required for the completion of such role by such other artist. Should the producer notify the artist that the artist has been cast to portray a role in a photoplay, and should the artist thereupon or at any time prior to the designated date of commencement of the employment period concerned advise the producer that the artist does not intend to render such services, the producer (in addition to all other rights and remedies it may have in the premises) shall have the right to extend the term of this agreement for all or any part of the period commencing as of the date of receipt by the producer of such notice, and continuing until the expiration of the time which would have been reasonably required to complete the portrayal of such role, or, should another person be engaged to portray such role, continuing until the completion of such role by such other person. Each and all of the several rights, remedies and options of the producer contained in this agreement shall be construed as cumulative, and no one of them as exclusive of the others or of any right or priority allowed by law."

Defendant urges a construction of paragraphs 13 and 14 which would make them applicable to suspension of performance due to plaintiff's military service and which would give it the right to extend the term of the contract for a time equal to the period of such interruption. The provisions which defendant relies upon are the following from paragraph 13: "In the event that by reason of mental or physical disability or otherwise, the artist shall be incapacitated from fully performing the terms hereof or from complying with each and all of his obligations hereunder, * * * then in either or any of said events this agreement shall be suspended during the period of such disability or incapacity, and the producer shall not be required to pay any compensation to the artist for or during such period of suspension or suspensions. The term of this agreement, and all of its provisions herein contained, may be extended, at the option of the producer, for a period equivalent to all or any part of the period of such suspension or suspensions," and the following from paragraph 14: "In the event of the failure, refusal or neglect of the artist to perform or observe any of his obligations hereunder to the full limit of his ability or as instructed, the producer, at its option, shall have the right to cancel and terminate this agreement or the employment period concerned, and, if the right to cancel and terminate this agreement is not exercised, shall have the right to extend the term of this agreement and all of its provisions for a period equivalent to all or any part of the period during which such failure, refusal or neglect continues."

It appears clearly from a study of the three paragraphs that each of them was intended to cover situations to which neither of the others would apply. Paragraph 12 provides for extensions of time for causes beyond the control of the parties, such as fire, war, etc.; paragraph 13 provides for extensions in the event of plaintiff's incapacity to render the agreed services, and

paragraph 14 provides for such extensions in the event production should be interrupted or prevented by reason of plaintiff's failure or refusal to render his services as agreed.

The court made the following findings:

"VIII. Defendant did not at any time from and including March 7, 1942 to and including March 6, 1943 serve upon plaintiff any notice that it did exercise its right or option to extend the term of employment described in subdivision (c) of paragraph 20, which term of employment was for a period of one year commencing March 7, 1942 and expiring March 6, 1943.

"XI. Defendant did on March 3, 1944, notify plaintiff of its election to extend the then current term of plaintiff's employment, to wit, the term of employment referred to in subdivision (d) of paragraph 20 of said contract, for a period of 51 weeks and 6 days."

[1, 2] It appears from these findings that defendant did not attempt to avail itself of any rights of extension under paragraphs 12, 13 or 14 prior to March 3, 1944, but that it did on that date attempt to extend the then current term of plaintiff's employment under one or more of said paragraphs. Finding XI obviously does not refer to an attempted extension under paragraph 12. A notice given in March, 1944, of an election to continue the agreement in force, based upon plaintiff's having entered the military service in July, 1942, would not have been in compliance with the provisions of paragraph 12, nor does it appear in the record that defendant offered or intended to proceed under the provisions of that paragraph.

If defendant was attempting to exercise an option under paragraph 14, the notice which it gave was ineffective to extend the term of the agreement, for the reason that paragraph 14 relates only to "the failure, refusal or neglect of the artist to perform or observe any of his obligations hereunder to the full limit of his ability," etc. Plaintiff's military duties excused performance under his agreement, and the failure to render services in the production of photoplays during the period of such military service was not a failure to perform or observe any of his obligations to defendant.

[3] Defendant relies heavily upon the first phrase of paragraph 13, namely, "In the event that by reason of mental or physical disability or otherwise, the artist shall be incapacitated," etc., and seeks to give to the words "or otherwise" and "incapacitated" exceedingly broad meanings. It is not contended that plaintiff's duties as a member of the armed forces constituted a mental or physical disability which incapacitated him from rendering the agreed services, but it is contended that by reason thereof he was "otherwise" so "incapacitated," and that defendant therefore had the right to suspend him during the term of such military service, and to extend the term of the agreement for an equivalent period. Under defendant's theory, plaintiff would be "incapacitated" by his military service even though he was merely prevented from giving his services to defendant. The situations in which production might be "prevented," "suspended" or "postponed" are specifically provided for in paragraph 12. If paragraph 13 should be interpreted to mean that plaintiff was incapacitated from performing his contract because he was prevented by his military duties from rendering services to defendant, it could also be said that he would be incapacitated in many of the situations specified in paragraph 12, for the reason that any one of a number of those situations might temporarily prevent his acting in photoplays. We cannot give to paragraph 13 any such meaning, for to do so would give defendant the right to suspend plaintiff and extend the term of the contract in any situation in which plaintiff, although mentally, physically and otherwise capable of performing his duties, would be prevented from performing them by causes beyond his control. Paragraph 12 makes special provision for all the anticipated contingencies in which performance might be interrupted by causes other than the incapacity or disability of plaintiff or by conduct constituting a breach of his obligations. Plaintiff's entering the armed forces is not among them and paragraph 12 cannot be broadened by a forced construction of the general language of paragraph 13. Plain-

tiff was prevented, but not "incapacitated" nor "disabled" from performing his contract by reason of his military duties, and paragraph 13 does not apply to that situation.

[4] One of the provisions of the agreement read as follows: "This agreement contains the entire understanding and agreement of the parties hereto and it is acknowledged by both parties hereto that, except as expressly provided in this agreement, there are no representations or warranties or other agreements, express or implied, in any way relating to the provisions of this agreement." The agreement must be read as expressing the complete understanding of the parties as to all possible conditions which would operate to extend any yearly term of plaintiff's service, or which would give defendant an option to extend it. Nothing was left to implication. In view of the provisions quoted above, it can only be concluded that the parties intended that there should be no extension of the term of the contract in any event not specified therein. It therefore appears that there was no express agreement in paragraphs 13 or 14 for extension of the term of the employment beyond March 6, 1945, in the event of plaintiff's entering the armed forces. Defendant contends that, even so, the main purpose of the parties was to accomplish the production of a given number of photoplays and that the writings which they executed do not express a mutual understanding that time is of the essence of the agreement. From this premise it is argued that the judgment under which plaintiff would be required to make the twenty-one additional photoplays after his discharge from the service does not impose upon him any additional burden or an obligation substantially different from the one he originally undertook, and that under these circumstances plaintiff will be required to make the remaining photoplays after he has been released from the Army. Defendant relies upon the rule of the Restatement, Contracts, as follows: "Section 462. Temporary Impossibility. Temporary impossibility of such character that if permanent it would discharge a promisor's entire contractual duty, has that operation if rendering performance after the impossibility ceases would impose a burden on the promisor substantially greater than would have been imposed upon him had there been no impossibility; but otherwise such temporary impossibility suspends the duty of the promisor to render the performance promised only while the impossibility exists." And upon the following statements of Mr. Williston (6 Williston on Contracts (1938 Rev.Ed.), sec. 1957, pp. 5489, 5490): "* * * If the delay caused by impossibility is excusable and is of short duration, the promisor is still held bound by his promises, except to the extent of such delay. If the impossibility persists for a length of time sufficient to go to the essence of the contract (and only in that case) the temporary non-performance on one side will justify the other party in rescinding the contract altogether. But may the promisee in spite of long delay refuse to take advantage of his excuse and demand performance of the contract as soon as it becomes possible? This depends on whether the promisor would thereby be compelled to render performance substantially different from what he contracted for. If so, he is permanently excused." And from section 1931, pp. 5410, 5411: "The true distinction is not between difficulty and impossibility. A man may contract to do what is impossible, as well as what is difficult, and be liable for failure to perform. The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor."

[5] Plaintiff, also, relies upon these same principles. The question is whether they are applicable to the facts of the case and, if so, in what manner they apply. It is unquestionably the law that where performance has been rendered impossible temporarily, further performance will not be required if it would impose upon the promisor a substantially greater burden than the one he originally assumed. The court made the following finding: "No substantial [additional] burden has been or will be imposed upon plaintiff in connection

with the performance of the services by him as an actor in photoplays produced by defendant, by reason of his service in the armed forces of the United States or by reason of any performance of the duties provided for in said employment contracts or will be imposed upon plaintiff as and when he may be discharged from the armed forces of the United States or may be permitted by such armed forces to participate as an actor in the production by defendant of the photoplays provided for in said employment contracts." Defendant says that the finding is one of fact and that it is conclusive upon the question of plaintiff's obligation to make twenty-one more pictures. The finding is favorable to defendant as far as it goes, but it is by no means conclusive. Performance by plaintiff of the agreed services after his discharge from the Army might not be more burdensome to him, but might constitute performance vitally different from that contemplated by the parties, with respect to the time of performance, and if this is shown to be the case he has been permanently excused. We must therefore inquire whether it was reasonably within the contemplation of the parties that plaintiff's services, if interrupted, would be resumed under such circumstances as have developed, that is to say, whether the making of the additional twenty-one photoplays in a period commencing at some indefinite date after March 20, 1945, when the judgment was rendered, would be performance reasonably within the contemplation of the parties when they made the agreement. This returns us to defendant's contention that time was not made of the essence of the agreement. Unless this position is sustainable, the completion of plaintiff's services after the date of the judgment would not be performance within the stated term of the employment, since there was no express provision for extending the term beyond March 6, 1945. Therefore, unless the stipulations as to time of performance were so elastic as to encompass performance after March 6, 1945, such performance would be outside anything reasonably within the contemplation of the parties and therefore outside the contract itself.

[6] The provisions of the agreement quoted emphasize the importance which the parties accorded the time element. It is emphasized further by the obvious necessities of the business of producing motion pictures. The agreement is replete with additional provisions which indicate strongly that the parties were expected and required to adhere strictly to the stipulations as to time of performance. There was an "employment period" for the production of each photoplay; the time after the expiration of each such period in which plaintiff was required to report for the purpose of making retakes was limited to 10 days; if a photoplay was in production at the expiration of any employment period, the same could be extended for not exceeding 15 days. Various options were given the respective parties to be effective under certain conditions, and the time when each might be exercised was specified in numbers of days. The time of performance, being strictly limited, was of the essence of the agreement. At the scheduled rate it would take more than two and a half years to make twenty-one photoplays. The agreed time for this work was between July, 1942, and March, 1945. Even if plaintiff had been discharged from the armed forces on the date of the judgment, the time required to render services as ordered by the judgment would extend to October, 1947. The parties specified the several periods of time to be devoted to the work, and thereby excluded all others. The fact that defendant is willing to accept plaintiff's services over an entirely different period does not change plaintiff's obligation. Performance of services as ordered by the judgment would be wholly outside the original agreement. The time which plaintiff has not contracted away belongs to him and he has a right to do with it as he pleases. When the time which he agreed to devote to defendant's work ran out he became free to work for whomever he pleased, or not to work at all.

The conclusion we have reached upon the main point takes the case beyond the principles which govern in situations where performance within the contemplation of the parties may be had after a condition of temporary impossibility has ended. Many such cases have been cited and discussed by the parties. A review of them would not be within the scope of our decision. It

may be said, however, that in all the cases relied upon by defendant, in which it was held that temporary impossibility merely suspended performance, without terminating the contract, some degree of performance remained possible within the anticipated life of the contract.

[7] One of the conclusions of law was that "By reason of his acts and conduct as found in Findings of Fact numbered XV hereinabove, plaintiff recognized and acquiesced in the continuance of his duties and obligations under said employment contracts and held himself to be still bound by them after he would enter the armed services and waived all right to claim any discharge from the duties and obligations imposed on him by said employment contracts and by each of them." Before discussing this conclusion, it should be mentioned that the March, 1942 contract contained a paragraph reading as follows: "24. In the event that the artist shall be required to serve in the armed forces of the United States pursuant to the Selective Service Act, or shall volunteer for such service, the parties hereto will agree upon their mutual rights and obligations hereunder in view of such military service." When it became apparent that plaintiff would join the armed forces, negotiations were entered into for the purpose of working out some plan under which plaintiff could make some pictures while he was in the military service. Finding number XV was substantially in the language of the allegations of the defense of waiver and it was alleged and found that in July, 1942, plaintiff orally agreed that after his entry into the armed forces he would act in three photoplays for defendant if the Army Air Force gave its consent; that the Army Air Force did give its consent to the production of the first photoplay; that defendant made preparations to produce the first and second proposed photoplays, incurring therein substantial costs and expense; that it notified plaintiff that production would commence August 15, 1942; that plaintiff was able to appear in said first photoplay but refused to do so unless defendant would consent to certain modifications of the 1938 and 1942 agreements; that defendant did not agree to the requested modifications and so said photoplays were not made. It would appear that this defense of alleged waiver was urged against plaintiff's contention that his entering the armed forces, ipso facto, terminated his employment for it is said in defendant's brief: "Autry by his conduct recognized and acquiesced in the continuance of his obligations under the contracts and waived any right to claim that the contracts were ended." It is immaterial whether plaintiff's alleged agreement to make the three photoplays was an admission that the original employment had not been terminated or a recognition of a duty under said paragraph 24 to endeavor to agree upon a plan for the making of some photoplays during the course of his military service. If plaintiff thereby conceded that his employment had not been terminated by his enlistment and also that it was his duty to endeavor in good faith to reach some agreement under said paragraph 24, such concessions did not deprive him of the right to discontinue his services when the term of his employment expired in March, 1945. Nothing but an express agreement between the parties could have extended the life of the contract beyond that date. The conclusion of the court on the point of waiver relates to services to be performed within the life of the contract. It is not pertinent to the ground of our decision and furnishes no support for the judgment. It follows from what we have said that the judgment should be reversed.

We necessarily leave undecided numerous questions which have been argued in the briefs. In view of the fact that the agreement which is the subject of the declaratory judgment had come to an end before the judgment was rendered, we do not feel called upon to answer any further questions with respect to the interpretation of the provisions which would have governed the rights and obligations of the parties if plaintiff had been discharged from the armed forces during the lifetime of the agreement. It should be added, however, that the judgment reserved for future determination the question whether, and to what extent, the term or terms of plaintiff's employment under the two writ-

ings was limited by the provisions of section 2855 of the Labor Code of the State of California.

The judgment is reversed with instructions that the conclusions of law be amended to provide that on March 7, 1945, all obligation of plaintiff to render further services under said contracts or either of them terminated, and to enter judgment in favor of plaintiff accordingly.

DESMOND, P. J., and WOOD, J., concur.




75 Cal.App.2d 323

**FOERSTER v. DIREITO et al.**

Civ. 7220.

District Court of Appeal, Third District, California.

July 12, 1946.

Rehearing Denied Aug. 1, 1946.

Hearing Denied Sept. 5, 1946.

**1. Automobiles ⇐245 (72)**

One standing in light of arc lamp on pedestrian walk 27 feet from middle of street with his back toward truck, approaching on left side of street without warning by sounding of horn or slackening speed until about 7 feet from him, after which he mistakenly ran toward nearest curb when warned by companion and was run down by truck, which turned toward such curb, was not, as matter of law, guilty of contributory negligence barring recovery of damages for his resulting death.

**2. Automobiles ⇐242(8)**

In action for death of pedestrian struck by defendants' truck, burden was on defendants to prove deceased's contributory negligence asserted by them.

**3. Appeal and error ⇐1001(1)**

In death action, jury's finding, implied from verdict for plaintiff, that deceased was not contributorily negligent, may not be disturbed on appeal, if verdict is supported by any evidence or reasonable inferences therefrom on such issue, though reasonable minds may differ regarding effect of such evidence.

**4. Automobiles ⇐206**

Under ordinary circumstances, a pedestrian crossing duly marked highway is not contributorily negligent in failing to anticipate that automobile driver may endanger his life by operating automobile on wrong side of thoroughfare contrary to law.

**5. Automobiles ⇐206**

A pedestrian, in exercise of ordinary care, has right to expect that automobile driver will conform to traffic laws and drive on proper side of marked thoroughfare.

**6. Trial ⇐133(6)**

In mother's action for her minor son's death, plaintiff's attorney was not guilty of prejudicial misconduct in stating that another son of plaintiff was killed in action after fatal accident in reply to judge's question, "at present you mean?" after objection to such attorney's question on examination of plaintiff as to whether she had another son with Royal Canadian Air Force, where jury was repeatedly instructed not to act on sympathy and instructed to disregard such statement.

**7. Death ⇐99(3)**

An award of $15,000 damages to 58-year-old woman, living separately from her husband, for wrongful death of her 17-year-old son, who was healthy, strong, and capable and lived with her and regularly contributed from $37 to $75 monthly to her support, was not excessive. Code Civ. Proc. § 376.

**8. Death ⇐95(4)**

The measure of damages recoverable by woman living apart from her husband for her minor son's wrongful death was her actual pecuniary loss of son's contributions and services during his minority and estimated pecuniary loss of his society, comfort, and protection during term of her life expectancy. Code Civ.Proc. § 376.

**9. Death ⇐58(2)**

Where evidence shows substantial pecuniary loss because of minor child's wrongful death to surviving parent having child's custody, presumption is that child's finan-

cial contributions to parent and parent's enjoyment of child's comfort, friendly association, and protection would have continued during parent's life expectancy, in absence of contrary proof.

**10. Death ⇐58(2)**

In determining damages recoverable by mother for wrongful death of her minor son who regularly contributed certain sums monthly from his earnings to her support, presumption is that his earning ability would have increased.

**11. Evidence ⇐12**

Courts take judicial notice of mortality tables without actual proof thereof.

**12. Evidence ⇐14**

It is common knowledge that human beings' life expectancy has rapidly increased in recent years because of modern living methods, advance knowledge of medicine and surgery, and sanitary conditions.

**13. Appeal and error ⇐1004(1)**

A judgment on jury's verdict awarding damages will not be disturbed on appeal as excessive, if substantially supported by evidence, unless clearly result of jurors' passion or prejudice.

**14. Appeal and error ⇐930(2)**

The appellate court must assume that jury understood and obeyed trial court's instructions not to render verdict awarding damages to plaintiff because of sympathy for her, in absence of contrary evidence.

**15. Stipulations ⇐18(4)**

In determining whether jury's verdict, awarding mother damages for her minor son's wrongful death, was excessive, trial court had right to compute mother's expectancy in accordance with Federal Census Bureau's mortality table, printed in World Almanac, despite parties' stipulation that earlier American Mortality Table allotted her shorter life expectancy.

**16. Appeal and error ⇐1004(1)**

The mere amount of jury's verdict, awarding 59-year-old mother $20,000 damages for death of her 17-year-old son, who contributed $37 to $75 per month to her support from his earnings, did not indicate that it was procured by jurors' sympathy, passion, or prejudice, aroused by mother's attorney's statement in reply to trial judge's question that deceased's brother was killed in action, though it was trial judge's province to reduce amount of judgment on ground that verdict was otherwise excessive.

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Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Alice L. Foerster against Joaquin Direito, Pete Bordenave, and another, individually and doing business as Bordenave & Beckley, partners, and Homer Bennie McDowell, for the death of George Russell Foerster as the result of being struck by defendant partners' truck driven by defendant McDowell. From a judgment for plaintiff against defendant partners and McDowell, they appeal.

Affirmed.

Neumiller, Ditz & Beardslee, of Stockton (C. H. Hogan, of Stockton, of counsel), for appellants.

Phillip Barnett and R. L. Dreyfus, both of San Francisco, for respondent.

THOMPSON, Justice.

The defendants, Pete Bordenave and Garrett W. Beckley, as individuals, and as members of the firm of Bordenave & Beckley, and Homer Bennie McDowell, have appealed from a judgment which was rendered pursuant to the verdict of a jury against them in a suit for damages for the death of George Russell Foerster, the son of plaintiff, which occurred as the result of being struck by a truck driven by McDowell on the wrong side of Center Street in the City of Stockton. The deceased, in company with an associate, was standing, under the glare of a street light, on the walk which crossed the highway in Stockton. They were waiting to secure a ride in some passing automobile to Camp Parks near Livermore, where, as United States naval seamen, they were then stationed. The truck approached from behind them, on the wrong side of the street, and struck and killed the deceased. The appellants do not contend that the evidence fails to support the implied finding

that the driver of the truck was guilty of negligence, but they seek a reversal of the judgment on two grounds only, namely, that the evidence shows as a matter of law that the deceased was guilty of contributory negligence, and that plaintiff's attorney was guilty of prejudicial misconduct in stating to the court in the presence of the jury that another son of plaintiff, who was a member of the Royal Canadian Air Force, had been recently killed in military service in the war. It is asserted that statement induced the jury to render an excessive verdict on account of sympathy or prejudice. The verdict was for $20,000. On motion for new trial the trial judge reduced the judgment to the sum of $15,000, which was accepted by the plaintiff, and the motion was thereupon denied.

The plaintiff, who was fifty-eight years of age, is the mother of the deceased, George Foerster, who was seventeen years of age, and of another son and a married daughter. The plaintiff was unmarried at the time of the accident. She was separated from her husband and had been employed as a saleswoman at Penney's Store, and in the Emporium and Weinstein's Store at San Francisco. She has not been employed since the time of the accident. She was ill and under the charge of a physician. Prior to his enlistment in the Navy, the deceased worked in San Francisco as a valet in the Palace Hotel, and was employed elsewhere, contributing to his mother's support from $37 to $75 per month. After the older son married, George contributed to his mother the sum of $75 per month.

El Dorado street enters Stockton from the south and extends through the city in a northerly direction. Center street joins El Dorado at Fourth Street and runs northwesterly therefrom at a sharp angle. Both El Dorado and Center streets are marked along the centers thereof by white lines which converge from a point slightly south of Fourth Street, which intersects those streets at a right angle. This juncture of El Dorado and Center streets forms a gore or "Y" just north of Fourth Street. The combined streets are about ninety feet wide at Fourth Street. Center Street is sixty feet in width. A pedestrian's walk is outlined with white stripes across El Dorado and Center streets along the extended southern line of Fourth Street. At the curb, on the northwest corner of Center and Fourth streets, there is an electric pole equipped with an arc-light. In the center of Fourth Street, at a point about sixteen feet north of the extended westerly curb line of Center Street there is a manhole. This manhole is about twenty-seven feet west of the white stripe marking the middle line of Center Street.

At one o'clock A.M. of July 3, 1944, William L. Stone, who was enlisted in the United States Navy, and stationed at Camp Parks near Livermore, desiring to return to his camp from Stockton, walked to the southwest corner of Center and Fourth streets in Stockton to hail a southbound automobile to procure a ride back to his camp. It was a clear night and the streets were well lighted. As he stood under the arc-light at that corner he was joined by the deceased, George Foerster, who also sought to obtain a ride back to his station at Camp Parks. These boys were not previously acquainted, but they agreed to attempt to procure a ride together in a passing machine. They walked easterly together from the curb along the pedestrian pathway a distance of about sixteen feet where they stood twenty feet south of the manhole, facing the north from which they anticipated the approach of a car. They stood at that point, under the glare of the arc-light, twenty feet west of the middle white line of Center Street. They had no occasion to anticipate the approach of a machine from the south, behind their backs on the wrong side of Center Street, for to so travel would be in violation of the traffic law. There was then no machine in sight upon either El Dorado or Center street. Suddenly, as they stood at that point, Mr. Stone's attention was called to the noise of the motor of an approaching machine behind them, coming from the south. Glancing over his shoulder, Mr. Stone saw a truck about two hundred feet away coming directly toward them on the wrong side of Center Street. He said it was traveling about thirty-five miles an hour. He testified that "I know he [the truck driver] was way over on that [western] side of the road. I could see the whole road so he had

to be over on that side of the line." No horn was sounded. The speed of the truck was not diminished until immediately before it struck the deceased. There is no evidence that the deceased heard or saw the approaching truck. Stone however did say "Look out, there is a truck or something coming." There is no evidence that George Foerster heard that warning or that he knew the truck was coming toward them from their rear on the wrong side of the highway. Stone ran easterly along the pedestrian walk a distance of about twelve or fifteen feet to avoid being struck. When he was asked on cross examination why he ran toward the center of the street, he replied: "I thought the driver was asleep and I didn't know where he might wind up. He might have run up on to the curb and into the store or something. Anyway, I thought my safest place was to run out in the middle of the road because I didn't know whether the driver was drunk or asleep or what happened to him, but I knew he was heading out in the wrong direction and I wanted to get out of the way of him."

Mr. Stone testified that the truck continued to run at the same rate of speed without changing its course until it struck the deceased. He said he saw the truck when it was "two or three feet" from the deceased; that it was running in a northwest direction toward the western curb. Stone testified that the deceased ran northwesterly about sixteen feet, to a point twenty-five feet from where he previously stood. The truck driver pointed out on the diagram in evidence the spot where Foerster was struck, which was "three feet and two inches" northwesterly from the manhole which was designated thereon. That point is about thirty feet west of the white line marking the middle of Center Street. The truck was way over on the wrong side of Center Street and headed in a diagonal course toward the western curb. The evidence of Mr. Stone, that the speed of the truck was not diminished until it was close to the deceased, is corroborated by the evidence of skid-marks from the wheels of the truck which were clearly discernible on the paved street, beginning at a distance "seven feet and eleven inches back from the point of impact." The skid-marks extended to a point near the rear end of the truck as it afterward stood parked within three feet of the western curb on the wrong side of Center Street. It ran about 125 feet beyond the point where the boys stood on the pedestrian walk before it stopped. There were no other machines in sight on Center Street at the time of the accident.

Mr. Stone testified that after he ran several feet into the street, to escape being hit by the truck, he glanced back and saw Foerster still standing where he had left him and that the truck was then close upon him, but that the deceased then started to run in a northwesterly direction and was overtaken and struck at a point about eight feet from the manhole. Stone heard the application of the brakes and saw the body of Foerster hurled into the air. He said "I know it must have been the truck running over the boy; it was bump! bump! bump!, all amid the noise that the truck makes, all together." The head and body of the deceased were badly crushed. He lay upon the street near the western curb of Center Street, a short distance behind the parked truck. He was then dead. The driver returned to the point where the body lay. An officer was promptly called, and they discussed the accident.

McDowell testified that he lived on North Center Street in Stockton; that he was employed by the defendants, Bordenave & Beckley, as a driver of their truck; that he was then returning after the delivery of a truck and trailer load of cattle to Vallejo and San Francisco. He was on his way home in Stockton, and had turned left from El Dorado Street onto Center Street when the accident occurred. He testified that he "saw a sailor [Stone] running to the right of the road just north of the pedestrian lane"; that he "just saw one" man at that time; that he didn't see Foerster until the truck was "twelve feet south of the cross walk. * * * When I first saw him he had his back turned to me. I had already cut to the left and when I saw him I cut still sharper to the left, figuring he would follow his first companion. * * * As I approached this cross walk there I was cutting over toward the curb and as I said, when I got about the—the front of my

truck must have been somewhere about the cross walk, and he broke and ran the same way I was going. In other words, he ran northwest trying to get to the curb across the street, which I was headed for [in] the same direction." Evidently the deceased did not know of his danger from the truck coming from behind him on the wrong side of the street until the front of the truck was "somewhere about the cross walk" upon which he stood, for the driver testified that he was then standing with "his back toward me." Mr. Stone testified that the horn was not sounded. Clearly the deceased was taken by surprise. In his emergency, not knowing which way the truck might go, the deceased ran northwest toward the nearest curb to escape being hit. He was overtaken and struck before he ran a distance of twenty-five feet. It is not reasonable to assume that Foerster would have stood with his back toward the approaching truck if he had known that it was coming toward him on the wrong side of the highway.

The jury was fully and fairly instructed on every essential issue. The appellants do not complain of any instruction given or refused. The jury returned a verdict of $20,000 in favor of the plaintiff. Upon motion for a new trial the judge reduced the amount of the verdict to $15,000. The granting of a new trial was made conditional upon the acceptance of that reduced judgment. It was accepted by the plaintiff and the motion was thereupon denied. From the judgment which was accordingly rendered this appeal was perfected.

The implied finding of the jury that defendants were guilty of negligence, which proximately caused the death of George Foerster, is amply supported by the evidence. Indeed the appellants do not challenge that fact.

[1] There is no merit in appellants' contention that the deceased was guilty of contributory negligence as a matter of law. He was standing in the light of an arc-lamp, on the pedestrian walk twenty-seven feet west of the middle white line of Center Street, facing the north, with his back toward the approaching truck. There is no evidence that he saw or knew of the approach of the truck behind his back on the wrong side of the street. He was not required, in the exercise of due caution, to anticipate danger from a machine which was operated on the wrong side of the street in conflict with the law. The presumption is that he looked south before he left the curb to enter the pedestrian walk. The driver of the truck failed to warn him by sounding the horn. He did not slacken the speed of his truck until it was too late, when he was about seven feet from where the deceased stood. When the deceased first became aware that the truck was coming straight toward him, he ran "northwest trying to get to the curb." In the emergency which confronted him, the deceased may not be held responsible for lack of judgment in selecting a course to escape which proved to be more perilous. As the driver of the truck testified, he was also "cutting over toward the curb." The truck ran down George Foerster and killed him. It is true that Mr. Stone testified that when he glanced over his shoulder and saw the truck bearing down upon them, he exclaimed "Look out, there is a truck or something coming," and that he immediately ran easterly toward the center of the street to escape being hit. But Stone did not state where the machine was, or the direction from which it was approaching. Evidently the deceased was confused and he did not know where to locate that approaching machine, even if he heard the warning from his companion, and the truck was coming from behind his back. That is a reasonable conclusion to be drawn from the fact that after Stone ran some sixteen feet and stopped, he looked back and saw the deceased still standing in his original position on the pedestrian walk with his back toward the approaching truck.

[2-5] It was the sole province of the jury to determine under the circumstances of this case whether the deceased was guilty of contributory negligence. The jury was fully and properly instructed upon that issue. The burden was on the defendants to prove the asserted contributory negligence of the deceased. They failed to do so. That issue was determined against them. The implied finding of the jury, in

that regard, may not be disturbed on appeal, if there is any evidence or reasonable inferences to be drawn therefrom in support of the verdict. We are persuaded there is ample evidence to support the verdict on that issue. Even though reasonable minds may differ regarding the effect of the evidence of contributory negligence, this court would not be warranted in reversing the judgment on that account. Wynne v. Wright, 105 Cal.App. 17, 286 P. 1057; Pinello v. Taylor, 128 Cal.App. 508, 513, 17 P.2d 1039; Samuelson v. Siefer, 62 Cal.App.2d 320, 325, 144 P.2d 879; Johnson v. Southern Pac. R. Co., 154 Cal. 285, 97 P. 520. Under ordinary circumstances, it is not contributory negligence for a pedestrian who is crossing a duly marked highway to fail to anticipate that the driver of an automobile may endanger his life by operating his machine, contrary to law, on the wrong side of the public thoroughfare or street. In the exercise of ordinary care, a pedestrian has the right to expect that the driver of an automobile will conform to the traffic laws and that he will drive on the proper side of a marked thoroughfare or street. Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L.R.A.1917C, 477, Ann.Cas.1918E, 560; Averdieck v. Barris, 63 Cal.App. 495, 218 P. 786; Gornstein v. Priver, 64 Cal.App. 249, 259, 221 P. 396; Wright v. Foreman, 86 Cal.App. 595, 602, 261 P. 481; 79 A.L.R. 1089, par. IV, note; 145 A.L.R. 536, note; 2 Cal.Jur.Ten Year Supp., p. 384, sec. 248.

[6] The attorney for plaintiff was not guilty of prejudicial misconduct in answering the question propounded to him by the judge even though the reply did disclose the fact that the mother had another son who has "since been killed in action." It does not appear that the defendants were prejudiced thereby. We may not assume that statement was wilfully made for the purpose of creating additional sympathy for the mother, or that the verdict was induced thereby. The jury was repeatedly instructed that "You cannot act upon your sympathy." Moreover, the court instructed the jury to disregard that statement. The following colloquy occurred in the examination of plaintiff on that subject:

"Q. And you had one other son, is that not true? You had a son besides George? A. Yes.

"Q. And he was with the Royal Canadian Air Force, is that correct? A. Yes.

"Mr. Neumiller: I object to the question as incompetent and immaterial.

"The Court (Addressing Mr. Barnett): At present you mean?

"Mr. Barnett: No; at the time of the accident. He has since been killed in action, Your Honor.

"Mr. Neumiller: We assign counsel's remark as prejudicial error and misconduct and request the Court to instruct the jury to disregard this. * * *

"The Court: The objection is sustained.

"Mr. Neumiller: I ask again, if Your Honor please, that the Court direct this jury to disregard this prejudicial remark and misconduct of counsel.

"The Court: The court does not adopt counsel's language [that it is misconduct and prejudicial], but the Court does instruct the jury to disregard the statement of counsel that the witness' son has been killed—not the son who is involved in this accident—but still another son; that has no connection with the case whatsoever."

It will be observed that the witness was not asked if her other son, who was serving in the Royal Canadian Air Force, was killed in action. That reply was prompted by the inquiry of the judge. The good faith of plaintiff's attorney in asking if the witness had another son in the Canadian Air Service may be indicated by the fact that he was attempting to account for an increased monthly payment which George made to his mother "after the other son married." She testified that George "at first * * * sent me $37.00 and then when my other son got married he increased it to $50.00. * * * When he was working there [in San Francisco] he gave me $75.00 a month."

[7-9] We are of the opinion the amount of the judgment which was reduced by the trial judge to $15,000 was not excessive. This suit was brought under Section 376 of the Code of Civil Procedure by the mother

of a seventeen year old boy for his death caused by the wrongful act of the defendants. The boy was unmarried. The mother was living separate from her husband. The boy had been living with and regularly contributing to the support of his mother. He was a healthy, strong, capable young man. They were congenial. The measure of damages was the pecuniary loss sustained by the mother, in accordance with the proved facts, for the period of time, not only during the son's minority, but also during the term of the life expectancy of the plaintiff. She was 58 years of age at the time of the accident. The jury had a right to award damages, under the circumstances of this case, for actual pecuniary loss of contributions and services during the son's minority, and also for estimated pecuniary loss to her of "society, comfort and protection," sustained on account of her son's death. Peluso v. City Taxi Co., 41 Cal.App. 297, 300, 182 P. 808; Wong Kit v. Crescent Creamery Co., 87 Cal.App. 563, 580, 262 P. 481; Zeller v. Reid, 26 Cal.App.2d 421, 79 P.2d 449; Waterbury v. Elysian Spring Water Co., 139 Cal.App. 355, 359, 33 P.2d 1048; Duclos v. Tashjian, 32 Cal.App.2d 444, 453, 90 P.2d 140; Williams v. McDowell, 32 Cal.App.2d 49, 53, 89 P.2d 155; Gilmore v. Los Angeles Ry. Corporation, 211 Cal. 192, 200, 295 P. 41. Where the evidence shows substantial pecuniary loss on account of the wrongful death of a minor child, suffered by a surviving parent having its custody, in the absence of proof to the contrary it is presumed the financial contributions and enjoyment of comfort, friendly association, and protection would continue during the life expectancy of the surviving parent. In Parsons v. Easton, 184 Cal. 764, at page 772, 195 P. 419, at page 422, it is said thereof:

"The mother's age was a little under 60 years, and her expectancy of life was a little over 14 years. This, of course, assumes ordinary good health. In the absence of anything to the contrary, the presumption would be that the benefit to the parents from the son, if any, would have continued during her survivorship the same as during the lives of both of them."

[10-13] That presumption applies to the facts of this case. George Foerster was a capable, industrious, healthy and considerate 17 year old son who actually contributed to his mother's support from $37 to $75 per month for several years prior to his death. The presumption is that his earning ability would increase. Karwoski v. Grant, 30 Cal.App.2d 171, 180, 85 P.2d 944. It was stipulated that plaintiff was 58 years of age at the time of the accident, and that the American Table of Mortality allotted to her a life expectancy of 15.39 years. Without actual proof thereof courts take judicial notice of Mortality Tables. Wong Kit v. Crescent Creamery Co., supra, 87 Cal.App. at page 581, 262 P. 481; Peluso v. City Taxi Co., supra, 41 Cal.App. at page 302, 182 P. 808; 31 C. J.S., Evidence, § 99, p. 698. The World Almanac for 1945, page 502, shows that the life expectancy of a white female, who is 58 years of age, is 18.46 years according to the United States Bureau of the Census. It is common knowledge that the life expectancy of human beings has rapidly increased in recent years on account of modern methods of living, the advanced knowledge of medicine and surgery, and of sanitary conditions. The purchasing value of money has also greatly decreased. If the jury awarded plaintiff damages for actual pecuniary loss for 18.46 years at $75 per month in accordance with said maximum figures, the sum would amount to $16,614, to which it was authorized to add pecuniary loss of "society, comfort and protection." We are of the opinion a reviewing court may not hold that $3,386 for that element of damages would have been excessive, under the facts of this case. That would account for the verdict of $20,000 which was rendered by the jury. Certainly we may not hold, as a matter of law, that the reduced judgment of $15,000 is excessive. It has been frequently held that a judgment for damages, which has substantial support of the evidence, will not be disturbed on appeal as excessive, unless it clearly appears to have been the result of passion or prejudice on the part of the jurors. We think the present record will not support that construction.

We conclude that the reduced judgment of $15,000 is not excessive.

Many precedents exist in the California cases in support of the conclusion that the reduced judgment of $15,000, which was rendered in the present action, is not excessive. In Wheeler v. Brown, 47 Cal.App. 2d 239, 117 P.2d 707, a verdict of $20,000 was returned by the jury in favor of a mother, as damages for the wrongful death of her son. On motion for a new trial the judgment was reduced to $15,000, which was affirmed on appeal. In Rocca v. Tuolumne County Electric Power & Light Co., 76 Cal.App. 569, 245 P. 468, a judgment of $12,000 was awarded to the mother as damages for the wrongful death of her son. The mother had a life expectancy of only ten years. The judgment was affirmed. In Fortier v. Hogan, 115 Cal.App. 50, 1 P.2d 23, a judgment of $9,275, which was awarded to the father of his eight year old child for its wrongful death was held not to be excessive. In that case, there was no evidence of the actual earning ability of the child. In Wong Kit v. Crescent Creamery Co., supra, a verdict of $5,500 for the wrongful death of plaintiff's nine year old boy was also affirmed on appeal. In that case there was likewise no showing that the boy then had any earning ability. In the case of Waterbury v. Elysian Spring Water Co., supra, the mother of an eleven year old boy was awarded damages in the sum of $5,500 on account of his death caused by the negligence of the defendant. On appeal that judgment was affirmed. There was no evidence of actual earning ability of the deceased boy. Many other similar judgments have been upheld by our courts.

[14-16] It is true that the trial judge in this case remarked in the very able opinion which he filed upon the motion for new trial, giving his reasons for denying the motion, conditioned upon plaintiff's acceptance of the proposed reduced judgment in the sum of $15,000, that:

"I have concluded * * * that such information [that plaintiff had recently lost another son who was serving in the Royal Canadian Air Force] was calculated to arouse the sympathy of the jury and was doubtless reflected in the amount of the award, which was larger than the evidence justified."

That is not a statement that the judge believed the jury had knowingly or wilfully rendered a verdict based either wholly or in part on sympathy. It is merely a statement that the judge thought the jury had unconsciously permitted their sympathy to be "reflected" in a judgment "which was larger than the evidence justified." The jury had been repeatedly and properly instructed that it must not render a verdict out of sympathy for the plaintiff. In the absence of evidence to the contrary we must assume the jury understood and obeyed that direction from the court. It is apparent the judge did not believe the jury deliberately rendered a verdict based in whole or in part on sympathy, for he denied the motion for new trial, which was chiefly based on that very contention. The opinion shows that the trial judge figured the actual pecuniary loss at the rate of $50 per month for only 15.39 years of additional life expectancy of the plaintiff. There is some evidence that the deceased had contributed to his mother's support the sum of $75 per month. In spite of the stipulation that the American Mortality Table allotted plaintiff a life expectancy of 15.39 years, the court was not bound by that figure. The court had a right to compute her expectancy in accordance with the later figures of the mortality table as shown by the United States Bureau of the Census and printed in the World Almanac for 1945, of which it takes judicial knowledge. We are therefore persuaded the mere amount of the verdict does not indicate that it was procured by the sympathy or by the passion or prejudice of the jury, although it was the province of the trial judge to reduce the judgment because he believed that it was otherwise excessive.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

JARKIEH v. BADAGLIACCO et al.

Civ. 13013.

District Court of Appeal, First District, Division 1, California.

July 25, 1946.

Rehearing Denied Aug. 24, 1946.

Hearing Denied Sept. 16, 1946.

1. Joint tenancy ⇐6

Title to a joint tenancy bank account, in the absence of fraud or undue influence, rests in the survivor. Gen.Laws, Act 652, § 15a.

2. Trusts ⇐107

Upon proof of a transfer made in reliance upon an oral agreement to hold in trust and upon proof of the subsequent repudiation of the agreement, the trier of facts may infer that maker of promise had intention not to perform at time promise was made, which is actual fraud.

3. Joint tenancy ⇐6

Under pleading and proof that, at time mother opened joint tenancy bank accounts with daughter, mother expressed intent that upon her death the accounts be divided equally between daughter and son, and daughter orally promised to hold accounts in trust to the extent of one-half for such purpose, daughter's subsequent repudiation of trust related back to original promise and constituted "fraud" within exception to rule that title to a joint tenancy bank account vests in survivor in the absence of fraud. Gen.Laws, Act 652, § 15a.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

4. Trusts ⇐108

Fraud may be proved by circumstantial evidence of a repudiation of a trust by trustee and attempted retention by trustee of trust res, the intention not to perform being a matter of inference from the facts proven.

5. Joint tenancy ⇐6
Trusts ⇐108

Under provision creating a conclusive presumption that, in the absence of fraud or undue influence, title to a joint tenancy account vests in survivor, legal title goes to the survivor, but evidence is admissible to show that survivor holds such title subject to the terms of a trust, regardless of fraud or undue influence. Gen.Laws, Act 652, § 15a.

6. Trusts ⇐325

The Bank Act provisions creating conclusive presumption that title to a joint tenancy account vests in survivor in the absence of fraud or undue influence, has no application to trustee accounts. Gen. Laws, Act 652, § 15a.

7. Trusts ⇐110

Evidence was sufficiently clear and convincing to authorize judgment determining that defendant held one-half of certain bank accounts in trust for plaintiff.

8. Trusts ⇐110

Evidence of the existence of a trust must be clear and convincing.

9. Trusts ⇐109

Parol evidence that titles to specified bank accounts came to defendant subject to a trust in favor of plaintiff was not inadmissible as varying the terms of written agreement entered into with bank.

10. Frauds, statute of ⇐50(2), 54½

Daughter's oral agreement with mother, at the time mother opened joint tenancy bank accounts and a trustee account with daughter, that, upon mother's death, daughter would divide accounts with son, was not within the statute of frauds. Code Civ.Proc. § 1973, subd. 6; Civ.Code, § 1624, subd. 6.

11. Trial ⇐257

Litigant's noncompliance with code section requiring that all proposed instructions covering law as disclosed by the pleadings be delivered to judge before first witness is sworn justifies court in refusing to give instructions. Code Civ. Proc. § 607a.

12. Trial ⇐257

Requested instructions relating to matters disclosed by the pleadings and which were not delivered to judge before first witness was sworn, the subject matter of which instructions was substantially cov-

ered by other instructions given, were properly refused. Code Civ.Proc. § 607a.

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Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by Albert E. Jarkieh against Emma Badagliacco, also known as Emma Jarkieh, and others, to establish a one-half interest in certain bank accounts. From a judgment for plaintiff, named defendant appeals.

Affirmed.

See also 68 Cal.App.2d 426, 156 P.2d 969.

James M. Thomas, and Emmett R. Burns, both of San Francisco, for appellant.

Harold H. Cohn, of San Francisco, for respondent.

PETERS, Presiding Justice.

The plaintiff and defendant are brother and sister, being the children of Anna Jarkieh, now deceased. Plaintiff brought this action to establish a one-half interest in certain bank accounts which were in the names of defendant and Anna at the time of Anna's death. The jury decided in favor of plaintiff, and from the judgment entered on the verdicts the defendant appeals.

The theory of the first amended complaint, and the theory upon which the case was tried, is that although the legal titles to the bank deposits are in defendant, she holds a one-half interest therein in trust for plaintiff.

The first amended complaint alleges in a first cause of action the existence of a trust account in the Hibernia Savings Bank which Anna Jarkieh, at the time of her death, held as trustee for the defendant. It is further alleged that decedent was an uneducated person unable to read or write; that she had no knowledge of business affairs; that the defendant was in a close confidential relationship with her mother; that the mother trusted her daughter implicitly; that during her lifetime (and the evidence most favorable to plaintiff shows that this occurred when the trust account was opened) the mother orally advised her daughter, the defendant, that she was establishing the trust account and expressed her intent that the moneys in the account were to be held by defendant after the death of the mother for the purpose of distributing the account share and share alike between defendant and plaintiff; that defendant orally agreed to divide the money in this fashion; that in reliance upon this agreement the mother established the trust account and permitted the moneys to remain in the account until the time of her death; that after the mother's death defendant refused to abide by the terms of the trust and refused to divide the money. The second cause of action alleges the existence of two joint accounts in the Bank of America held in the names of decedent and defendant as joint tenants. The rest of the allegations of the first cause of action are pleaded as to this cause of action.

The evidence was highly conflicting. The record discloses a bitter, and in many respects sordid, family dispute over this money between this brother and sister starting before the mother's death, becoming extremely bitter immediately after the mother's death, and continuing down through the trial. The evidence most favorable to plaintiff supports the implied findings of the jury that at the time the trustee and two joint tenancy accounts were opened defendant promised her mother that upon the mother's death she would divide the money equally with her brother. The express oral trust was proved by direct and circumstantial evidence.

The evidence shows that the two joint tenancy accounts, in which there was a total of about $7,000, were opened in 1935. The trustee account, in which there was in excess of $12,000, was opened in 1939. All the accounts had their origin in accounts formerly in the name of Anna Jarkieh alone. The money represented a lifetime of scrimping and saving on the part of the mother under most adverse economic conditions.

The defendant attacks the judgment on various grounds. Fundamentally these ob-

jections all center around the contention that, inasmuch as the amended complaint does not charge, in express terms, that defendant exercised fraud or undue influence upon her mother in procuring the accounts, the defendant, as a matter of law, is entitled to the money in these accounts under the provisions of § 15a of the Bank Act. Act 652, Deering's General Laws, p. 211. It is urged that the evidence showing the agreement to share the accounts with her brother was outside the issues, and was inadmissible under this section of the Act. Connected with this same point are the contentions that the challenged evidence was admitted in violation of the parol evidence rule, and the statute of frauds.

Section 15a of the Bank Act, upon which defendant places her main hope for a reversal, applies only to joint tenancy accounts, and reads in part as follows: "The making of the deposit in such form [joint tenancy] shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors."

[1-4] There are several important cases dealing with the presumptions created by this or similar sections. See Wallace v. Riley, 23 Cal.App.2d 654 and 669, 74 P.2d 807; Estate of Gaines, 15 Cal.2d 255, 100 P.2d 1055; see, also, Moskowitz v. Marrow, 251 N.Y. 380, 167 N.E. 506, 66 A.L.R. 870; Marrow v. Moskowitz, 255 N.Y. 219, 174 N.E. 460; Walsh v. Keenan, 293 N.Y. 573, 59 N.E.2d 409. It is undoubtedly the rule, under this section, in the absence of fraud or undue influence, that the title to a joint tenancy account vests in the survivor. See Jorgensen v. Dahlstrom, 53 Cal.App.2d 322, 127 P.2d 551. But that rule is not decisive of the problem here presented. That is so because the facts pleaded and proved support the implied finding of actual fraud. It is elementary law that upon proof of a transfer made in reliance upon an oral agreement to hold in trust, and upon proof of the subsequent repudiation of this agreement, the trier of fact may infer that the maker of the promise had the intention not to perform at the time the promise was made. That is actual fraud. In the instant case there is ample evidence that at the time the accounts were opened and many times afterward the mother stated in the presence of her daughter that it was her intent and the intent of the daughter that the accounts were to be divided equally upon the mother's death, and that the daughter acquiesced in those representations or actively made such representations herself. When the accounts were opened, and many times thereafter, the daughter orally promised to hold them in trust to the extent of one-half. Under such circumstances the trier of the facts was justified in inferring from the fact of the subsequent repudiation that defendant never intended to carry out the agreement when it was made. The subsequent repudiation relates back to the original promise. This actual fraud in the procurement of the accounts was pleaded and proved. This was the theory of the trial court as disclosed in the instructions. It is well settled that fraud may be proved in this fashion. In Snyder v. City Bond & Finance Co., 106 Cal.App. 745, 748, 289 P. 859, 860, the following appears: "As a further contention for the reversal of the judgment, appellant urges the ground of insufficiency of the evidence. Appellant argues that there was no evidence before the jury that would justify the necessary finding that the promises were made without intention to perform. It is well settled that fraud may be proved by circumstantial evidence. 'An intention not to perform a promise may be a matter of inference from the facts proven' (12 Cal.Jur. 829), and subsequent conduct may be sufficient to show that there was no intention of performing at the time of the promise. 12 Cal.Jur. 740, citing Williams v. Hasshagen, 166 Cal. 386, 137 P. 9; Holiday v. Tolosano, 39 Cal.App. 151, 178 P. 170, 171. American Law Reports, Annotated, in volume 51, page 166, states the rule as follows: 'A person's intent, within the meaning of the rule relating to fraudulent promises made without intention of performance, is often a difficult matter to determine, and evidence of subsequent conduct and speech on the part of

the promisor may be resorted to for the purpose of showing fraudulent intent, which may be shown by such evidence as matter of inference, although there is no direct evidence of a preconceived, secret intention on the part of the promisor at the time of making the promise, not to perform it.' In Holiday v. Tolosano, supra, the court said: 'It is also true that there is no direct evidence in the record before us that at the time of making the contract here involved there was any preconceived, secret intention on the part of Tolosano not to perform it; but in this connection the record, in our opinion, discloses sufficient evidence from which it may be justly inferred that at the time of entering into the contract Tolosano had in fact no intention of performing his obligations thereunder. "What a person's intent in such a matter may be is often a difficult thing to determine. It usually must be ascertained from his future conduct and speech, and the fact as to such intent is one peculiarly to be deduced by process of reasoning from the facts in evidence by the trial judge." Tench v. McMeekan, 17 Cal.App. 14, 20, 118 P. [476], 478.' "

It is thus apparent that the instant case falls squarely within the actual fraud exception contained in §15a of the Bank Act. This determination makes it unnecessary to decide at the present time whether the fraud exception in the section covers cases of constructive fraud. That question is an open one in this state, the Supreme Court, in the recent case of Estate of Gaines, 15 Cal.2d 255, at page 267, 100 P.2d 1055, expressly so holding.

[5] It might also be pointed out that under § 15a, in the case of joint deposits, in the absence of fraud or undue influence, the surviving joint tenant only takes *title* to the account. There is nothing in the wording of that section that precludes a holding that in a proper case, regardless of fraud or undue influence, the surviving joint tenant holds that legal title in trust for another. In such a case the conclusive presumption contained in the section is not being disturbed. Title goes to the survivor but evidence is admissible to show that the survivor holds such title subject to the terms of a trust.

[6] These arguments of defendant are only applicable to the two joint tenancy accounts, and are not applicable at all to the trustee account. The provisions of the Bank Act creating the conclusive presumption in favor of the depositors apply only to accounts in joint tenancy. As to trust accounts the Bank Act merely provides a protection to the banks, in that the bank is authorized to pay the balance to the person for whom the trust deposit was made.

[7, 8] The contention that the evidence is insufficient to support the judgment requires but passing mention. There is direct evidence given by plaintiff that when the accounts were opened in 1935 and 1939 there was a family discussion in which plaintiff, defendant and the mother participated, and it was then agreed by all that the accounts should be opened as was later done so that in case of the mother's death the daughter could withdraw the money and divide it equally with her brother. There is substantial evidence that defendant agreed to this arrangement. This testimony, although contradicted by defendant, alone supports the judgment. There was ample evidence that subsequently the mother stated to several apparently disinterested witnesses, in the presence of the daughter, that this was the arrangement made by her and her daughter. Shortly before her death the mother, who was Russian, visited a Russian priest in San Jose and discussed the matter with him. The daughter was present. The priest testified that the mother told him of the accounts and that it was her desire that they be equally divided between her two children. The priest asked the defendant how she felt about it and she replied that her mother was "the boss." After the mother's death the priest testified that defendant visited him and promised to divide the money in accordance with the agreement. While it is true that evidence of the existence of a trust must be clear and convincing (Estate of Gaines, 15 Cal.2d 255, 266, 100 P.2d 1055), the present record amply meets all of the requirements laid down in that case.

[9] The contention that the oral evidence of the existence of the trust was in-

admissible because it varied the terms of the written agreements entered into with the banks, is clearly without merit. This is not a case where the plaintiff claims that the parties never intended to create joint tenancies, or trustee accounts, but a case where it is claimed that the titles to these accounts came to defendant subject to a trust. Such evidence in no way affects the original written agreements entered into with the banks. In re Kellogg, 41 Cal.App.2d 833, 840, 107 P.2d 964. This rule was stated in Estate of Gaines, 15 Cal.2d 255, 265, 100 P.2d 1055, 1060, in the following language: "The theory of the trial court seems to have been that it was competent to introduce the evidence discussed above to show that though title passed to appellant under the joint tenancy agreement, it went to him *in trust*. The cases relied upon are those which hold that though a writing purports to make an absolute transfer, extrinsic evidence may be offered of a collateral agreement to hold the property as security, or in trust. See Wigmore, supra, sec. 2437; Williston, supra, sec. 635. This exception to the parol evidence rule is, of course, well settled; and the evidence might be admissible under such a theory, if it established a collateral agreement on appellant's part to hold the property in trust."

[10] Equally untenable is the contention that the alleged oral agreement violates the statute of frauds. Code Civ.Proc. § 1973 (6); Civ.Code, § 1624(6). These sections provide that an agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeth any property, or to make any provision for any person by will must be in writing. These sections are not here applicable. No agreement to devise property is involved. The promisor is the daughter who, under the agreement found to exist, promised to share the money upon surviving her mother. Clearly, the promise was to be performed within her lifetime. The case of Woolsey v. Woolsey, 121 Cal.App. 576, 9 P.2d 605, relied upon by defendant, is not in point. That was an action to enforce an alleged parol trust agreement as to a joint account. The court properly held that such an agreement was invalid under the statute of frauds to the extent that it purported to require the bequeathing of the bank fund by the surviving joint tenant by will. Here no such agreement was involved.

It is also urged that the trial court erroneously instructed the jury. The instructions of which complaint is made refer to the alleged promise of defendant to divide the money and use the term "fraud" in connection therewith. Defendant argues that fraud was outside the issues. For reasons previously given this contention is without merit.

It is also urged that error was committed by the refusal of the trial court to give certain instructions claimed to be material to defendant's case. In this connection the following facts are pertinent: The trial commenced on June 24, 1943, and ended July 13, 1943. During the course of the trial the judge repeatedly called the attention of counsel to the fact that no instructions had been handed to the court as required by § 607a of the Code of Civil Procedure. After repeated warnings that were disregarded the judge stated to counsel that because of their failure to comply with the statute he was making an order that neither side would be permitted to present more than ten instructions. Subsequently, and on July 6, 1943, defendant's counsel presented twenty-four instructions to the court, and plaintiff's counsel presented ten. Just before the argument to the jury on July 13, 1943, defendant proffered an additional two instructions. The court gave nine of defendant's twenty-six instructions. As to the refused instructions, seventeen in number, some were properly refused on the ground that they did not apply, others because the matter contained therein was covered by other instructions, and others because the provisions of § 607a of the Code of Civil Procedure were disregarded. The defendant contends that four of the refused instructions should have been given. Two of these instructions were refused because of § 607a, and the other two because the court felt they did not apply.

Section 607a of the Code of Civil Procedure provides: "In every case which is being tried before the court with a jury, it shall be the duty of counsel for the

respective parties, before the first witness is sworn, to deliver to the judge or justice presiding at the trial, and serve upon opposing counsel, all proposed instructions to the jury covering the law as disclosed by the pleadings. Thereafter, and before the court has commenced instructing the jury, and before the commencement of the argument, counsel may deliver to such judge or justice, and serve upon opposing counsel, additional proposed instructions to the jury upon questions of law developed by the evidence and not disclosed by the pleadings. All proposed instructions shall be typewritten, each on a separate sheet of paper. Any proposed instruction which is delivered to the judge or justice at a time later than is provided for herein may be disregarded; but, in that event, the judge or justice shall write upon the margin of such proposed instruction the fact that he refused to consider the same for the reason that the requirements of this section have been disregarded."

[11, 12] Non-compliance with this section justifies the court in refusing to give the instructions. See cases collected 24 Cal.Jur. p. 798, § 75. The statute embodies a sound rule of procedure and is intended to give the trial judge ample time to study the proposed instructions. Defendant urges, however, that the trial court here abused its powers because, so it is claimed, plaintiff's theory was not disclosed by the pleadings and was not disclosed until July 1, 1943, during the trial. The answer to this contention is that the two instructions of which complaint is made and which were refused for failure to comply with § 607a relate to matters disclosed by the pleadings. One deals with the rule that the burden rests upon the plaintiff to establish his case by a preponderance of the evidence and then explains what is meant by that phrase, and the second has to do with the conclusive presumption contained in § 15a of the Bank Act. Both of these instructions deal with matters of law disclosed by the pleadings. Furthermore, the matters covered in these two instructions were substantially covered by other instructions given by the court. As to the two instructions refused as not applying, one states, in effect, that before the jury can find there was a trust agreement they must find that the elements were proved with reasonable certainty, while the second deals with the law relating to voluntary trusts. The subject matter of these instructions was substantially covered by other instructions given by the court.

The judgment appealed from is affirmed.

WARD, J., and SCHOTTKY, Justice pro tem., concur.

Hearing denied; SPENCE, J., dissenting




75 Cal.App.2d 300

**GREEN et al. v. PEDIGO.**

**Civ. 15103.**

District Court of Appeal, Second District, Division 1, California.

July 11, 1946.

**1. Automobiles ⇐244(13, 35)**

In action for death of bicyclist struck by defendant's automobile at street intersection, evidence warranted jury's inference, indicated by verdict for plaintiffs, that defendant would have seen bicycle had he exercised ordinary care in looking to left and right just before and as he entered intersection and was negligent, if he saw bicycle, in failing to slacken speed, apply brakes or change course of automobile after entering intersection.

**2. Automobiles ⇐171(4)**

Failure of driver of vehicle entering highway intersection to yield right of way to vehicle entering it on his right at same time, as required by statute, constitutes negligence. Vehicle Code, § 550(b).

**3. Negligence ⇐136(14, 25, 26)**

The proximate cause of accident, negligence, and contributory negligence are primarily fact questions for determination by duly constituted arbiters thereof.

**4. Automobiles ⇐245(82)**

A bicyclist, struck by automobile at street intersection, was not contributorily

negligent as matter of law in failing to yield right of way to automobile, which entered intersection from his right, in view of evidence that motorist did not use required ordinary care and skill in control and operation of automobile. Vehicle Code, § 550(b).

**5. Automobiles ⇐146, 160(1)**

A motorist's lack of knowledge that another vehicle or pedestrian is on highway does not excuse him from liability for damage to such vehicle or death of pedestrian as result of motorist's conduct amounting to negligence had he known of such fact.

**6. Automobiles ⇐171(13)**

A motorist, found by jury's verdict to have been guilty of negligence proximately causing death of bicyclist struck by automobile at street intersection, cannot avail himself, on appeal, of benefit of presumption that bicyclist approaching intersection from motorist's left would exercise due care. Vehicle Code, § 550(b).

**7. Automobiles ⇐171(4)**

In determining whether operator of vehicle, approaching highway intersection to left of another vehicle entering it at same time, was negligent in failing to yield right of way, all circumstances surrounding collision between such vehicles must be considered. Vehicle Code, § 550 (b).

**8. Automobiles ⇐171(4)**

The law giving right of way to operator of vehicle approaching highway intersection from right of another vehicle approaching it at same time contemplates operation of his own vehicle in prudent manner with due regard to others' safety. Vehicle Code, § 550(b).

**9. Appeal and error ⇐989**

An appellate tribunal's function is not to consider relative weight of conflicting evidence, but only its legal sufficiency to support verdict and judgment challenged on appeal.

**10. Automobiles ⇐171(2), 245(14)**

The statutory provision that vehicle shall be driven as close as practicable to right-hand curb or edge of roadway was enacted for benefit of motorists traveling in same direction, not at right angles to each other, and is not a rigid rule, violation of which constitutes negligence as matter of law under all circumstances. Vehicle Code, § 525(a).

**11. Automobiles ⇐153**

In determining whether position of vehicle at or near center of highway, instead of near right edge thereof as required by statute, established operator's negligence, whole situation as to condition of streets, traffic, convenience, and number of vehicles passing must be considered. Vehicle Code, § 525(a).

**12. Automobiles ⇐245(82)**

A bicyclist, struck by automobile at intersection of two streets, which were free of other moving vehicles or pedestrians, was not contributorily negligent as matter of law in driving near center line of street, instead of close to right curb as required by statute, in absence of showing that there was not plenty of room for free passage by automobile to either side of bicycle. Vehicle Code, § 525(a).

**13. Automobiles ⇐212**

A bicycle is not a "motor vehicle" within statutory provision requiring motor vehicle driver to give audible warning with his horn when reasonably necessary to insure safe operation, in view of statutory definition of bicycle as self-propelled vehicle. Vehicle Code, §§ 32, 671(b).

See Words and Phrases, Permanent Edition, for all other definitions of "Motor Vehicle".

**14. Automobiles ⇐245(82)**

A bicyclist, struck by automobile at street intersection, was not contributorily negligent as matter of law in failing to equip bicycle with horn to warn traffic of impending danger, in absence of any statutory provision requiring such equipment of bicycles. Vehicle Code, §§ 622, 671(b).

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Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Clara L. Green and others against Joe Pedico for the wrongful death of Carlton Clinton Green as the result of

a collision between a bicycle ridden by him and an automobile operated by defendant. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Austin & Austin, of Compton, for appellant.

F. Henry Necasek, of Long Beach, for respondents.

WHITE, Justice.

This is a wrongful death action arising out of a collision between an automobile and a bicycle, as a result of which Carlton Clinton Green, the husband of plaintiff Clara L. Green, received injuries from which he died almost immediately.

On May 18, 1944, defendant, Joe Pedigo, was operating a 1941 Chevrolet automobile in a northerly direction on Paulson Avenue across the intersection of Plum Avenue in the City of Compton, Los Angeles County, while the deceased was at the same time and place propelling a bicycle in an easterly direction near and across the same intersection. Plaintiffs are the only heirs at law of said decedent.

By their complaint plaintiffs alleged that the defendant negligently and at an excessive rate of speed operated his automobile near and through the aforesaid intersection, as a result of which he collided with the bicycle propelled by decedent. Defendant's answer denied any and all negligence on his part and as an affirmative defense alleged that decedent was himself guilty of contributory negligence in that he operated his bicycle without exercising ordinary care for his own safety, as a result of which carelessness the fatal accident occurred. Defendant also affirmatively alleged that the accident, and the injuries and death ensuing therefrom, were the result of an unavoidable accident in which the defendant was free from negligence.

The cause proceeded to trial before a jury, which returned a verdict for plaintiffs in the sum of $15,000. A motion for a new trial was denied, and from the judgment entered upon the verdict defendant prosecutes this appeal.

In urging a reversal appellant presents but two grounds: (1) That the evidence fails to disclose any negligence upon his part; and (2) that the evidence discloses as a matter of law that the decedent was guilty of contributory negligence.

The record reveals that the deceased was a man 61 years of age; that he had been riding the bicycle involved in the accident several times a week for some six months; that he had been riding a bicycle since he was 35 years of age and was also licensed to operate an automobile in the State of California. There was testimony that the deceased was in good health, possessed of all of his faculties; that his hearing was good; and although he had undergone a cataract operation and wore glasses, his eyesight was good. At the trial it was stipulated that the intersection at which the accident occurred "is a square street intersection * * * not in the business district, but in the residential district. Paulson Avenue runs north and south and Plum Avenue runs east and west. The streets from curb to curb * * * are 29 feet." The accident happened between four and four-ten p. m. It was a clear day, the pavements were dry, and the sun was shining from the west.

Defendant was driving his automobile north on Paulson Avenue at or near the center line of the highway. According to his testimony, he approached the intersection of Plum Avenue at a speed of from 12 to 15 miles per hour. He further testified that as he approached the intersection he "slackened up his speed" and looked both to the left and right, but saw no vehicle in either direction. After entering the intersection he looked straight ahead. Prior to the impact the defendant at no time saw the decedent, the bicycle or any other vehicle upon the highways. Defendant testified that as he was going through the intersection he felt "just a jar like my pipe had dropped off my muffler, like I had run over something, that is all"; that he thereupon applied his brakes "pretty fast * * * to see what it was." He testified that after he applied his brakes the automobile traveled not "over eight feet at the most"; but it was testified by a police

officer that marks upon the pavement indicated that the automobile traveled from the center line of Plum Avenue, where the brakes were applied, for a distance of 19 feet. The body of decedent was under the front part of the automobile and a portion of the bicycle was under the left rear wheel of the automobile.

The only eye-witness to the accident was Mrs. Irene Christy, who was seated in a parked automobile facing north about 125 to 135 feet south of the intersection. She testified she was looking toward the intersection. She first saw the decedent propelling his bicycle east on Plum Avenue near the center of the highway. At about the same time she observed defendant's automobile proceeding north on Paulson Avenue. It slowed down as it approached the intersection and then proceeded across. This witness testified that the man on the bicycle proceeded across the intersection until he arrived at about the middle thereof, when "he just put on his brakes, and then he stepped down, astride the bicycle." As to what thereafter happened we quote from the record as follows:

"Q. Then what did you see happen? A. Well, he was trying to stop, and he put on his brakes, and then he stepped down on the curb, astraddle the bike.

"Q. Was he stopped when he stepped down? A. Well, it looked to me like he was; I don't know.

"Q. Then what happened? A. The front wheel of the car, or some part of the front part of the car struck the front wheel of the bicycle.

"Q. Then what did you see next? A. Well, I saw him—he was turning over in the air, under the car, and it threw him under the wheels.

"Q. How high did it throw him? A. Oh, about the height of the fender.

* * * * * *

"Q. Both the bicycle and the car entered the intersection about the same time, did they? A. They entered the intersection at the same time, is the way it looked to me from where I was sitting."

Mrs. Christy further testified that at the time "the front wheel of the car struck the front wheel of the bicycle" the decedent was "astraddle the bicycle with both feet on the ground. * * * He was standing."

In support of his claim that the record discloses no evidence of any negligence on his part, appellant asserts that he approached the intersection at a speed of from 12 to 15 miles per hour, slowed down slightly, looked in both directions, and proceeded across the intersection; that at no time did he see the decedent or his bicycle and was only apprised that something was amiss when he felt a bump that "seemed like it was either the muffler or running over a box that made a little noise * * *"; that the sun was in his eyes, "the deceased on an inconspicuous vehicle in a portion of the highway where he should not have been, and the further fact that deceased never passed in front of the defendant's car, but that the front wheel of the bicycle and the front wheel of the car came together."

[1] In view of the fact that defendant was traveling north at about four p.m., it is difficult to understand how the sun could be shining in his eyes. The answer to appellant's contentions is to be found in the fact that there was before the jury testimony of Mrs. Christy that when she first saw the decedent he was about eight feet back from the intersection and that defendant's automobile was about the same distance from the intersection; that defendant's view was unobstructed; that both vehicles "entered the intersection at the same time." From this and other testimony the jury was entitled reasonably to infer that if the defendant had used ordinary care in looking to his left and right just before and as he entered the intersection, he would have seen the bicycle, and by the exercise of due care have avoided the collision.

If the defendant did see the bicycle his conduct would clearly amount to negligence, because by his own testimony it was shown that he did not slacken his speed, apply his brakes, or change the course of his vehicle after entering the intersection and while the decedent was attempting to or did stop his bicycle and was astride the same with both feet on the ground at or

near the center of the intersection. Under the facts and circumstances here proven, the inference apparently drawn by the jury as indicated by their verdict, that if the defendant had looked he must have seen the bicycle both before and after it entered the intersection, cannot be disturbed on appeal.

[2-5] We come now to a consideration of appellant's claim that the decedent was guilty of contributory negligence as a matter of law which proximately contributed to the fatal injuries he received. In that regard, it is first asserted that in view of the testimony that both vehicles entered the intersection at the same time, the deceased, being the driver of the vehicle on the left, should have yielded the right of way to the defendant, and that the defendant, even though he saw the decedent, had a right to assume that the latter would comply with the law and yield the right of way.

Subdivision (b) of section 550 of the Vehicle Code reads:

"When two vehicles enter an intersection from different highways at the same time the driver of the vehicle on the left shall yield the right of way to the driver of the vehicle on the right."

It must be conceded that a failure to yield the right of way in conformity with the statutory duty constitutes negligence. Hosking v. Danforth, 1 Cal.App.2d 178, 181, 36 P.2d 427; Dell v. Hjorth, 51 Cal. App.2d 576, 579, 125 P.2d 505. The cited cases are the ones relied upon by appellant in support of his claim that in failing to yield the right of way decedent was guilty of contributory negligence as a matter of law. However, in both cases the court was concerned with a judgment rendered in favor of the defendant where the trial court found that such negligence on the part of plaintiff was the proximate cause of the accident. The question of proximate cause, negligence and contributory negligence is primarily one of fact for determination by the duly constituted arbiters thereof. Though it be conceded that defendant was strictly within the law as to the "right of way," there is sufficient evidence in the record to warrant an inference by the jury that he did not use, as was his duty, the required ordinary care and skill in the control and operation of his vehicle to avoid an accident. Benjamin v. Noonan, 207 Cal. 279, 283, 277 P. 1045. The fact that defendant did not know another vehicle or pedestrian was on the highway will not excuse him where the jury was warranted in finding, under the evidence, that his conduct would have amounted to negligence had he known that another vehicle or pedestrian was on the highway. Rush v. Lagomarsino, 196 Cal. 308, 317, 237 P. 1066.

[6-8] Appellant's contention that he had a right to presume that anyone approaching the intersection from his left would exercise due care in so doing, and inasmuch as the decedent failed so to do, defendant is exculpated of responsibility for the accident, is answered by the rule that one who himself is negligent may not rely upon the presumption. Since by the verdict appellant was found to be negligent, he cannot avail himself of the benefit of such presumption. Truitner v. Knight, 83 Cal.App. 655, 662, 257 P. 447. In the case of Lawrence v. Goodwill, 44 Cal.App. 440, 457, 186 P. 781, 787, the following was approved as a clear and correct statement of the rule of law covering the right of way over highways: "While the law gives to the operators of vehicles on the right what is generally termed the 'right of way,' still it does not follow as a matter of law that upon the happening of a collision between two vehicles at the intersection of two public highways that the operator of the vehicle on the left is necessarily guilty of negligence. *All the facts and circumstances surrounding the happening of the accident must be considered in determining whether such operator was in fact negligent.* (Italics ours.) In other words, the law governing the operation of vehicles must be applied to the facts and circumstances of the case, and the law which gives to the operator of a vehicle on the right the so-called 'right of way' also contemplates that such operator of such vehicle is himself operating his vehicle in a careful and prudent manner, and with due regard to the safety of others."

[9] In the instant case the jury by their verdict answered in the negative the question of whether appellant was himself operating his automobile in a careful and prudent manner and with due regard to the traffic and the use of the highway by others. And by their verdict the jury also impliedly found that appellant's negligence was the proximate cause of the fatality. Though the evidence was in conflict, we are bound to recognize that the jury and the trial judge who passed upon the motion for a new trial had the benefit of personal observation of the witnesses, and that the function of an appellate tribunal is not to consider the relative weight of conflicting evidence, but only its legal sufficiency to support the challenged verdict and judgment.

Appellant next earnestly urges that the decedent was guilty of contributory negligence as a matter of law because he failed to propel his bicycle close to the right edge of the roadway, but was riding at or near the center line of the highway in violation of section 525(a) of the Vehicle Code, which section at the time of the happening of this accident read: "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right-hand curb or edge of, such roadway * * *."

[10] In the case of Arundel v. Turk, 6 Cal.App.2d 162, 164, 44 P.2d 383, 384, it was also urged by respondent that appellant was guilty of contributory negligence as a matter of law, because, assuming she was on her right side of the road, she operated her automobile too close to the center line when there was plenty of room to the right, in violation of section 122(b) of the California Vehicle Act (section 525(a) of the Vehicle Code at the time here pertinent). In disposing of this contention the court said: "We believe, and we have been cited no authority to the contrary, that the section in question was enacted for the benefit of motorists traveling in the same direction." To the same effect see Polk v. Weinstein, 12 Cal.App.2d 360, 363, 55 P.2d 588; Matsuda v. Luond, 52 Cal.App.2d 453, 459, 126 P.2d 359; Mathers v. County of Riverside, 22 Cal.2d 781, 784, 141 P.2d 419, and cases therein cited. Furthermore, "The rule is elastic. It is not a rigid rule the violation of which under all circumstances constitutes negligence as a matter of law." Mathers v. County of Riverside, supra, 22 Cal.2d at page 785, 141 P.2d at page 421.

[11, 12] We are persuaded that before any inference of negligence could be drawn against the deceased, the whole situation as to the condition of the streets, traffic, convenience, number of vehicles passing, would necessarily have to be illustrated in the evidence. These are all factors to be taken into consideration in determining whether the position on the street of the vehicle in question was such that the operator thereof was or was not guilty of negligence. Mauchle v. Panama Pacific Int. Exp. Co., 37 Cal.App. 715, 719, 174 P. 400. Under the evidence with which we are here confronted we are not prepared to say that the decedent was guilty of contributory negligence as a matter of law in propelling his bicycle, as was the appellant his automobile, near the center line of the highway instead of keeping close up to the curb. The evidence shows without contradiction that both highways were free of other moving vehicles or pedestrians, and it does not appear that there was not plenty of room for free passage by appellant to either the left or right of the bicycle rider. As was said in the case of Mauchle v. Panama Pacific Int. Exp. Co., supra, 37 Cal.App. at page 719, 174 P. at page 402: "Some discretion must be left to juries and trial courts in such cases; and we think in this case that we cannot hold as a matter of law that Mauchle was guilty of contributory negligence."

[13, 14] Finally, appellant contends that decedent was guilty of contributory negligence as a matter of law because his bicycle was not equipped with a horn or other contrivance for warning traffic of impending danger. We are cited to no authority holding that a bicycle must be so equipped, nor has our search for any such authority been fruitful. Appellant relies upon section 671 (b) of the Vehicle Code, which provides that "The driver of a *motor* vehicle when reasonably necessary to insure safe operation shall give audible warning with his

horn. * * *" (Emphasis added.) But the answer to appellant's claim is that a bicycle is not a *motor* vehicle, which is defined by section 32 of the Vehicle Code as "a vehicle which is self-propelled." We find no provision in the Vehicle Code requiring any vehicle other than a motor vehicle to be equipped with a horn. Veh. Code, sec. 671. Section 622 of the Vehicle Code requires that every bicycle shall be equipped with a white light on the front and a red reflector on the rear, but the only provisions requiring other warning devices are applicable solely to *motor* vehicles. It therefore follows that in not having his bicycle equipped with a horn the decedent was violating no provision of law upon which a charge of contributory negligence could be predicated.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.




75 Cal.App.2d 280

**AMERICAN LOCKER CO., Inc., v. CITY OF LONG BEACH et al.**

**Civ. 15325.**

District Court of Appeal, Second District, Division 2, California.

July 9, 1946.

Hearing Denied Sept. 5, 1946.

**1. Licenses ⇐5½**

The words "license and regulate" as used in city charter of Long Beach include the authority to impose a license tax for revenue purposes only.

See Words and Phrases, Permanent Edition, for all other definitions of "License and Regulate".

**2. Municipal corporations ⇐79**

State law authorizing cities to license businesses for purpose of regulation and not otherwise, being in conflict with provision in city charter of Long Beach authorizing imposition of license tax for revenue purposes only, was not applicable to Long Beach. Business and Professions Code, § 16000.

**3. Municipal corporations ⇐121**

Corporation maintaining coin-operated lock boxes for public use could not question validity of city ordinance requiring it to pay a license tax for operation of a place wherein space is rented for storage of clothing or other personal property on ground that portion of same section of ordinance imposing license tax on operation of "what is commonly known as a locker club" was too indefinite and uncertain to be enforceable.

**4. Licenses ⇐29, 36**

Where the same business is conducted at several different places, generally the operator must procure required license or pay required tax for each establishment, unless under ordinance imposing license tax only one license or tax is required.

**5. Licenses ⇐29**

Under city ordinance requiring a separate license for each branch establishment or separate office or place for carrying on business or pursuit for which license was required, a corporation maintaining coin-operated lock boxes for public use in various railroad and bus terminals of city could properly be required to pay a license fee for each different place where it conducted its business.

**6. Licenses ⇐7(9)**

City ordinance imposing license tax of stated amount on all engaged in same business, regardless of business done or profits received, was not void as being confiscatory, though tax was approximately equivalent to licensee's annual net profit.

**7. Licenses ⇐7(3)**

A license tax imposing the same amount upon all engaged in the same business, regardless of business done or profits received, is not an unreasonable discrimination against any particular person engaged in the same business because his net profit is less than that of others engaged in same business or less than the tax imposed.

8. Commerce ⇐63

City ordinance imposing a license tax on every person operating any place wherein space is rented for storage of clothing or other personal property was not invalid as imposing an illegal burden on interstate commerce in absence of allegation or proof that corporation on which tax was imposed with respect to maintenance of coin-operated lock boxes for public use was engaged in interstate commerce or that the lock boxes were actually or closely related to movement of such commerce.

9. Commerce ⇐63

The test of whether a license tax on a business imposes an illegal burden on interstate commerce is whether the activities taxed are actually in or so closely related to the movement of such commerce as to be a part of it, and not whether they affect or indirectly relate to interstate commerce.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by American Locker Company, Inc., against the City of Long Beach, a municipal corporation, and others to enjoin enforcement of an ordinance of defendant city imposing a license fee. From a judgment in favor of defendants predicated upon the sustaining, without leave to amend, of their demurrer to the complaint, plaintiff appeals.

Judgment affirmed.

Denio, Hart, Taubman & Simpson, of Long Beach, for appellant.

Irving M. Smith, City Atty., and AtLee S. Arnold, Deputy City Atty., both of Long Beach, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants predicated upon the sustaining, without leave to amend, of their demurrer to the complaint in an action to enjoin the enforcement of an ordinance of defendant city requiring a license fee for the maintenance of coin operated lock boxes in stations or terminals of railroads or bus lines, located in the city of Long Beach, plaintiff appeals.

So far as material here it is alleged in the complaint as follows:

"That plaintiff is in the business of placing and maintaining in the stations or terminals of various railroad, interurban, and bus lines, and in open and public portions of said stations or terminals, a tier or tiers of coin operated metal lock boxes. That said boxes are so constructed that a person wishing to use the same may deposit a coin in a slot in an unoccupied box and then place belongings in said box and lock the same therein for temporary safe keeping. That the average annual earnings of such boxes for a five year period have been $1.29 per box. That plaintiff is now operating a tier of eight of such boxes in the Central Bus Station at 56 American Avenue in the City of Long Beach. That defendants have demanded and are now demanding from plaintiff the payment of the sum of $10.00 as a license fee for revenue purposes only under the provisions of Section 3.355 of said License Code on said eight boxes so located in said Central Bus Station for the year 1945. That plaintiff also maintains similar coin operated boxes in other bus stations and terminals in the City of Long Beach, and said defendants have heretofore demanded and received from plaintiff for the year 1945 the sum of $10.00 as a license fee for revenue purposes only for each separate location of a group of said boxes in each such station or terminal.

"That plaintiff has refused to pay said sum of $10.00 demanded as aforesaid for said boxes at said Central Bus Station at 56 American Avenue.

"That heretofore and under date of September 14, 1943, the City Council of the City of Long Beach adopted and enacted Ordinance No. C-2232, known as the License Code, the title of which ordinance is as follows, to wit:

"'An ordinance to establish a license code, thereby consolidating and revising the law relating to the licensing and regulating of certain businesses, professions and pursuits carried on within the City of Long Beach; providing fees therefor; imposing penalties for violations thereof; and re-

pealing all ordinances and parts or ordinances in conflict herewith'.

"That Section 3.355 of the License Code now provides as follows:

"'Sec. 3.355. Locker Clubs. For every person conducting, managing or operating what is commonly known as a Locker Club in the City of Long Beach, or operating any place wherein space is rented to persons for the storage of clothing or other personal property, whether such charge be in the form of a regular charge or a membership fee to such club, the sum of Ten Dollars ($10.00) per year'.

"That Section 6.105 of said License Code provides as follows:

"'A separate license shall be obtained for each branch, establishment or separate office or place for carrying on any business or pursuit specified in this Ordinance and the amount thereof, unless otherwise specified shall be equal to the amount specified for carrying on the original business.'

"That under date of January 30, 1945, Section 3.515 of said License Code was amended to read as follows, to wit:

"'Ordinance No. C-2364

"'Vocational. For every individual engaged in any business, occupation, profession or vocation in the City of Long Beach, not otherwise specified in this ordinance, and maintaining a fixed place of business in said City, the sum of Ten Dollars ($10.00) per year; provided, however, that this provision shall have no application to individuals whose entire earnings as a result of engaging in such business, occupation, profession or vocation are limited or confined to a salary or wage or commission paid by an employer, and provided that this section shall have no application to individuals engaged in the teaching of the cultural pursuits of music, both vocal and instrumental, drama, elocution and art.'

"That the charter of the City of Long Beach provides in Section 329 thereof as follows:

"'Sec. 329. All general laws of the State of California applicable to municipal corporations, now or hereafter enacted, and which are not in conflict with the provisions of this charter, shall be applicable to the City of Long Beach.'

"That said City Charter of the City of Long Beach does not contain any provision authorizing or permitting the licensing of any business, occupation, or profession for revenue purposes only, and that the provisions of the General Laws of the State of California, in Section 16000 of the Business and Professions Code are therefore made applicable to the City of Long Beach by said section 329 of said City Charter. That said Section 16000 of said Business and Professions Code provides as follows:

"'Authority to license. The legislative bodies of incorporated cities may, in the exercise of their police power, and for the purpose of regulation, as herein provided, and not otherwise, license any kind of business not prohibited by law transacted and carried on within the limits of their jurisdictions, including all shows, exhibitions and lawful games, and may fix the rates of such license fee and provide for its collection by suit or otherwise.'"

Plaintiff urges the following five reasons why in its opinion section 3.355 of the License Code of the City of Long Beach is invalid.

1) *The charter of defendant city specifically prohibits the municipality from imposing a license tax for revenue purposes, but its power is limited to imposing a license tax for regulatory purposes only.*

This proposition is untenable. Section 33 of the charter of defendant city reads as follows:

"Sec. 33. To license and regulate places of amusement and the carrying on of any and all professions, trades, callings, occupations and kinds of business, carried on within the limits of said city; and to fix the amount of license tax thereon to be paid by all persons engaged in carrying on such places of amusement and such professions, trades or callings, occupations and kinds of business in said city, and to provide for the manner of enforcing the payment of such license tax; and to regulate, restrain, suppress and prohibit hawking, peddling and the carrying on of any

laundry, livery and sale stable, cattle or horse corral, feed yard, horseclipping establishment, bill boards, lumber yards, planing mills, rolling mills, oil wells, furnaces, chimneys and smoke stacks, tanks or refineries, foundries, brickyards, slaughter houses or butcher shops, and the keeping of bees, cattle or other domestic animals, poultry or pigeons within the limits or within any designated portion of said city; and to prohibit and suppress the sale or giving away of intoxicating liquors; and the keeping of any place where alcoholic liquor or other intoxicating drinks are sold or given away, and all faro banks, games of chance, gambling houses, or bawdy houses, and any and all obnoxious, offensive, immoral, indecent or disreputable places or practices within the said city."

[1] The law is settled in California that the words "license and regulate" as used in the foregoing section of the city charter of Long Beach include the authority to impose a license tax for *revenue purposes only.* (In re Galusha, 184 Cal. 697, 700, 195 P. 406; In re Nowak, 184 Cal. 701, 705, 195 P. 402.)

Section 329 of the City Charter of Long Beach reads thus:

"All general laws of the State of California applicable to municipal corporations, now or hereafter enacted, and which are not in conflict with the provisions of this charter, shall be applicable to the City of Long Beach."

Plaintiff argues that defendant city by the incorporation in its charter of section 329 has adopted the provisions of section 16000 of the Business and Professions Code (formerly section 3366 of the Political Code) which reads thus:

"Authority to license. The legislative bodies of incorporated cities may, in the exercise of their police power, and for the purpose of regulation, as herein provided, and not otherwise, license any kind of business not prohibited by law transacted and carried on within the limits of their jurisdictions, including all shows, exhibitions and lawful games, and may fix the rates of such license fee and provide for its collection by suit or otherwise."

[2] This argument is fallacious for the reason that the limitation in section 16000 of the Business and Professions Code is contrary to the power conferred by section 33 of the city charter. Section 329 of the City Charter makes applicable to the defendant city only such laws of the state of California as are not in conflict with the provisions of the charter; since the section of the Business and Professions Code is in conflict with a provision in the city charter such section is not applicable to the defendant city and is not a limitation upon its powers. Hence, under the authority contained in section 33 of its charter the defendant municipality had the power to levy a license tax for revenue purposes only.

*2) Section 3.355 of the Long Beach License Code is too indefinite and uncertain to be enforceable because in its classification of those subject to the license tax it attempts to impose the tax upon those operating what is "commonly known as a locker club in the city of Long Beach."*

[3] This contention is likewise without merit. Plaintiff urges that the ordinance is invalid upon the authority of Barker Bros., Inc., v. City of Los Angeles, 10 Cal. 2d 603, 607, 76 P.2d 97, 98, wherein an ordinance of the city of Los Angeles imposing a tax on "any store which is commonly known as a department store or any store where a variety of goods, wares and merchandise are arranged in or offered for sale" was held invalid because there was not in the ordinance any definition of a department store by which a party might know whether a particular business was included in the terms of the ordinance, since the term "commonly known as a department store" could not be applied with any degree of certainty to any particular business and was too indefinite to be used as a classification for the purpose of taxation. This case is not here in point. There is no contention that plaintiff is being licensed under the provisions of an ordinance referring to locker clubs. The license tax is being imposed upon plaintiff under the provisions of the ordinance providing for the licensing of a person "op-

erating any place wherein space is rented to persons for the storage of clothing or other personal property." Clearly such a provision is definite and certain and is applicable to plaintiff since it admits that it is engaged in such a business.

3) *Plaintiff is liable to only one fee for all of its locked boxes located in defendant city.*

[4] This proposition is untenable. It is the general rule that where the same business is conducted at several different places the operator must procure the required license or pay the required tax for each establishment unless under the ordinance only one license or tax is required. (37 C.J. (1925) § 62, page 210; Goldstein v. State Revenue Comm., 50 Ga.App. 317, 178 S.E. 164, 165; City of Drumright v. Strand Amusement Co., 139 Okl. 162, 282 P. 128. Cf. Bramman v. City of Alameda, 162 Cal. 648, 653, 124 P. 243; Steuer v. City of Atlanta, 176 Ga. 433, 168 S.E. 7.)

In the present case section 6.105 of the Long Beach License Code reads as follows:

"A separate license shall be obtained for each branch establishment or separate office or place for carrying on any business or pursuit specified in this ordinance, and the amount thereof, unless otherwise specified, shall be equal to the amount specified for carrying on the original business."

[5] Clearly under the foregoing section of the license code plaintiff could properly be required to pay a license fee for each *different place* where it conducted its business. There is no attempt by the city to impose a tax upon each locked box in the tier of the coin operated metal lock boxes at any place of business conducted by plaintiff.

4) *The tax sought to be collected by defendant municipality is confiscatory and therefore void.*

[6, 7] This proposition is not sound. Plaintiff argues that since the amount it receives annually is approximately equivalent to the license tax, the license tax is confiscatory and therefore void. This position may not be sustained under the law of this state. The rule is established in California that a license tax imposing the same amount upon all engaged in the same business, regardless of business done or profits received therefrom, is not an unreasonable discrimination against any particular person engaged in the business because its net profit is less than that of others engaged in the same business or because the imposition of the tax may even result in some person engaged in the business operating at a loss. (City of Los Angeles v. Los Angeles Independent Gas Co., 152 Cal. 765, 768, 93 P. 1006, and cases therein cited; Alaska Fish Salting & By-Products Co. v. Smith, 255 U.S. 44, 48, 41 S.Ct. 219, 65 L.Ed. 489.)

5) *Section 3.355 of the Long Beach License Code imposes an illegal burden on interstate commerce.*

[8, 9] This proposition is devoid of merit. There is no allegation in the complaint that plaintiff is engaged in interstate business or that the depositors' lock boxes which it rents are used in interstate commerce. The test is not whether the activities affect or indirectly relate to interstate commerce, but whether they are actually in or so closely related to the movement of commerce as to be a part of it. (Barker Bros., Inc. v. City of Los Angeles, 10 Cal.2d 603, 609, 76 P.2d 97; Schroepfer v. A. S. Abell Co., 4 Cir., 138 F.2d 111, 113.) So far as appears in the record in the instant case there is nothing to indicate that plaintiff's lock boxes are actually or closely related to the movement of interstate commerce.

Cooney v. Mountain States Tel. & Tel. Co., 294 U.S. 384, 55 S.Ct. 477, 79 L.Ed 934, relied on by plaintiff, is factually distinguishable from the instant case. In such case the state of Montana attempted to impose a license tax based upon the number of telephone instruments used in the telephone service in that state without regard to its character as intrastate or interstate business. Since the same instruments and equipment were in the command of the customers for either intrastate or interstate service, the court held that the licensing statute must distinguish between the intrastate and interstate character of the

business. Clearly the present situation is not analogous to that which obtained in the case just mentioned.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.




75 Cal.App.2d 344

**THOMPSON v. BROWN et al.**

**Civ. 7223.**

District Court of Appeal, Third District, California.

July 15, 1946.

Hearing Denied Sept. 12, 1946.

**1. Appeal and error ⇐1011(1)**

Where record on appeal discloses that evidence on particular issue was in sharp conflict, appellant's assertion that there was substantial evidence in her favor on such issue does not justify appellate court in overruling trial court's determination thereon.

**2. Appeal and error ⇐1040(4)**

In mandamus proceeding for restoration to position of senior stenographic clerk in district attorney's office where evidence disclosed that petitioner, after alleged withdrawal of her resignation from such position, executed and filed with county civil service commission a writing stating that she had permanently severed her connection with county and demanded return of amount to her credit on retirement association's books, error, if any, in sustaining demurrer to portion of petition alleging her request to withdraw resignation, thereby preventing proof of alleged notice of such withdrawal, was harmless.

Appeal from Superior Court, Sacramento County; Warren Steel, Judge.

Mandamus proceeding by Bernice Fox Thompson against John Q. Brown, District Attorney of Sacramento County, and others, for restoration of petitioner to the position of senior stenographic clerk in the district attorney's office. Judgment for respondents, and petitioner appeals.

Affirmed.

Otis D. Babcock, of Sacramento, for appellant.

John Quincy Brown, Dist. Atty., and John B. Heinrich, Supervising Deputy Dist. Atty., both of Sacramento, for respondents.

PEEK, Justice.

This is a proceeding in mandamus by which petitioner seeks to be restored to the position of Senior Stenographic Clerk in the office of the District Attorney of Sacramento County.

By the first count of her petition it is alleged that she was employed in said office under a permanent civil service classification; that on or about June 19, 1944, under duress, menace, oppression, coercion and undue influence of said district attorney and his chief deputy she submitted her resignation from said employment to become effective July 21, 1944; that the securing of said resignation was wrongful, illegal and without cause; that ever since July 22, 1944, respondents have refused to permit her to carry on her duties in said position, although she is ready, able and willing to do so; and that she has no plain, speedy or adequate remedy at law. For a second cause of action petitioner re-alleges the principal averments set forth in the first cause, and in addition alleges that on or about July 12, 1944, she filed a written request with respondent Civil Service Commission, withdrawing and recalling for resignation, but that respondents refused to comply with said request or to recognize her right to continue in her employment.

To said petition respondents filed a general demurrer and a return or answer denying generally the allegations set forth therein. The demurrer was overruled as to the first cause of action and sustained without leave to amend as to the second alleged cause of action. The matter was heard on the one issue thus framed, that of undue influence as set forth in appellant's first cause of action.

Appellant, in support of the allegations in her complaint, testified to the effect that she was the wife of one M. A. Thompson, a chiropractor, who had been arrested and charged by respondent Brown, the district attorney, with the crime of abortion; that on the morning of her husband's arrest she was informed by said respondent that under the circumstances it would be very embarrassing for her to remain in the office; that if she did not divorce her husband it would be necessary for her to resign therefrom; that respondent Mundt, Brown's assistant, told her she should get rid of her husband who had married her only to gain whatever protection he could from the district attorney's office; that respondent Brown gave her a printed resignation blank, which he ordered her to fill out, sign and return to him; that Brown requested her to stay for two weeks in order to familiarize her successor with the work of the office; and that, when she reported for work at said office on July 21, she was told by Mundt that there was none available. Other witnesses corroborated in part the testimony of appellant.

On cross-examination, however, she testified she knew that as a civil service employee she could have refused to sign the resignation; that it was possible that prior to the time respondent Brown first mentioned anything concerning divorce she might have told him she was going to divorce her husband; and that at the conclusion of her conversation with respondent Mundt he left it to her judgment as to what she should do. She further testified that of her own accord she personally prepared and filed a demand with the Sacramento County Employees' Retirement Association for the return of all sums placed to her credit with said association, and that just prior to July 1, 1944, she made up a special supplemental payroll for herself showing the termination of her employment as of July 21.

According to the respondent district attorney and his assistant, it was appellant and not they who first mentioned the possible embarrassment of her position; that likewise it was she who announced to them she was determined to get a divorce and to resign from her position; that it was she who obtained the resignation blank and filled it out; that the resignation was dated approximately one month ahead not, as appellant stated, in order to acquaint a new stenographer with the duties of the office, but to enable her to receive vacation pay in lieu of the vacation to which she otherwise would have been entitled by continuing her employment for that period, thereby gaining the necessary credits.

It is uncontradicted that the resignation, dated to become effective July 21, 1944, was signed by appellant on June 17, 1944, countersigned by respondents Brown and Mundt, and given to respondent Brown; that appellant continued to work in the office until July 1, 1944, when she took up other employment; that on or about July 1, 1944, she prepared and signed a special supplementary payroll for herself showing the termination of her employment in the office as of July 21, 1944; that on or before August 2, 1944, appellant made demand upon the Sacramento County Employees' Retirement Association for all accrued credits standing in her name with said association, which demand was filed on said date with the Civil Service Commission; that said demand recited that appellant had resigned her position on July 21, 1944; that a warrant for the amount found to be due her was mailed to appellant by the commission and her account was closed on the books; and that appellant thereafter attempted to return the said warrant to the association but the association refused to accept it.

At the conclusion of the hearing the court adopted findings favorable to respondents and entered judgment accordingly.

[1] On appeal appellant first complains of the action of the trial court in finding against her on the evidence. She does not contend that there is no substantial evidence to support the finding, but merely asserts that "the evidence is substantial to the effect that the petitioner was coerced into resigning her position." The rule is too well established to warrant the citation of authorities that where, as here, the record discloses that the evidence on the particular question in issue is in sharp conflict, an assertion such as appellant makes here, even if warranted, would not justify

this court in overruling the determination of the trial court on such issue.

[2] Appellant next contends that, as a resignation takes effect upon the date mentioned in the writing, subject to the terms contained therein (citing Meeker v. Reed, 70 Cal.App. 119, 123, 232 P. 760, and People ex rel. Webb v. Marsh, 30 Cal.App. 424, 159 P. 191), and as the effective date of the resignation herein admittedly was July 21, 1944, it was prospective in character and could be withdrawn at any time prior to said date, citing People v. Porter, 6 Cal. 26, 27. From this she concludes that proof of the alleged withdrawal of her resignation should have been admitted.

In answer to this, respondents in effect argue that, irrespective of the character of the resignation as prospective or not, the rules of the Civil Service Commission promulgated under authority of the Sacramento County Charter expressly provide for the filing of a resignation with the appointing authority, and therefore it inferentially follows that the purported withdrawal which was admittedly filed with the commission and not with the district attorney was a mere nullity and ineffectual for all purposes.

A factual situation somewhat similar to the present controversy is found in the case of Shade v. Board of Trustees, 21 Cal.App. 2d 725, 70 P.2d 490, 491. Therein it appears that on April 3, 1936, the plaintiff, a teacher under permanent tenure, filed with the president of the board of trustees a resignation which by its terms was to become effective June 12, 1936. The resignation was accepted by the board on May 11, 1936, and on the following day plaintiff addressed to each member of the board a letter in which he rescinded and withdrew his resignation and requested the board to rescind its acceptance. No further action was taken by the board, but at all times subsequent to June 12, 1936, plaintiff was refused employment as a teacher. The court therein, although stating that "a tender of resignation is nothing more than an offer to resign", i.e., a termination of a "contract of employment", and therefore, being a mere offer, the offeror is "entitled to withdraw it at any time before it was accepted", concluded nevertheless: "Since the attempted withdrawal of the resignation was made after the board of trustees had accepted the resignation, it was ineffectual. The board, having accepted the resignation and having fixed the effective date thereof (School Code, § 5.640 * * *), it could not be unfixed by the plaintiff."

It also has been held that the "mere receipt" of a resignation by the proper officer without any other act of acceptance is sufficient. People v. Marsh, 30 Cal.App. 424, 159 P. 191. It would seem to follow, therefore, that if, as the Shade case holds, a resignation is a mere offer, valid only if accepted, and if, as the Marsh case holds, the mere receipt of the resignation by the proper officer is sufficient evidence of a valid acceptance, then, from the undisputed facts of the present case, when appellant's resignation was filed with the district attorney who accepted the same and in addition countersigned it as a witness, said offer of resignation and acceptance thereupon were merged into a complete contract unaffected by any subsequent attempted withdrawal.

However, it is not necessary to decide the issue herein presented solely upon the theory that the resignation had been accepted prior to its alleged withdrawal. The record discloses that, in addition to the preparation of a supplemental payroll showing the date of termination of her employment as July 21, 1944, appellant, subsequent to the time of her alleged withdrawal of resignation, executed a writing which appears to constitute a confirmation of her resignation as of that date. This document bears the signature of the district attorney as well as that of appellant, and the filing mark of the respondent commission, dated August 2, 1944. It reads as follows:

"Board Of Retirement
Sacramento County Employees' Retirement Association
Gentlemen:

On the 22nd day of July, 1944, I permanently severed my connection with the County of Sacramento as an employee in the District Attorney Department and do not anticipate re-employment in any department of the County of Sacramento.

I hereby make demand for return and payment to me of total amount deposited by me, or deducted from salary warrants payable to me, and placed to my credit on the books of the Retirement Association, plus accrued interest to above date, waiving future claims to any prior service rights that may be due me.

Employee's name in full
(Signed) Bernice Fox.
Postoffice Address
1000 Fremont Way
Sacramento, Calif.

In case mailing address is not given, the warrant will be held in treasurer's office until definite instructions as to delivery are received

The following form of approval must be signed by the head of the department in which the applicant was employed.

I hereby certify that Bernice Fox (Name of Employee) ——— (Number) has permanently left the employ of the County of Sacramento, and approve her application for payment to her of the full amount to her credit on the books of the Retirement Association.

Date of Last Deduction July 21, 1944.
(Signed) John Quincy Brown,
(Head of Department)"

Even if it be assumed that the demand contained in said writing for the balance of the money credited to her on the books of the association did not necessarily constitute a confirmation of her resignation, yet by said demand she did admit permanent severance from her employment under civil service; she did demand the return and payment of the whole amount deposited by her or deducted from salary warrants payable to her and placed to her credit with the retirement association; and she did waive any future claim to the permanent civil service right. Hence this writing, if not an unqualified confirmation of her prior resignation, certainly might well have been considered as an admission of the facts therein stated and as a waiver or retraction of any prior withdrawal, thereby justifying respondent commission in concluding that appellant had irrevocably elected to abide by her resignation.

From the foregoing discussion, it clearly appears that, if there was error in sustaining the demurrer to appellant's purported second cause of action, thereby preventing proof of the alleged notice of the withdrawal of her resignation, such error was harmless. Had the demurrer been overruled and said notice of withdrawal been proved, the existence of the other undisputed facts to which we have referred as establishing either a prior acceptance or subsequent confirmation of the resignation, or a waiver of the right of withdrawal, would have required the identical conclusion that we have reached in the absence of such proof, and the result would have been precisely the same. See, 5 C.J.S., Appeal and Error, § 1687, pp. 857, 858; Eustace v. Dechter, 53 Cal.App.2d 726, 731, 128 P.2d 367; Enos v. Murtaugh, 47 Cal.App.2d 269, 274, 117 P.2d 905.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.




75 Cal.App.2d 288

**PEOPLE v. GATLIN.**

Cr. 4001.

District Court of Appeal, Second District, Division 2, California.

July 9, 1946.

**1. Criminal law ⇐1144(13)**

On defendant's appeal from a conviction, evidence is viewed in light most favorable to the people.

**2. Larceny ⇐65**

In prosecution for grand theft, evidence was sufficient to authorize findings on which conviction was based that defendant was a participant in the crime, that defendant and third party were "confidence men" or "bunco artists" working in conjunction and intended to deprive complaining witness of his property.

3. Larceny ⇐23

Grand theft is committed when a person with a preconceived design to appropriate another's property to his own use obtains possession of it by fraud or trickery and such property need not be used by the thief.

4. Criminal law ⇐572

Evidence authorized conviction of grand theft as against defense of alibi.

5. Criminal law ⇐260(11)

Finding of trial court on conflicting evidence that defendant did not establish an alibi is binding upon reviewing court.

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Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Ernest J. Gatlin was convicted of grand theft, and from the judgment of conviction he appeals.

Affirmed.

Maurice A. Gleason, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of grand theft, after trial before the court without a jury, defendant appeals. There is also an appeal from an order denying his motion for a new trial.

[1] The evidence being viewed in the light most favorable to the People (respondent), and pursuant to the rules set forth in People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732, the essential facts are:

At about noon on September 19, 1945, the complaining witness, Mr. Gabriel, cashed two liberty bonds and two pay checks at the Security First National Bank in San Pedro. He then started toward the postoffice and at the intersection of Seventh and Pacific streets he met a brown skinned man, hereinafter referred to as "B. S. M.". This man engaged Mr. Gabriel in conversation. At the same time he noticed defendant standing near by. B. S. M. had what appeared to be $8000. He seemed to be ignorant and illiterate and also acted as though he were drunk. While Mr. Gabriel was talking to him, defendant walked by and B. S. M. called to him, "Hey, you, come here", whereupon defendant joined the group. In the ensuing conversation defendant told B. S. M. not to exhibit his money on the street. As Mr. Gabriel walked toward the postoffice the two men accompanied him. They talked about money and women. When they reached a point about the middle of the south side of Seventh Street between Grand and Pacific streets, B. S. M. asked the complaining witness to hold his money and when Mr. Gabriel told him to put the money in the bank, B. S. M. stated that he wished to store the money for only two or three days, thereupon he offered to give Mr. Gabriel $1000 if he would hold his money for three or four days and added "to prove your good faith, have you got $1000?" to which Mr. Gabriel gave an affirmative answer. B. S. M. then said, "You draw that $1000 and put it with mine and take it all home and keep it until I call for it." At first Mr. Gabriel refused to draw any of his own money out of the bank but said he would hold the $8000 for B. S. M. to whom he would give his address. Thereafter defendant persuaded Mr. Gabriel to draw his own money from the bank saying, "I don't know if he is half crazy or drunk, but he has got about $8000 on him, Why don't you keep it?" When Mr. Gabriel stated his intention to leave, defendant said, "Wait a minute, don't leave", and urged Mr. Gabriel as follows:

"Go ahead and draw it, we might as well get it. Somebody else will knock him in the head and take his money. He wants you to take it and keep it three or four days for $1000. * * * That is easy money and we will split the money. * * * He's got all his money, about $8000 and he wants you to keep his money. He's offered to give you $1000. Go ahead and draw your money and prove to him you are in good faith, and take it on home and we will split it. You can give me as much as you want."

As a result of defendant's persuasion, the complaining witness accompanied by defendant went to the bank and withdrew $1000 from his savings account. This sum

was in two $500 bales of bills. Mr. Gabriel accompanied by defendant took the $1000 back to where B. S. M. was waiting on Grand Street. The three men then sat on the curb. Taking his money from his pocket, B. S. M. stated to Mr. Gabriel, "I want you to put your money with mine and, you are going to have all the money." Mr. Gabriel added his $1000 to the top of the roll. B. S. M. then tied the roll and handed it to Mr. Gabriel who put it in his pocket. Whereupon B. S. M. objected to Mr. Gabriel putting the money in his pocket stating, "I don't want you to keep it in your pocket" and, "I want you to put it in here." Mr. Gabriel took the money out of his pocket, surrendered it to B. S. M. and watched him tie it in a handkerchief which supposedly contained $9000. B. S. M. then handed it to Mr. Gabriel, who gave his address to the defendant and then proceeded to the postoffice where he untied the handkerchief and found that it did not contain any money but merely a paper sack and newspaper wadding. Since then the complaining witness has seen neither his own $1000 nor the $8000 possessed by B. S. M.

Defendant urges reversal of the judgment on two propositions which will be stated and answered hereunder seriatim:

First: *There was not any substantial evidence that defendant (1) was a participant in the crime, (2) and the "brown skinned man" were working in conjunction, (3) profited at the expense of the complaining witness, or (4) intended to deprive the complaining witness of his property.*

[2] This proposition is untenable.

(1) The complaining witness, Mr. Gabriel, gave direct testimony that defendant was present at the time mentioned in the statement of fact supra; likewise Officer Hamilton testified that defendant told him in the presence of Sergeant Dorsey that he had seen Mr. Gabriel on the southwest corner of Seventh and Pacific streets on September 19, 1945. Similar testimony was given by Sergeant Dorsey. This testimony, if believed by the trial judge, was sufficient to sustain the finding that defendant participated in the crime.

(2) From the facts set forth above the trial judge was justified in inferring that defendant and the "brown skinned man" were "confidence men" or "bunco artists" who had engaged in the above nefarious scheme for the purpose of cheating the gullible complaining witness. (See In re Clark, 34 Cal.App. 440, 441, 167 P. 1143; People v. Rial, 23 Cal.App. 713, 717, 139 P. 661; People v. Malone, 20 Cal.App.2d 1, 6, 66 P.2d 216; People v. Hennessey, 201 Cal. 568, 571, 258 P. 49; People v. Santora, 51 Cal.App.2d 707, 125 P.2d 606; People v. Shaughnessy, 110 Cal. 598, 604, 43 P. 2.)

[3] (3) Grand theft is committed when a person with a preconceived design to appropriate another's property to his own use obtains possession of it by fraud or trickery and such property need not be used by the thief. (People v. Rial, 23 Cal.App. 713, 719, 139 P. 661; People v. Cook, 10 Cal. App.2d 54, 57, 51 P.2d 169; People v. Edwards, 72 Cal.App. 102, 116, 236 P. 944.)

(4) It is the function of the trier of fact from all the evidence to determine the intent with which defendant deprived Mr. Gabriel of his property. Clearly the facts hereinbefore set forth justified the inference that defendant intended to wholly and permanently deprive the complaining witness of his money.

Second: *The evidence established an alibi for defendant.*

[4, 5] In view of the testimony set forth under proposition First (1), there is no merit in defendant's contention that he established an alibi. His testimony to the effect that he was not present at the time the crime was committed was contradicted by his admission to the police officers, and by the testimony of the complaining witness which, as indicated above, the trial judge believed, while he disbelieved defendant's testimony. The finding of the trial court on conflicting evidence that defendant did not establish an alibi is of course binding upon this court.

Since the record is free from error the judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

75 Cal.App.2d 369

## GUTE v. HALSTEAD.

Civ. 3397.

District Court of Appeal, Fourth District, California.

July 15, 1946.

1. Appeal and error ⇐996

Where two inferences are reasonably deducible from the facts, the jury's verdict or court's finding will not be set aside on appeal.

2. Appeal and error ⇐931(1)

Evidence, so far as subject to opposing inferences, must on review be regarded in light most favorable in support of the judgment.

3. Negligence ⇐134(4)

In action for damages caused when fire spread from defendant's realty to plaintiff's realty after head of match that defendant was lighting flew off into inflammable material raked from under tree, evidence sustained trial judge's finding on uncontradicted facts that defendant was negligent.

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Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Action by Frank T. Gute against Vernon H. Halstead to recover damages resulting from a fire that started on defendant's property and spread to plaintiff's property. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Luce, Forward, Lee & Kunzel, of San Diego, for appellant.

C. Guy Selleck, Jr., of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment for $800 damages resulting from a fire which started on defendant's property and spread to the property of plaintiff destroying his cabin and the growth on the land.

The trial court found that defendant on September 22, 1944, negligently started a fire on his own property, and negligently permitted it to spread to the property of plaintiff. The sole ground of appeal is that there is no evidence of negligence of defendant supporting these findings.

Plaintiff and defendant own adjoining properties in the mountainous district of San Diego County. The country-side was covered with dry grass, leaves and other inflammable materials.

Defendant and his wife were engaged in building a tent-house near an oak tree on their property. They had cleared the site and had raked the dry grass and other inflammable materials from under the oak tree. There was a strong breeze blowing.

Defendant becoming tired at his labors, sat down to rest on a saw horse which was under the edge of the oak tree, about five feet from its "drip line", and about five feet from the inflammable material which had been raked from under the tree. He rolled a cigarette and reached around and struck a "kitchen type" match on the saw horse. When he raised the match in front of his face he saw that the head was broken off. He testified that he immediately looked around and saw that a fire had started in the dry grass; that he and his wife immediately attempted to extinguish the blaze; that they stamped on it, beat it with boards, tried to smother it with a canvas and dirt and poured water on it without any success; that the fire, driven by the wind, became a conflagration and spread from defendant's property to plaintiff's.

The foregoing facts are not disputed and it is urged that there is no reasonable inference of negligence to be drawn from them to support the judgment.

[1, 2] The rules governing trial and appellate courts in deciding cases when there is no conflict in the evidence is set forth in Mah See v. North American Accident Ins. Co., 190 Cal. 421, 213 P. 42, 44, 26 A.L.R. 123, as follows: "This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts, there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the ver-

dict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212. In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520, 153 P. 951; Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 547, 174 P. 44, 45."

It seems to us that there are at least two reasonable inferences which might be drawn from the uncontradicted evidence. These inferences are to the effect that there was negligence on the part of defendant in either starting the fire, or in discovering it promptly, or both, and that the fire could have been prevented from spreading if defendant had been vigilant. If this is true, then the judgment must be affirmed. Clark v. San Francisco, etc., Ry. Co., 142 Cal. 614, 76 P. 507. Thus we have reached the conclusion that the evidence justifies a reasonable inference of negligence in either instance.

The breaking of the kind of match used by defendant when being ignited on a board is not unusual, and that the head, when broken off, would fly a distance of five feet was not an unforeseeable result. Thus the striking of such a match on a board on a windy day, in close proximity to inflammable material, might furnish the ground for the inference of negligence in starting the fire.

[3] It is true that defendant and his wife both testified that the fire was discovered immediately and that they immediately made heroic but unsuccessful efforts to extinguish it. The size of the blaze when discovered, and the lack of success of their vigorous efforts to control it, may have caused the trial court to conclude that defendant and his wife were mistaken in their testimony that the fire was discovered immediately and that they immediately proceeded to try to extinguish it. The trial judge might have concluded that the fire was not immediately, or even promptly discovered, and that there were no prompt efforts to control it. When defendant saw the broken stump of the match in his hand it should have been a warning of danger and he should have anticipated the probability of fire. If he did not do this, and did not take prompt action to extinguish the fire, and thus permitted it to get such a start that it could not be controlled, the reasonable inference of negligence on his part in not acting promptly on the warning of danger is strong, points to his negligence in this respect, and supports the findings and judgment against him as this evidence presented a question of fact for the decision of the trial judge.

The judgment is affirmed.

BARNARD, P. J., concurs.



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